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Northwestern University School of Law

THE
FEDERAL REPORTER.

VOLUME 49.

CASES ARGUED AND DETERMINED

IN THE

CIRCUIT COURTS OF APPEALS AND CIRCUIT
AND DISTRICT COURTS OF THE
UNITED STATES.

PERMANENT EDITION.

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FEDERAL REPORTER, VOLUME 49.

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¹Appointed March 17, 1892.

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³Died Jan. 22, 1892.

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¹ Appointed March 17, 1892.

² Designated to sit, with the circuit justice and the circuit judge, in the court of appeals.

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CASES

ARGUED AND DETERMINED

IN THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE CIRCUIT AND DISTRICT COURTS.

BLANKS *et al.* v. KLEIN *et al.*

(Circuit Court of Appeals, Fifth Circuit. November 27, 1891.)

1. APPEAL—DIMINUTION OF RECORD—CERTIORARI.

On appeal to the circuit court of appeals the clerk of the court below, being the custodian of the record, is to determine, in the absence of agreement of counsel, what evidence shall be included in the transcript following the note of evidence made under the rule of court; and if any omissions are found relief can be had by *certiorari* for diminution of the record, as provided by court rule 18.

2. SAME.

A transcript which contains all the parts of a deposition called for by either party is sufficient.

Appeal from Circuit Court, Southern District of Mississippi.

Suit by A. L. Blanks and others against E. B. Klein and others. Plaintiff appeals. Heard on motion for alternative *mandamus* to clerk to certify copy of record. Motion denied.

Wade R. Young, for petitioners.

Mayre Dabney, opposed.

Before PARDEE, Circuit Judge, and LOCKE and BRUCE, District Judges.

LOCKE, District Judge. This motion coming on upon notice, and the parties appearing and presenting the facts of the case, we are able to decide the matter without issuing the writ or waiting for a return. The real question appears to be as to what should be contained in the record, and not as to whether the clerk should be ordered to certify the transcript. The clerk is the custodian of the record, and, in the absence of an agreement by counsel, it is for him to determine what evidence shall be included in the transcript following the note of evidence made under the rule of court. Upon the record being filed, if any omission or addition is found,

relief can be had by either party under rule 18.¹ Upon this motion there is presented with the answer of the clerk what he as clerk certifies under seal to be a correct transcript of the record, together with such portion of the deposition of George M. Klein as is called for by the counsel in the case for the respective parties. If this deposition was presented, and any portion of it read in evidence, either the whole should be put in and sent up, or, if there is any good reason why that should not be done, certainly each party should be permitted to have included in the transcript such portion as he may consider suits his case. A deposition presented and admitted—as it appears from the note of evidence that that of George M. Klein in this case was—cannot be used by one party exclusively for his own purposes, and the other party prohibited from using the same. Each party has a right to take exceptions to the evidence offered against him in the court below, and reserve such question for the appellate court. It is not within the discretion of the clerk either to diminish the record by leaving out any evidence presented below on account of its being considered irrelevant, or to increase it with matter not presented. The copy of the transcript presented and certified by the clerk to be a true copy of the record as appears on file in the court below, except that only such portions of the deposition of George M. Klein mentioned in item 13, page 21, of the transcript is inserted as is called for by the counsel in the case for the respective parties, appears to be a complete transcript of the record, except as to the deposition of George M. Klein, and of that to contain all that the parties on each side desire; and we think it should be accepted by appellants as a sufficient transcript. It is therefore ordered that the motion be denied, with costs; and, it appearing that the time for filing said transcript has expired pending proceedings under this motion, it is further ordered that appellants have 20 days in which to file said transcript.

¹ Rule 18 is as follows: "No *certiorari* for diminution of the record will be hereafter awarded in any case unless a motion therefor shall be made in writing, and the facts on which the same is founded shall, if not admitted by the other party, be verified by affidavit. And all motions for such *certiorari* must be made at the first term of the entry of the case; otherwise the same will not be granted, unless upon special cause, shown to the court, accounting satisfactorily for the delay."

NEW YORK, N. H. & H. R. Co. v. COCKCROFT *et al.*

(Circuit Court, D. Connecticut. February 2, 1892.)

1. FEDERAL COURTS—FOLLOWING STATE LAW.

The decisions of a state court as to the sufficiency of an appeal in a special proceeding are controlling upon the federal courts.

2. SAME—DECISION OF RAILWAY COMMISSIONERS—EFFECT OF APPEAL.

A railroad company procured the assent of the Connecticut railway commissioners to the taking of certain lands, and applied to the judge of the superior court to have the damages assessed. The land-owner appealed from the order of the commissioners, and at the same time removed the proceedings for assessment to the federal court. In this court he pleaded in abatement the pendency of the appeal. Before the hearing as to the sufficiency of the plea, the appeal was dismissed by the state court for want of jurisdiction. *Held* that, while the sufficiency of the plea was to be determined as of the date it was filed, yet the decision by the state court was to be taken as showing what the law was at that time.

3. SAME—SUPERSEDEAS.

As by the statute giving the right of appeal from the order of the commissioners (Gen. St. Conn. § 3518, as amended by Acts 1889, p. 129) the same is not taken before the commissioners, or allowed by or filed with them, but is an independent proceeding before the superior judge, the provision made by the statute that the appeal shall operate as a *supersedeas* does not come into operation until the court takes jurisdiction of the appeal; and a decision by it that it has no jurisdiction thereof shows that there was no *supersedeas*.

Application to Assess Value of Lands to be taken by a railroad company. Heard on demurrer to the plea in abatement. Demurrer sustained.

Lynde Harrison, for plaintiff.

Simoon E. Baldwin, for defendants.

WHEELER, District Judge. By the statutes of the state railroad companies appear to have the right to take additional lands for railroad purposes, and to locate, abandon, or change depots or stations, upon the consent of the railroad commissioners, filed in the town-clerk's office, and payment or tender of damages ascertained on application to a judge of the superior court. And by section 3518 of the General Statutes, as amended by the Public Acts of 1889, p. 129, a person aggrieved by any order of the railroad commissioners upon any proceeding relative to the location, abandonment, or changing of depots or stations may appeal from the same to the superior court by petition in writing, which may hear the appeal, re-examine the question of the propriety and expediency of the order appealed from as upon complaints for equitable relief, and, in case the order is not affirmed, make any other order in the premises which might have been made by the railroad commissioners therein; and such appeal is a *supersedeas* of the order appealed from until the final action of the court thereon. The plaintiff procured the consent of the railroad commissioners to the taking of the land in question. The defendants appealed to the superior court. The plaintiff made application to a judge of the superior court for ascertainment of the damages. The defendants removed that application to this court, and have pleaded the appeal in abatement. The plaintiff has demurred, and the demurrer has been heard.

When the plea was filed the appeal had not been entered in the superior court. Since then it has been there entered, and been dismissed by the court for want of jurisdiction, and this has been affirmed by the supreme court of errors. *Cockcroft's Appeal*, 60 Conn. 161, 22 Atl. Rep. 482. Counsel for the defendants insists that the plea stands as of the time when it was filed, and that this court is to determine its sufficiency as if the demurrer had been heard then, before any decision of the courts of the state upon the appeal, and according to the views of this court upon the right of appeal. That the sufficiency of the plea is to be determined as of then is doubtless true. But the laws of the state governing the right of appeal were the same then as now; and the decision of the highest court of the state upon them since shows what, in the judgment of that court, they then were. By section 721 of the Revised Statutes of the United States the laws of the several states, except where the constitution, treaties, or statutes of the United States otherwise require or provide, are to be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply. This seems to govern all proceedings in court, except equity and admiralty cases, although they are not strictly according to the common law, and to be applicable here. The decisions of the highest court of a state upon the construction of its laws seem to be the best exposition of what the laws really are. *Luther v. Borden*, 7 How. 1; *Randall v. Brigham*, 7 Wall. 523; *Post v. Supervisors*, 105 U. S. 667. That the courts of the United States do not always follow the decisions of the courts of the state upon questions of general law arising in the states is not contrary to this. *Venice v. Murdock*, 92 U. S. 494; *Claiborne Co. v. Brooks*, 111 U. S. 400, 4 Sup. Ct. Rep. 489. Especially should the decisions of the courts of the state govern in the construction of statutes relating to their own jurisdiction and procedure. If this court should decide that the superior court had jurisdiction of the appeal, and abate this proceeding for that cause, that court would not have the appeal before it, nor be bound to proceed with the appeal if there. Such diversity would appear to be contrary to the system of the jurisprudence of the United States, and tend to confusion and obstruction, rather than to the promotion of justice. The decisions of the state courts seem to be conclusive against the right of appeal in this case from the railroad commissioners to the superior court.

The counsel for the defendants further insists that the fact of the appeal operated by force of the statute as a *supersedeas* of all further proceedings until final action of the court thereon; and that this proceeding for the ascertainment of the damages could not be had before then. The nature of the proceeding for an appeal is important here. No appeal is taken before, filed with, or allowed by, the railroad commissioners, and no removal of the proceedings before them or of their record is had. The application to the superior court is an independent proceeding, which operates upon the parties, and not upon the railroad commissioners nor their judgment until the superior court acts. That court has not acted upon the appeal at all; but has merely held that there was none. If it had

taken jurisdiction, an appeal would have been pending; and, if sustained, its order, and not that of the railroad commissioners, would have been the foundation for further proceedings, if any were provided for. But, as it took no jurisdiction whatever, the proceedings of the railroad commissioners were left in force as they had been all the while. The statute does not provide that an attempted appeal, nor that the service of a citation on a petition for an appeal, shall operate as a *supersedeas*, but that such appeal—that is, an appeal in such a case—shall operate as a *supersedeas*. This is settled to be not such a case; therefore this was not such an appeal as the statute gave that effect to. Demurrer sustained, and plea adjudged insufficient.

BRUSH-SWAN ELECTRIC LIGHT CO. OF NEW ENGLAND v. BRUSH ELECTRIC CO.

(Circuit Court, S. D. New York. January 18, 1892.)

PRINCIPAL AND AGENT—RIGHTS INTER SE—SALE OF PATENTED MACHINES.

A corporation owning certain patents, and manufacturing machines thereunder, constituted another company its exclusive agent for the sale thereof in certain Eastern States, the agent to receive as compensation a discount of 20 per cent. on the price, and, if the principal sold in this territory, 20 per cent. also upon all its sales. Subsequently the principal, for a cash consideration of \$65,000, in addition to certain annual royalties, sold to a third company an exclusive license to sell machines under one group of patents in the whole United States. *Held*, that the agent was not entitled to recover of its principal any part of the \$65,000, or 20 per cent. commission upon sales made by the licensee, until it was shown that the latter company had actually sold machines within the agent's territory.

In Equity. Suit by the Brush-Swan Electric Light Company of New England against the Brush Electric Company for specific performance of a contract, whereby the latter company constituted the former its exclusive agent for the sale of certain patented machines in certain eastern states, and agreed to furnish the same to it at a stated discount; also for an injunction to restrain the defendant from selling machines in complainant's territory, and for an accounting as to sales already made. A decision in favor of complainant was rendered January 17, 1890, (41 Fed. Rep. 163.) A rehearing was denied, (43 Fed. Rep. 225,) and an interlocutory decree, referring the cause to a master to take an account, was entered July 18, 1890. The hearing is now upon exceptions to the master's report. Overruled.

The other facts fully appear in the following statement:

The decree directed that it be referred to John A. Shields, Esq., as a special master of this court—

"To take and state an account of all such machinery, apparatus and appurtenances as shall have been sold or delivered by the said defendant within the aforesaid territory as limited by the foregoing territorial exceptions, from and after the 10th day of June, 1885, and of the prices at which each of such sales shall have been made, and of all sales and licenses of right to use any or all

of the patents and inventions belonging to said defendant, to the benefit of which said complainant is entitled under and by virtue of the agreements hereinbefore mentioned within the said territory, which may have been made by the said defendant, and of all moneys which shall have been received therefrom; and also to take and state an account of all the damages which shall have been sustained by the complainant by reason thereof, and by reason of the refusal, neglect or delay of the defendant to fill and execute orders received by it from the said complainant, and by reason of any and all other matters and things in the complaint herein set forth, and to report thereon to the court after deducting any sum which the said master may find to be due from the complainant to the defendant."

On the 24th of November, 1891, the master filed his report in which he found due from the defendant to the complainant the sum of \$29,242.11, \$10,725.49 of which has been paid pursuant to the terms of the decree. The above amount was arrived at by stipulation between the parties. Two claims for damages were, however, reserved for decision. The master's conclusion as to the second claim is in the following words:

"*Second.* A claim for commissions on the basis of 20 per cent. upon a certain contract made by the defendant with the Consolidated Electric Storage Company, June 2, 1890. Referring to the terms of the decree which limits and defines my duties and powers, it will be found that I am confined to an account of 'such machinery, apparatus and appurtenances as shall have been sold or delivered,' and 'all sales and licenses or rights to use any or all of the patents and inventions,' necessarily within the territory included in the contracts in suit. Upon the question of damages, the transaction furnishing the basis thereof must be one conflicting with complainant's rights within this territory. It does not appear that anything has thus far been done within this territory under the agreement with the Consolidated Electric Storage Company, upon which the commission of 20 per cent. would apply, and until something of this kind is done, it is difficult to see how the complainant can be damaged under its contract. It is clear that the complainant is not entitled to 20 per cent. upon the entire contract with said storage company, because that contract covers territory in which complainant has no right whatever. Until something shall be done under the license or agreement of the storage company, within complainant's territory, the complainant will suffer no damage by reason thereof. I am therefore compelled to find and report against complainant upon this second reserved claim."

To this finding of the master the complainant duly excepted. No other exception was taken by either party.

Joseph H. Choate and William G. Wilson, for complainant.

Gilbert H. Crawford, for defendant.

Coxe, District Judge. By the terms of the agreements between the parties the complainant became the exclusive agent of the defendant, for the sale of the electrical machinery and apparatus manufactured and controlled by the defendant, within certain limited territory. The compensation which the complainant was to receive for its services as agent was a discount of, at least, 20 per cent. upon the selling price of the machinery and apparatus sold by it. If the defendant sold in this territory it was to pay a commission, at the same rate, to the complainant. It is plain, therefore, that if the contracts had been faithfully performed the complainant could have received nothing, except

this discount and commission upon machinery and apparatus sold in the specified territory. The stipulation entered into between the attorneys recognizes the loss of this percentage as the true rule for the assessment of the complainant's damages. It is the true rule. On the 2d of June, 1890, the defendant granted an exclusive license, under various patents for improvements in secondary batteries, to the Consolidated Electric Storage Company. The license covered the entire United States and the territories thereof. The consideration for this license was \$65,000 in cash and certain annual royalties. The proof shows that the \$65,000 was paid pursuant to the terms of the agreement. There is no proof of other payments. The complainant insists that it is entitled to recover the entire sum of \$65,000 as damages.

I am of the opinion that the master was correct in disallowing this claim. There were no facts before him from which he could formulate a correct rule of damages. There was no proof of the sale by the defendant or the storage company of a single secondary battery in the complainant's territory. There was no proof that the storage company had done any act in hostility to the complainant's interests, or that complainant had lost a sale because of the license. So far as this evidence goes there was a mere transfer of rights under certain letters patent. The complainant derived no pecuniary benefit from these patents while the defendant controlled them, and nothing has yet been shown which entitles the complainant to remuneration now. Certainly the mere transfer of the patents from one corporation to another does not confer that right. Even assuming that the complainant is entitled to some part of the \$65,000, there is nothing to show what part. That sum was paid for a license extending throughout the entire country. There is nothing to show what the rights so transferred, if confined to the complainant's territory, would be worth. The situation appears to be one where the language of the supreme court in *Machinery Co. v. Dolph*, 138 U. S. 617, 11 Sup. Ct. Rep. 412, seems applicable:

"On breach of such a contract, the principal matter in respect to which provision was made is the one to be mainly regarded. If subordinate provisions are clear and definite, and damages for disregard thereof determinable by plain and obvious rules, of course such damages may be recovered; but if because they are subordinate the provisions in respect thereto are indefinite, then the court may not, with the idea of preventing injustice, attempt to substitute equivalents therefor. The main purpose of the contract must be regarded and its specific provisions in connection therewith enforced, and proper damages given for the breach thereof. A lack of certainty as to terms of contract obligations of either party, or measure of damages for breach, is simply the misfortune of him who seeks to recover in case of a breach thereof."

The exception is overruled and the report of the master is confirmed.

BRUSH ELECTRIC CO. v. BRUSH-SWAN ELECTRIC LIGHT CO. OF NEW ENGLAND.

(Circuit Court, S. D. New York. January 16, 1892.)

PRINCIPAL AND AGENT—CANCELLATION OF CONTRACT.

The Brush Electric Company constituted a certain corporation its agent for a period of years for the sale of its machines in New England and other eastern states. Disagreements arose between them, and at length the Brush Company refused to furnish more machines under the contract. On suit by the New England Company the contract was upheld, but, pending further proceedings, the Brush Company filed a cross-bill to cancel the contract, alleging that since the former decision the New England Company had come under the control of hostile influences, namely, those of the Westinghouse Company, which was engaged in manufacturing machines competing with those of the Brush Company. This allegation was based mainly on the ground that an attorney having a merely formal relation with the New England Company, and who was the legal adviser of, and personally interested in, several corporations in which Mr. Westinghouse was interested, had written a letter containing the unauthorized statement that the New England Company was "controlled by the Westinghouse interests." It appeared at the trial that Westinghouse and Jackson, stockholders in the Westinghouse Company, had bought a controlling interest in a certain illuminating company. But no acts of hostility were shown. It further appeared that the illuminating company also had a contract of agency with the Brush Company, and that since it came under the alleged hostile influences it had sold more Brush machines than ever before. *Held*, that no cause was shown for canceling the contract.

In Equity. Final hearing on cross-bill, answer, and proofs.

The Brush Electric Company, owning certain patents, and engaged in manufacturing electrical machines thereunder, had a contract with the Brush-Swan Electric Company of New England, whereby the latter was constituted its exclusive agent for the sale of said machines in New England and other eastern states. The contract provided, among other things, that the New England Company was to receive as compensation a certain discount on the selling price, and that the Brush Company would not itself sell any machines in the specified territory. Various disagreements arose between the two companies, mainly growing out of the alleged inability of the New England Company to meet its payments to the Brush Company, as provided by the contract. At length the latter refused to furnish more machines, and began selling them in that territory itself. On suit by the New England Company, the contract was upheld, and the complainant declared to be entitled to an injunction and accounting. 41 Fed. Rep. 163. A rehearing was applied for and denied. 43 Fed. Rep. 225. Afterwards leave was given to file the cross-bill, upon which the present hearing is had. *Id.* 701.

John E. Parsons, Albert Stickney, and Gilbert H. Crawford, for cross-complainant, cited the following authorities:

In the case of an individual, the mere fact of divided duty constitutes a breach of the employment agreement. *Pearce v. Foster*, 17 Q. B. Div. 536; *Dieringer v. Meyer*, 42 Wis. 311; *Davoue v. Fanning*, 2 Johns. Ch. 252; *Michoud v. Girod*, 4 How. 554. It would be a defense in a suit for past compensation. *Murray v. Beard*, 102 N. Y. at page 508, 7 N. E. Rep. 553. And it might entitle the principal to damages up to the value to him of the agreement. *Panama, etc., Co. v. India Rubber, etc., Co.*, L. R. 10 Ch. App. 515.

Joseph H. Choate and William G. Wilson, for cross-defendant.

COXE, District Judge. The relief demanded by the cross-bill is that the contracts decided to be valid in the original suit shall be canceled and the original bill dismissed. The theory of the cross-bill is that since the main controversy was tried the cross-defendant (the Brush-Swan Company) has come under influences which are hostile to the cross-complainant (the Brush Company) and that it would be inequitable to enforce the relations of principal and agent between companies so diametrically opposed in interest. The main facts and circumstances of which hostility is predicated may be briefly stated as follows: George Westinghouse, Jr., and Caleb H. Jackson are stockholders in the Westinghouse Electric Company of Pittsburgh, a competitor, in electrical business, of the Brush Company. In September, 1889, Westinghouse and Jackson purchased a controlling interest in the stock of the Brush Illuminating Company, which has, substantially, the same contract with the Brush Company as the Brush-Swan Company, except that the operations of the Illuminating Company are confined solely to the city of New York. The Brush Illuminating Company controls a majority of the stock of the Brush-Swan Company. In other words, the Brush-Swan Company can be controlled by the Illuminating Company, the Illuminating Company can be controlled by Westinghouse and Jackson and they can be controlled by the Westinghouse Company, *ergo*, the Brush-Swan Company may be controlled by "the Westinghouse interests." On the 14th of February, 1890, Paul D. Cravath, a lawyer, addressed a letter to Henry Hine, a general district agent of the Westinghouse Electric Company, in which he refers to the Brush-Swan Company as being "controlled by the Westinghouse interests." The firm of which Mr. Cravath was a member was substituted as attorneys for the Brush-Swan Company in this litigation, but their connection with it has been only a formal one. Mr. Cravath is interested as counsel, and otherwise, in several corporations in which Mr. Westinghouse is interested, and has, of late, acted as adviser for Mr. Westinghouse in many instances. On the other hand, it appears that the Brush Company has made no attempt to cancel its contract with the Illuminating Company, which though directly controlled by Westinghouse and Jackson is, apparently, doing a satisfactory and remunerative business. Both Westinghouse and Jackson disclaim any hostility to the Brush Company and insist that their intention is and always has been to assist the Brush-Swan Company pecuniarily in carrying on its business if the old relations are resumed.

It seems to be admitted on all sides, where the rights of the parties are fixed by contracts like those in controversy, that an agent who, in all things, honestly and faithfully performs his duty towards his principal, cannot be legally discharged. It is not pretended that the Brush-Swan Company, the Illuminating Company, or, indeed, "the Westinghouse interests," have done any act to indicate a hostile intent towards the Brush Company. The case, stated as strongly as the proofs will warrant, shows only that the Westinghouse Company and the Brush Company are rivals in business, and that some individuals connected with the former company have obtained the control of the Illuminating Company,

which in turn, owns a controlling interest in the Brush-Swan Company. But all this falls far short of establishing hostility on the part of the Brush-Swan Company towards the Brush Company. Why the directors of the Brush-Swan Company, assuming them to be rational men, should have any inclination to engineer that company into a position of hostility is not explained and is not easy to conjecture. Its only available property is the contract with the Brush Company. Why should it destroy its only source of income? If the contract relations are resumed, and the Brush-Swan Company faithfully and diligently performs its obligations under the contracts, it will, in all probability, build up a successful business and put money in the purses of its stockholders. If, on the other hand, it sees fit to destroy itself in a vain attempt to aid the Westinghouse Company, the result will be the immediate cancellation of its contracts, leaving the Brush Company free to enter the field as an active competitor. That the Brush-Swan Company will pursue a course dictated alike by honesty, self-interest and common sense, may, fairly, be presumed. But it need not be left to presumption. Its future course can be demonstrated beyond dispute. As before stated, the apprehension of enmity is not founded upon any overt act of the Brush-Swan Company. Since its orders were refused it has been in a state of legal coma. It has done nothing.

It is argued, however, that it may become unfriendly because of the alleged hostile interests which surround it. This proposition can be tested in only one way. To the question, "How will the Brush-Swan Company conduct itself in the future?" the answer is: "Try it; give it an opportunity to show how it will act." Let the Brush Company resume its contract relations with the Brush-Swan Company and it will very soon appear whether the latter company will in good faith carry out its contracts. The Brush Company is entirely secure in trying this experiment, for the moment a hostile act on the part of the Brush-Swan Company is proved, that moment the Brush Company is relieved. The difficulty with the position of the Brush Company is that it depends for support upon an attenuated inference which is barely discernible in its inception, grows less and less substantial as it progresses, and fades away entirely long before it reaches the cross-defendant. The only facts proved tend to show that the control which the Brush Company dreads would be anything but detrimental to its interests.

The Illuminating Company is the agent of the Brush Company for the city of New York. The Illuminating Company is much nearer the hostile influence, because a majority of its stock is owned, personally, by Westinghouse and Jackson. And yet no fault is found with the Illuminating Company, and no attempt has been made to cancel its contract. The relations between the parties have been friendly, their contract has been faithfully kept, and the result has been financially beneficial to both. The proof shows that since the Illuminating Company came under the sinister influence of that somewhat esoteric and intangible apparition known as "the Westinghouse interests," it has sold many more Brush lamps than ever before.

If the Brush Company can succeed upon the facts of the cross-bill, it can, *a fortiori*, cancel its contract with the Illuminating Company. No one will seriously argue that this is possible, and yet every reason urged against the Brush-Swan Company applies with greater force to the Illuminating Company.

The Cravath letter does not fill the fatal hiatus in the cross-complainant's proof. Giving it the most inimical construction contended for and it is still insufficient. The court would hardly be justified in destroying valuable contract rights upon a hasty and careless declaration made in the circumstances disclosed by Mr. Cravath. It was, he says, a 'thoughtless and unauthorized statement. It added no new fact to the controversy, it was a mere expression of opinion. If the ill-advised expression relating to "the Westinghouse interests" had been used by the writer to characterize some act which, otherwise, might not indicate a hostile intention, a different construction would, perhaps, be necessary. But, as has been seen, the Brush-Swan Company had done nothing to indicate that it was controlled by "the Westinghouse interests" and "the Westinghouse interests" had done nothing to indicate that they had controlled or would control the Brush-Swan Company. Certainly there was nothing to indicate a control hostile to the Brush Company. So far as facts are concerned Mr. Cravath's letter leaves the case as it was before.

The authorities cited on the brief submitted on behalf of the Brush Company all refer to cases of individuals where the agent was guilty of some conduct which was, or might be, injurious to the interests of the principal. No case has been cited, and, from the known diligence and ability of counsel, it may safely be inferred that none can be cited, where a corporation, faithfully performing its duties, has been discharged as agent, because individuals, supposed to be hostile to the principal, own a majority interest in a corporation which in turn owns a majority interest in the agent corporation. It is not easy to compare an individual with a corporation in such circumstances, but the court is here asked to sanction a proposition, which, if applied to an individual, would enable a principal, in violation of his contract, to discharge a faithful agent because a rival in business, by reason of relationship or pecuniary obligations, was supposed to exercise an influence over the agent which might be used to the injury of the principal. This will never do. Such a proposition cannot be sustained, whether the agent be an individual or a corporation. The cross-bill cannot be maintained without some proof of hostility on the part of the cross-defendant. No such proof has been given.

The original decree should not be disturbed.

CITY OF NEW ORLEANS v. PAINE, U. S. Deputy-Surveyor.

(Circuit Court, E. D. Louisiana. February 2, 1892.)

1. PUBLIC LAND GRANTS—LOCATION—JURISDICTION.

In the case of public grants of land without definite and ascertained limits, the courts cannot protect the alleged rights of the grant-owners until they are located by public survey, adopted, and approved; and the mere decision of the secretary of the interior as to the proper boundaries will not give the courts jurisdiction to control the subsequent official survey directed by such decision.

2. SAME—SURVEY—DECISION OF SECRETARY OF INTERIOR.

The secretary of the interior fixed the meaning of the words, "as far as Lake Maurepas," as contained in the ancient Spanish grant known as "Dupard's," to mean as far as a line drawn from the lowest point of the southern shore of the lake at right angles to a line drawn from the Mississippi river through the center of the grant from front to rear; and the surveyor general, directed to make the survey under such decision, ascertained and fixed the lowest point on the southern shore of the lake as it was located in 1769, the date of the grant. The succeeding secretary of the interior did not approve such survey, and directed it to be made upon the basis of the boundary of the lake as it existed in 1888, the date of the former secretary's decision. *Held*, that the court was without jurisdiction to interfere to restrain such survey on the ground that the rights of the owner of the grant were conclusively fixed by the decision of the secretary of the interior, and would be taken away under the guise of interpreting such decision.

In Equity. Bill filed by the city of New Orleans against R. B. Paine, United States deputy-surveyor, to enjoin a survey. Hearing on bill, demurrer, exhibits, etc. Injunction denied.

J. L. Bradford, for complainant.

Wm. Grant, for defendant.

BILLINGS, District Judge. This cause was heard upon the bill itself and exhibits, upon an application for an injunction *pendente lite*, and upon the demurrer. The cause is really to be heard and decided on the bill of complaint so far as its allegations cover the matters involved, as it is met on the part of the defendant by a general demurrer. The case made by the bill is as follows: The city of New Orleans, as legatee under the McDonough will, had vested in it a complete grant, known as "Dupard's," made by the Spanish government before the cession of the territory of Orleans to the United States, the grant bearing date in 1769. This grant had been recognized as a complete grant by Secretary Lamar. 6 Dec. Dep. Int. p. 473. The only question left open by his decision is that of the point from which the northern boundary of the grant should start as the point of beginning in actual survey. Secretary Lamar, in 1888, fixed the meaning of the words contained in the grant, "as far as Lake Maurepas," to mean as far as a line drawn from the lowest point of the southern shore of Lake Maurepas at right angles to a line drawn from the Mississippi river through the center of the grant from front to rear. The surveyor general was directed to make the survey under this decision, and he made it, ascertaining and fixing the lowest point of the southern shore of the lake, as that body of water was shown to have been located in 1769, the date of the grant. The survey so made was never approved by the department, but, on the application of the commissioner of the general land-office, Acting Secretary Chand-

ler, in 1891, disapproved of the survey already made, which was, as has been stated, upon the basis of the starting point of the boundary as the lake existed in 1769, the date of the grant, and directed instructions to be given to the surveyor general to make the survey upon the basis of the starting point of the boundary as the lake existed in 1888, the date of Secretary Lamar's decision. To arrest and enjoin this last survey the bill is filed.

The solicitor for the complainant urges that under the decision of the secretary of the interior the rights of his client were conclusively fixed, and that under the guise of interpreting that decision his rights are to be totally taken away; that the decision meant to refer to the lake as it was located at the time of the grant, and that such has been the change in its location since that time that to make its present location, or that of 1888, the basis of boundary, would leave the city of New Orleans no land whatever under this grant; that, the right having been fixed, the court ought to interfere to prevent erroneous and destructive construction of a decision which the department does not attempt to change, but only to interpret. The solicitor for the defendant, the district attorney, on behalf of the defendant, besides his argument on the merits, presents to the court the objection that the court is entirely destitute of jurisdiction to interfere with the survey in the present state of the case in the land department, and upon the facts presented by the bill. It is this question of jurisdiction or authority alone upon which I feel called upon to pass.

I think, with reference to this question, two propositions are found to be the result of all the decisions of the supreme court of the United States: *First*, that, where there is a complete grant of a specific tract of land according to ascertained boundaries, the grantee may sue in ejectment, and protect his rights through the courts. *Secondly*, that where, and to the extent that, there are no ascertained limits, these limits must be ascertained by the executive department, which is by law charged with that duty, and that courts of justice cannot, in the first instance, fix by metes and bounds the location of the grant. This results from the fact that the administration of all the lands, public and private, was, upon the cession, vested in the first instance in the United States government,—the public lands, for the purpose of sale and practical location; the private lands, for the purpose of practical location and separation and demarkation from other public lands and private lands. It would open the door to endless confusion unless these grants which needed definite location by the ascertainment of boundaries and by survey were first, by practical survey, to be severed by the public domain, and separated from the lands of others. Most certainly must this be true of a grant, one boundary of which needs to be determined before a conclusive location and survey could be made. I am aware that there is a distinction between complete grants, with completely ascertained boundaries, made before the cession to the United States, and grants made afterwards. But even in the former case, where, as here, a boundary is claimed to be established through the decision of the secretary of the interior by

reference to a point, as to the practical location of which the department has given instructions, as a rule of public order and general good, it must be true that the location by public survey must be made so far as the boundary thus established is concerned; for the public survey concerns not alone one grantee, but rival claimants who claim the identical territory or a portion of it, and adjacent owners, and the residue of the public lands. If the claim which is the basis of this suit needed no location by the secretary of the interior, and no definition by survey, except with reference to the public domain and the claimants under other grants, the rule above stated, it seems to me, would still obtain. It is to be observed that it is the action of the department upon which alone the complainant's boundary has been in location established. It follows, as it seems to me, the matter of fixing the boundaries of this grant, although a complete grant antedating the cession, was still wholly within the authority of the land-officers of the executive department, and wholly outside that of the courts.

Then comes the question, has the land-office reached such a point or stage in its proceedings that courts can lay hold of the matter? The boundary has been in theory reached. A survey has been made and reported, but was not satisfactory to the proper officer. The survey has been disapproved, and another survey directed. I understand that it is the survey—the practical location of the grant among the other private and the public lands—which must be effected, and in the proper way evidenced, before the courts can have any jurisdiction over the matter. Great hindrance would be opposed to the government in the location of this grant if this court should now, without any power to direct another survey, and indeed without any jurisdiction at all over the surveyor general, enjoin the defendant from making the second survey upon the ground that the officer setting aside the former survey, and directing the second, had for any reason erred. It would leave the land department incapacitated by the action of the court from proceeding in the matter of any survey; in other words, it would arrest and forever interrupt a survey, and thus leave the action of the land-office perpetually incomplete. My conclusion, therefore, is that, no matter how much ground the complainant has for urging that the eastern or further boundary of the grant is to be reached and ascertained by taking the indicated point on the shore of the lake as it was at the time of the execution of the grant, he can now, and until the final and complete survey, sanctioned in the ordinary mode, has been made, urge it only before the officers of the land department; that until then it is a question to be determined by the executive, and not by the judicial, department. The application for the injunction must be denied, and the demurrer maintained.

GRIGGS v. PERRIN *et al.*

(Circuit Court, N. D. New York. February 3, 1892.)

COPYRIGHT—INFRINGEMENT.

The copyright of a book describing a new system of stenography does not protect the system, when considered simply as a system apart from the language by which it is explained, so as to make the illustration by another of the same system in a different book, employing totally different language, an infringement.

In Equity. Motion for a preliminary injunction. Denied.

The complainant is the owner of a copyright of a book, written by J. George Cross, entitled "Eclectic Short-Hand." At the January term, 1890, a motion was made for a preliminary injunction. The defendants denied infringement. The issue thus raised was referred to a master to take proofs and report. The master reported that the complainant's work as a literary production only was protected; that the system of phonetic writing explained in the book is not the subject of a copyright; and that there is no proof that the defendants have copied complainant's book considered merely as a literary production. The master says: "My conclusion, therefore, is that while the matter explanatory of the system, whether the system is an old one or new and original, is the subject of a copyright, the system the book illustrates is not the subject of a copyright; that there being no proof that the copyright of the Eclectic is infringed regarding it merely as an explanatory work, unless the copyright carries with it an exclusive right to the system set forth, complainant is not entitled to the relief demanded." The master does not decide that the defendants have copied the complainant's system, but he does decide that the copyright does not prevent them from publishing a different work explanatory of a similar system. The motion now comes on to be heard again upon the master's report and exceptions thereto, filed by the complainant. The testimony taken by the master has not been printed or brought to the attention of the court.

Alfred Wilkinson, for complainant.

Arthur Stewart, for defendants.

COXE, District Judge. The only question decided by the master and discussed at the argument is whether or not the copyright of a book describing a new art or system of stenography protects the system, when considered simply as a system, apart from the language by which the system is explained, so that another who illustrates the same system in a different book, employing totally different language, can be treated as an infringer. It is thought, upon the authority of *Baker v. Selden*, 101 U. S. 99, that the master was right in the conclusion reached by him. A party may invent a new machine and write a book describing it for which he may obtain a copyright. This does not prevent another author from describing the same machine. He must not copy the copyrighted book, but he may write one of his own. So with a process, a system or an art, the fact that one person has described it and obtained

a copyright for his description does not prevent others from describing the same art in their own language. The copyright book is sacred, but not the subject of which it treats. If the defendants have described the complainant's system they have not offended, for that reason only, against the copyright law. If they have copied complainant's book they have offended against that law. As the complainant has no right to a monopoly of the art of short-hand writing, because he has written a book explanatory of that art as developed by him, and as there is insufficient proof to show that the defendants have copied the complainant's book, considered apart from complainant's system, it follows that the exceptions disputing the master's conclusion of law must be overruled and the motion for a preliminary injunction denied.

REID v. McCALLISTER *et ux.*

(Circuit Court, D. Oregon. April 24, 1885.)

EQUITY—PLEADINGS AS EVIDENCE—MORTGAGE PROCURED BY FRAUD.

In a suit to enforce the lien of a mortgage against a husband and wife, the wife answered, admitting that she signed the instrument, but only upon the false and fraudulent representations of the complainant's agent, who obtained her signature and acknowledgment, and that she was ignorant, and unable to read. A general replication was filed, and the cause was heard on the pleadings alone. *Held*, that the allegations of fraud were not new matter in avoidance, but were responsive to the bill, and were sufficient to prove that the wife did not execute the mortgage.

In Equity. Bill by William Reid to foreclose a mortgage against Hardin McCallister and Julia McCallister, his wife. Heard on the pleadings without other evidence. Bill dismissed.

Ellis G. Hughes, for plaintiff.

Henry Ach, for defendant Julia McCallister.

DEADY, District Judge. This suit is brought to enforce the lien of a mortgage executed by the defendants on November 25, 1879, on 408 acres of land in Marion county, as a security for a loan of \$7,000, to the defendant Hardin McCallister, the husband of the defendant Julia McCallister.

The bill was taken for confessed as against the former, but the wife answered, alleging that one-half the premises belonged to her, and admitting that she signed the instrument, but only upon the false and fraudulent representation of the plaintiff's agent, who obtained her signature thereto and took her acknowledgment of the same; that the mortgage did not include her portion of the premises, but only that of her husband; and that she was an ignorant woman, and unable to read or write.

To this answer there was a general replication, and afterwards the case was heard on the pleadings, without any evidence other than that contained therein.

The answer, so far as it is responsive to the bill, is evidence for the defendant making it; but if the defendant, by his answer, admits a fact alleged in the bill, and then sets up another matter in avoidance thereof, this matter in avoidance is not responsive to the bill, and his answer is not evidence of it. *Clarke v. White*, 12 Pet. 190; *Tilghman v. Tilghman*, Baldw. 494; *Randall v. Philpips*, 3 Mason, 383; *McCoy v. Rhodes*, 11 How. 140; *Hart v. Ten Eyck*, 2 Johns. Ch. 87.

In this connection matter in avoidance is something subsequent to and distinct from or *dehors* the fact admitted; but, if the admission and avoidance constitute one single fact or transaction, the answer is evidence of both. *Hart v. Ten Eyck*, *supra*, 88, and note.

The plea of *non est factum* denies the execution of the deed by the defendant, puts the fact of execution in issue, and under it you may prove, because comprehended in it, that the defendant was imposed upon, and put her name to the paper under an erroneous impression as to its character or contents. *Van Valkenburgh v. Rouk*, 12 Johns. 338; 2 Greenl. Ev. § 246; Chit. Pl. 519; 2 Phil. Ev. 148. And so here the answer is competent, and, until contradicted, sufficient evidence that the defendant put her name to this instrument under an entirely erroneous impression of its contents, which impression was designedly produced by the false representations of the plaintiff's agent.

The only conclusion from the premises is that the defendant Julia McCallister did not execute the mortgage, so far as her portion of the premises is concerned, and, as to that, the bill must be dismissed.

Afterwards the plaintiff had leave to reinstate the case, and take testimony to prove the due execution of the mortgage, notwithstanding the averment in the answer to the contrary, which was done, and a decree given enforcing the lien of the mortgage upon the property of the defendant Julia McCallister.

DOBSON v. GRAHAM.

(Circuit Court, E. D. Pennsylvania. June 27, 1889.)

1. DISCOVERY—SECRETS OF MANUFACTURE.

Workmen pledged to secrecy, and employed in a factory in which the business is conducted in private, to secure the secrecy of the machinery and methods of manufacture, will not be compelled, in a suit against their employer, to answer interrogatories, and describe the peculiarities of his machinery, where no evidence has been introduced to show that the secrets of the defendant were used to conceal an invasion of complainant's rights.

2. PATENTS FOR INVENTIONS—PRESUMPTION OF INFRINGEMENT.

No presumption of infringement of complainant's patent by defendant arises from the fact that the workmen who constructed complainant's machinery were employed to erect defendant's machinery.

3. SAME—INSPECTION OF DEFENDANT'S MACHINERY.

Complainant will not be granted an inspection of machinery of defendant kept in secret, and claimed to embody important secrets, when complainant produces no evidence tending to show that it infringes his patents.

¹ Reported by Mark Wilks Collet, Esq., of the Philadelphia bar.

In Equity.

Bill to enjoin infringement of patent by John Dobson against Richard Graham. Plaintiff called defendant's workmen to show infringement, and asked them to state wherein the defendant's machine differed from complainant's. This they refused to do under advice of counsel. Plaintiff moves for an inspection of defendant's machinery, and to compel the witnesses to answer interrogatories. Motions denied.

Hector T. Fenton, for complainant.

Strawbridge & Taylor, for respondent.

BUTLER, District Judge. These motions must be dismissed for the reasons stated at an earlier period in the case. As then said, the plaintiff filed his bill charging infringement of his rights without having any positive knowledge upon the subject. He seems to have relied upon the chance of obtaining evidence to support the charge from the defendant and his workmen. Such a case is not entitled to the special favor of a court of equity. The defendant's business is conducted in private, for the purpose of securing to himself (as he asserts) the use of his peculiar machinery and methods of manufacture. These secrets of his business, if they cover nothing unlawful, are his property and as well entitled to protection as the rights secured by the plaintiff's patent. His workmen are bound by express contract not to divulge them. In the absence of such contract equity would imply an obligation of equal force. If it were shown that these secrets are used as a cloak to cover an invasion of the plaintiff's rights, or if there was reliable evidence tending to show it, and justifying a belief that they are sound, the motions would be sustained. But there is no such evidence before us. It appears that the defendant employs certain workmen who were formerly employed by the plaintiff; that these workmen are familiar with the plaintiff's patented machinery, and that they aided in constructing the defendant's. This is substantially all. These workmen have been permitted to answer questions directed towards a comparison of the defendant's machinery with the plaintiff's except where the answer would tend to describe wherein the former differed from the latter, and thus to describe the peculiarities of the defendant's machinery. The court cannot properly compel them to go further, nor, in this state of facts, compel the defendant to submit his machinery to inspection.

MEYER *et al.* v. CADWALADER, Collector.¹

(Circuit Court, E. D. Pennsylvania. June 18, 1891.)

1. CUSTOMS DUTIES—HAT TRIMMINGS.

The clause of the tariff act of 1883, providing for "braids, plaits, flats, laces, trimmings, tissues, willow sheets and squares, used for making or ornamenting hats, bonnets, and hoods, composed of straw, chip, grass, palm-leaf, willow, hair, whale-bone, or any other substance or material not specially enumerated or provided for," includes goods known, respectively, as "chinas" and "marcelines," and principally used for lining hats, if such goods are trimmings, and are chiefly used for making or ornamenting hats, bonnets, and hoods.

2. SAME—MEANING OF WORDS.

The term "trimmings" should not, under the evidence, be given any technical or particular commercial meaning, but should receive its popular signification and common import, as used and applied in ordinary life.

3. SAME—COMMERCIAL DESIGNATION.

The mere fact that chinas and marcelines are bought and sold by those particular names, and are called "linings," does not necessarily exclude them from the class of trimmings if they are in fact trimmings chiefly used either for making or ornamenting hats, bonnets, and hoods.

4. SAME—FORM IN WHICH ARTICLE IS IMPORTED.

The fact that the articles are imported by the piece, and must be cut up before they are actually applied to use in making or ornamenting hats, does not exclude them from the class of trimmings, if they are distinctly adapted and chiefly used for trimming hats, bonnets, and hoods, and are not specially enumerated or provided for in the act.

5. SAME—SILK ACT OF 1875.

Hat trimmings are dutiable under the hat-trimming clause of the act of 1883, and not under the silk act of February 8, 1875, notwithstanding that silk is their component material of chief value, and that they contain less than 25 per cent. in value of cotton.

At Law. *Assumpsit* to recover an excess of duties alleged to have been illegally exacted by the collector on goods imported by the plaintiffs in 1884. The facts are sufficiently set forth in the charge. The verdict was for the plaintiffs.

Frank P. Prichard and Henry E. Tremain, (Cyrus E. Woods, Harry T. Kingston, Augustus R. Stanwood, and Charles Curie, with them,) for plaintiffs.

W. W. Carr, Asst. U. S. Atty., John R. Read, U. S. Atty., W. P. Hepburn, Sol. of Treasury, and William H. Tuft, Sol. Gen., for defendant.

ACHESON, Circuit Judge, (*charging jury.*) This is an action by Meyer & Dickinson, importers, against the collector of the port of Philadelphia, (the United States being the real defendant,) to recover an alleged excess of duties paid under protest on goods entered at the custom-house on February 18, March 26, and April 16, 1884. The goods which were the subject of the duty were chinas and marcelines, the latter being made wholly of silk, and the former of silk and cotton, silk being the component material of chief value. The custom-house officers assessed upon the goods a duty of 50 per centum *ad valorem* under the last clause of Schedule L of the tariff act of March 3, 1883, (22 St. 510,) which reads:

¹ Reported by Mark Wilks Collet, Esq., of the Philadelphia bar.

"All goods, wares, and merchandise not specially enumerated or provided for in this act, made of silk, or of which silk is the component material of chief value, fifty per centum *ad valorem*."

The plaintiffs claim that the goods were liable only to 20 per centum *ad valorem* duty under the clause in Schedule N of the act which reads thus:

"Hats, and so forth, materials for: Braids, plaits, flats, laces, trimmings, tissues, willow sheets and squares, used for making or ornamenting hats, bonnets, and hoods, composed of straw, chip, grass, palm-leaf, willow, hair, whalebone, or any other substance or material not specially enumerated or provided for in this act, twenty per centum *ad valorem*."

The act of 1883 does not, in Schedule L or elsewhere, impose any duty upon chinas or marcelines by those names. The plaintiffs claim that the chinas and marcelines, the subject of this dispute, come under the clause just read, which begins with the words, "Hats, and so forth, materials for," as being trimmings chiefly used for making or ornamenting hats, bonnets, and hoods, and hence dutiable at 20 per centum *ad valorem* only. Whether these goods come under that clause, and are dutiable at 20 per centum instead of 50 per centum, as the custom-house officers held, is the question in this case.

The solution of the question involves two inquiries: *First*. Are these chinas and marcelines trimmings? *Secondly*. Are they chiefly or principally used for making or ornamenting hats, bonnets, and hoods? If an affirmative answer is given to both of these inquiries your verdict should be for the plaintiffs; but if a negative answer is given to either of them the defendant would be entitled to your verdict.

There is much testimony in the case tending to show that at the date of the passage of the tariff act of 1883 there was, and for a long time prior thereto had been, a well-recognized general class of articles, easily distinguishable by those in the trade, known under the denomination of "trimmings," the principal use of which was for making or ornamenting hats, bonnets, and hoods, and having their chief commercial value from that use. Many witnesses have testified that this general class styled "trimmings" embraces a great variety of articles, composed of different substances or materials, each of which articles has its own specific or particular name. Furthermore, there is evidence tending to show that these various articles thus constituting the general class of "trimmings" were and are imported into this country in different forms; for example, some by the gross, some cut in divers ways, and some by the piece. This designation, "trimmings," is found in the particular clause of the tariff act of 1883, under which the present controversy has arisen. The introductory words of that clause are these, "Hats, and so forth, materials for;" or, transposing the words, "Materials for hats, and so forth." The general subject-matter, then, of the clause, is "materials for hats, bonnets, and hoods." Immediately following the introductory words just quoted, the act specially names "braids, plaits, flats, laces, trimmings, tissues, willow sheets and squares." Then comes the declared use to be made of those eight articles, namely, "used for making

or ornamenting hats, bonnets, and hoods." So far as the question involved in the present case is concerned, the clause is to be read as if it stood thus:

"Trimmings used for making or ornamenting hats, bonnets, and hoods, and composed of straw, chip, grass, palm-leaf, willow, hair, whalebone, or any other substance or material, and not specially enumerated or provided for in this act."

Undoubtedly, then, this clause of the act embraces the entire class of trimmings shown to exist, of whatsoever substance or material composed, the chief use of which is for making or ornamenting hats, bonnets, and hoods, and not specially enumerated or provided for in the act. This was the decision of the supreme court of the United States in the two cases to which counsel have referred,—*Hartranft v. Langfeld*, 125 U. S. 125, 8 Sup. Ct. Rep. 732; *Robertson v. Edelhoff*, 132 U. S. 614, 10 Sup. Ct. Rep. 186.

I have already called your attention to the fact that chinas and marcelines are not specially made dutiable by those names by the tariff act of 1883. Are these articles trimmings, within the meaning of the clause relating to "Hats, and so forth, materials for," and dutiable at the rate of 20 per centum? The evidence tends to show that chinas and marcelines were used at the time of the passage of the tariff act of 1883, and long had been used, for lining hats, bonnets, and hoods; that they were and are particularly adapted to that use, and had and have their chief commercial value therefrom. The plaintiffs' witnesses have testified that these articles have always belonged to and constituted a part of the general class of hat trimmings, and have been used and chiefly used to trim and finish hats, bonnets, and hoods, and make the same merchantable commodities. The defendants' witnesses have testified that chinas and marcelines do not belong, and never did belong, to the class of trimmings for hats, bonnets, and hoods. In this matter these witnesses make a distinction between the outside and the inside of a hat, bonnet, or hood. According to their conception and expressed views, only the outside decorations or adornments of a hat, bonnet, or hood are embraced in the designation "trimmings." They give to the term, you perceive, the most narrow signification it will bear. Undoubtedly the word "trimmings," as used in the clause relating to "Hats, and so forth, materials for," includes ornamental appendages. But does it include nothing more? This you will determine upon consideration of the whole evidence, and having regard, also, to the terms of the particular clause of the tariff act with which we are now dealing. The language of that clause, as it relates to trimmings, you will remember, is: "Hats, and so forth, materials for, * * * trimmings, * * * used for making or ornamenting hats, bonnets, and hoods." The use is not confined to ornamentation; but, by the express words of the clause, is "for making" as well as "ornamenting." Either use is within the language of the act.

The defendants' witnesses also make a distinction between trimmings and linings, and they state that the latter are not included in the desig-

nation or class of trimmings. But the mere fact that chinas and marcelines are called "linings" does not necessarily exclude them from the class of "trimmings." Mere names are not, of themselves, controlling. It is immaterial that chinas and marcelines are bought and sold by those particular names, and are called "linings," if, in fact, they are trimmings chiefly used either for making or ornamenting hats, bonnets, and hoods.

The plaintiffs contend that they have given evidence tending to show that the lining of hats, bonnets, and hoods is really a finish of an ornamental nature. How this is, you will determine. But, aside from the matter of ornamentation, you are to consider whether the lining of a hat, bonnet, or hood is not a part of the construction or making of the article, within the meaning of the clause of the tariff act. Again I direct your attention to the language therein employed: "Trimmings * * * used for making or ornamenting hats, bonnets, and hoods." You will also recall and give proper consideration to the evidence tending to show that commonly, the lining of a hat, bonnet, or hood is necessary to its finish and fitness for use, and is required to make it a completed article, and a merchantable commodity. Under the evidence in this case the term "trimmings" should not be given any technical or particular commercial meaning, but should receive its popular signification and common import. The word "trimmings" should be understood and applied in its natural sense, as used in ordinary life.

The evidence tends to show that chinas and marcelines are particularly adapted and intended to be used, and in fact are and long have been used, as inside appendages for hats, bonnets, and hoods, to trim and finish them, and that their substantial commercial value consists in that use. Are they, or are they not trimmings, according to the natural meaning of that word? This you will determine, taking into consideration all the evidence on the subject, and having regard to the preponderating weight of the evidence. If you should find from the evidence that the articles here in question—chinas and marcelines—are not trimmings, that, of course, would make an end of the plaintiffs' case; but, if you should find them to be trimmings, then the only remaining inquiry will be as to what their chief use is. The plaintiffs have examined a large number of experienced witnesses, who have testified that the chief use of these goods is, and long has been, to line hats, bonnets, and hoods. Some evidence has been adduced by the defendant tending to show that these articles are adapted to some other purposes, and are so used to some extent; but I do not recall any testimony on the part of the defendant showing that the chief use of chinas and marcelines is for any purpose other than for lining hats, bonnets, and hoods. So that, according to my recollection of the testimony, the evidence offered by the plaintiffs as to the chief use of these articles is not contradicted. If, then, your finding should be that these goods are trimmings, and that their chief use is for making or ornamenting hats, bonnets, and hoods, your verdict should be for the plaintiffs.

It only remains for me to read and answer certain points or prayers for instructions submitted by counsel for the respective parties, and which cover every legal phase of the case. I am asked by the defendant to charge you:

"(1) If you believe that in March, 1883, chinas and marcelines were commercially known as 'linings,' and not 'trimmings,' then your verdict should be for the defendant."

This point is refused.

"(2) If you believe that the chinas and marcelines in suit were bought, sold, and used in trade in March, 1883, under those names, and were not commercially known as 'trimmings,' then your verdict should be for the defendant."

This point is refused.

"(3) If you believe that the chinas and marcelines were not 'trimmings,' according to the natural meaning of that word, in March, 1883, in the absence of evidence of commercial usage to the contrary, then your verdict should be for the defendant."

This point is affirmed.

"(4) Your verdict must be for the defendant if you believe that the articles in suit were chiefly used in March, 1883, for purposes other than making or ornamenting hats, bonnets, or hoods, even if you believe that they were known as 'trimmings.'"

This point is affirmed, if you so find from the evidence.

"(5) If you believe that the process of lining a hat, bonnet, or hood is, in trade, not part of the trimming of it, then your verdict must be for the defendant."

This point is affirmed, if you so find from the evidence.

"(6) If you believe that the chinas and marcelines in suit were not in the form of trimmings at the time of their importation, you must find for the defendant, although you should believe that they were suitable and adapted by their nature and qualities to be made into hat trimmings."

This point is refused. This point which I have just read and the next one embody the proposition advanced by defendant's counsel, and discussed by them before the jury, that the chinas and marcelines here in question cannot be regarded as within the term "trimmings" as employed in the act of congress, because they are imported by the piece, and before the material is actually applied to use in the making or ornamenting of hats, bonnets, and hoods the pieces have to be cut up into smaller pieces, and made into certain forms. But the court cannot accept this view as correct, and I instruct you that hat materials which are imported by the piece are "trimmings," within the meaning of the act of congress, if they are distinctly adapted, and in fact are chiefly used, for trimming hats, bonnets, and hoods, and are not specially enumerated or provided for in the act.

"(7) The jury are instructed that there is a distinction properly to be made between 'trimmings' and materials out of which to manufacture trimmings, and, if the articles in suit are not trimmings in the sense of being completely fabricated as such, but required skill and labor to cut, fit, fold, sew, or fashion them into trimmings, then they must find for the defendant."

You will understand that I am asked to instruct you in this way. This is the proposition which counsel ask me to affirm. I decline to give you that instruction, and I have given you the contrary instruction. The point is refused.

"(8) The language of a tariff act is to be construed in the light of commercial usage and trade terms prevailing at the time of its passage. If, therefore, you should find from the evidence that there were known in the trade in 1883 two classes of articles, distinct from each other, the one called 'trimmings for hats, bonnets, and hoods,' and the other, 'linings for hats, bonnets, and hoods,' and the marcelines and chinas in suit were embraced in the latter class, your verdict should be for the defendant."

This point is affirmed if you find that the distinction here suggested existed in point of fact, not merely in name, and that the class of "trimmings" does not include linings.

"(9) The 'trimmings' of a hat, bonnet, or hood, according to the natural meaning of the word, are the articles used to trim it. I charge you that, in the absence of evidence of commercial usage to the contrary, the material used in lining the inside of a hat is not a trimming, within paragraph 448 of the tariff act of 1883; and, if you find the marcelines and chinas in suit to have been used only for lining the hat, your verdict must be for the defendant."

You will understand that this is the language of counsel; that they ask me so to charge. I decline so to charge you. The point is refused.

"(10) By the act of February 8, 1875, all manufactures of silk, or of which silk was the component material of chief value, irrespective of classification by previous laws or commercial designation, were dutiable at sixty per cent., provided such manufactures did not contain twenty-five per cent. or more in value of cotton. If you find, therefore, that the articles in suit are manufactures of silk, or that silk is the component material of chief value in them, then you should find for the defendant, unless the articles in suit contain twenty-five per cent. or more in value of cotton."

This point is refused.

"(11) The burden of proof is upon the plaintiff in this case to show that the classification of the articles in suit was erroneous, and that they are 'trimmings.'"

This point is affirmed, but in your findings of fact you should have regard to the preponderating weight of the evidence.

The plaintiffs have submitted to me certain points, most of which I will specifically answer, and some of which I will not answer, because I conceive that the proper answers are embodied in the general charge which I have submitted to you.

The first point was withdrawn by plaintiffs.

"(2) If the jury find that the articles in question are adapted to use and are used for various purposes other than for trimming hats, but also find that the use to which they are chiefly applicable is in making or ornamenting hats, bonnets, or hoods, the verdict should be for the plaintiff."

This point is affirmed if the articles are chiefly used in making or ornamenting hats, bonnets, and hoods.

"(3) The circumstance that the articles in question may be used for purposes other than the making or ornamenting of hats, bonnets, or hoods is not

controlling, and does not subject them to a higher rate of duty, if the fact be that the distinctive feature of the goods consists in their adaptation to use for making or ornamenting hats, bonnets, or hoods."

This point is affirmed, with the qualification in regard to the chief use contained in the answer to the second point.

"(5) If, upon the evidence in this case, the jury believe that the purpose and use of the goods in question was to trim other articles,—that is to say, to adjust or fit such other articles to their final use,—they are trimmings, within the meaning of the act; and if their chief or predominant use is to trim hats, bonnets, or hoods, your verdict should be for the plaintiff."

This point is affirmed.

"(6) Upon the evidence in this case the term 'trimmings' should not be given any technical or particular commercial meaning, but should receive its popular signification and natural import; and, if the articles in question are trimmings, in the general and popular sense of the term, and are used for making or ornamenting hats, bonnets, or hoods, then, if such use is predominant, and not exceptional, the verdict should be for the plaintiff."

This point is affirmed.

"(8) If the jury believe that in commercial usage there is a well-defined class of articles recognized to be trimmings used for making or ornamenting hats, bonnets, and hoods, and that the articles in question belong to that class, then plaintiffs are entitled to a verdict."

This point is affirmed, if the articles are chiefly used for making or ornamenting hats, bonnets, and hoods.

"(9) It is not essential that the articles in controversy should be specially mentioned in the tariff as subject to a duty according to their individual names. If they are found to be trimmings, according to the natural meaning of the word, and are used to trim either hats, bonnets, or hoods, and also for other purposes, then, if principally used for making or ornamenting hats, bonnets, or hoods, the verdict should be for the plaintiffs."

This point is affirmed.

"(10) In this case the specific names by which the articles in question are bought and sold in trade and commerce do not control their classification for dutiable purposes."

This point is affirmed. I have so instructed you in my general charge.

"(11) It is not essential that the various articles in question should be bought and sold under the specific name of 'trimmings.' The individual names by which the articles in question are designated in trade do not interfere with their classification according to their predominant use, if it be found that they are trimmings, chiefly so used for making or ornamenting hats, bonnets, and hoods."

This point is affirmed. I have already so instructed you in my general charge.

"(12) Unless it be shown that the word 'trimmings' is restricted in trade and commerce to some particular articles to the exclusion of all others, that term should be given its natural signification, which would include all articles, of whatever material composed, the predominant use of which is 'to trim.'"

I affirm that point. The case is now in your hands.

MEYER *et al.* v. CADWALADER, Collector.¹

(Circuit Court, E. D. Pennsylvania. July 3, 1891.)

1. CUSTOMS DUTIES—HAT TRIMMINGS.

Whether the clause of the tariff act of 1883 providing for "braids, plaits, flats, laces, trimmings, tissues, willow-sheets, and squares used for making or ornamenting hats, bonnets, and hoods composed of straw, chip, grass, palm-leaf, willow, hair, whalebone, or any other substance or material not specially enumerated or provided for," includes certain gauzes, crepons, crepe, satins, and velvets, depends upon two considerations, viz.: *First*, whether the particular goods in suit were "trimmings;" and, *second*, whether their chief use was for making or ornamenting hats, bonnets, and hoods.

2. SAME.

The defendant having conceded that, under the evidence, the goods in suit were "trimmings," this question is narrowed to the single inquiry as to their chief use.

3. SAME—BURDEN OF PROOF.

The burden of proof is upon the plaintiffs, and it is incumbent on them to establish their allegations by sufficient evidence.

4. SAME—EVIDENCE—COURSE OF TRADE.

In considering the question of chief use, it is the duty of the jury to give more attention to the course of trade in the original distribution of the goods among those who import them than to the guesses of individuals as to the various uses to which the articles may be put by individual consumers.

At Law. *Assumpsit* to recover an excess of duty alleged to have been exacted by the collector upon certain velvet ribbons, gauzes, crepon, crepes, satins, and velvets imported by the plaintiffs in 1886. The facts are sufficiently set forth in the charge of the court. The defendant admitted that the duty collected on the velvet ribbons was excessive, and that there was due on that account \$244.01, but denied that anything was due on the other items. The verdict was for plaintiffs for the amount admitted to be due on the velvet ribbons only.²

Frank P. Prichard, Henry E. Tremain, and John G. Johnson, (Cyrus E. Woods, Harry T. Kingston, Augustus R. Stanwood, Charles Curie, and Alexander P. Ketchum, with them,) for plaintiffs.

W. W. Carr, Asst. U. S. Atty., John R. Read, U. S. Atty., William H. Taft, Sol. Gen., and W. P. Hepburn, Sol. of Treasury, for defendant.

ACHESON, Circuit Judge, (charging jury.) This is an action brought by Meyer & Dickinson, importers, against the collector of the port of Philadelphia, to recover an alleged excess of duties paid under protest on certain goods entered at the custom-house on various days in the months of March, April, and May in the year 1886. While the collector is the defendant named on the record, the United States are the real defendants. It is conceded under the evidence that an excess of duty was collected from the plaintiffs on the article of velvet ribbons, and there is no dispute as to the amount of such excess. As to that item, therefore, you will render a verdict for the plaintiffs. This amount is admitted to be \$244.01.

¹ Reported by Mark Wilks Collet, Esq., of the Philadelphia bar.

² A new trial was afterwards granted by the court on motion of plaintiffs. See 49 Fed. Rep. 32.

The articles which are here the subject of dispute are gauzes, crepons, crepes, satins, and velvets. These goods are made either wholly of silk, or of silk and cotton, silk being the component material of chief value. The collector assessed upon the goods, and required the plaintiffs to pay, 50 per centum *ad valorem*, under the last paragraph of Schedule L of the tariff act of March 3, 1883, (22 St. 510,) namely:

"All goods, wares, and merchandise not specially enumerated or provided for in this act, made of silk, or of which silk is the component material of chief value, fifty per centum *ad valorem*."

The plaintiffs claimed in their protest, and in this suit claim, that the goods were liable to only 20 per centum duty, under the provision in Schedule N of the act of March 3, 1883, which reads thus:

"Hats, and so forth, materials for,—braids, plaits, flats, laces, trimmings, tissues, willow-sheets, and squares, used for making or ornamenting hats, bonnets, and hoods composed of straw, chip, grass, palm-leaf, willow, hair, whalebone, or any other substance or material not specially enumerated or provided for in this act,—twenty per centum *ad valorem*."

The act of 1883 does not impose any duty upon the several articles which are here the subject of dispute; that is to say, gauzes, crepons, crepe, satins, and velvets, or any of them, by those names. The position of the plaintiffs is that those goods were classifiable under the clause of the act I have last read, which begins with the words, "Hats, and so forth, materials for," as being "trimmings" chiefly "used for making or ornamenting hats, bonnets, and hoods," and hence were subject to a duty of 20 per centum only. Whether the goods came under that clause, and were dutiable at the rate of 20 per centum, instead of at the rate of 50 per centum, as the collector held, is the question involved in this case.

This question (permit me here to say) should be approached and considered in a spirit of perfect fairness. Everything like prejudice or prepossession should be banished from the mind. We should all be animated by the earnest desire that the result reached shall be consonant with the law and in accordance with the evidence. If the plaintiffs' goods were rightly classified, they have no just cause for complaint. But if the collector was wrong in his classification, and exacted from the plaintiffs an excessive duty, then the government cannot honestly withhold from the plaintiffs the money so paid in excess of the legal rate of duty.

Two considerations enter into the decision of the question whether the plaintiffs' goods were dutiable under the 20 per centum clause of the act: *First*. Were the goods "trimmings?" *Secondly*. Were they chiefly used for making or ornamenting hats, bonnets, and hoods? If they were "trimmings," and their principal use was for making or ornamenting hats, bonnets, and hoods, then the plaintiffs are entitled to a verdict. But if they were not "trimmings," or, being "trimmings," if their principal use was not for making or ornamenting hats, bonnets, and hoods, the verdict should be for the defendants. This instruction applies to the goods as a whole, and to each particular kind here in dispute, and represented by the several samples. Your verdict might be in favor of the

plaintiffs as respects some of the articles, and in favor of the defendant as respects other articles, according to your findings of fact under the evidence as to the several articles involved in this controversy. Upon the proofs in this case the defendant concedes that all the articles here involved, namely, the gauzes, crepon, crepes, satins, and velvets, are "trimmings." There is therefore no longer any dispute on that point. You will then assume that all these articles belong to the general class of "trimmings," and your deliberation will be confined to the single inquiry as to their chief use. What was the chief use of these several articles? Was it for making or ornamenting hats, bonnets, and hoods? Or was their chief use for other purposes? In dealing with this subject you will carefully note that the question relates to the chief use of articles of the particular kinds and grades shown by the samples in evidence,—the numbered samples so often referred to by the counsel and the witnesses. The question is not as to the chief use of gauzes, crepon, crepes, satins, and velvets generally, but of goods the same as the samples. This is a point of primary importance, and in your consideration of the testimony must not be lost sight of.

I do not deem it necessary for me to recite at any length the evidence, or to attempt any particular analysis of it. The counsel of the respective parties have discussed the testimony very fully, and you have had the benefit of their views as to its bearing on the one side or the other of the question upon which you are to pass. The observations I shall submit to you will be brief and of a general nature. There is evidence in the case tending to show that the manufacture and trimming of hats, bonnets, and hoods is a very large industry in the United States; that there is a general class of articles known to the trade under the designation of "trimmings," specially adapted for and chiefly used for making or ornamenting hats, bonnets, and hoods, which class includes gauzes, crepes, satins, and velvets, and many other articles; that these articles are imported into this country in large quantities; and that there is in trade a class of persons who are dealers in these various articles under the general name of "hat trimmings." The plaintiffs have called and examined a large number of the importers of such goods and their employes; and also other persons in trade who deal in and distribute these imported articles among the original purchasers, namely, the millinery houses and dry goods houses and other dealers in hat trimmings. These witnesses have testified that the chief use of the articles here in dispute is in the making or ornamenting of hats, bonnets, and hoods. Some of those witnesses, not all of them, who are importers, are themselves interested in the question involved in this litigation, and that is a fact to be considered by you in estimating the weight to be given to their testimony. You have seen the witnesses last referred to, and have had an opportunity of observing their manner of testifying and their degree of intelligence, and it is for you to say what credit shall be given them.

The plaintiffs have also examined a number of other witnesses who are engaged in the business of manufacturing or trimming hats for men and women, and who are connected with that industry, and those wit-

nesses have testified that the chief use of the articles here in question is for making or ornamenting hats, bonnets, and hoods. All these witnesses, as it seems to me, (although this is a matter for you to determine,) by reason of their connection with the trade, have a good opportunity of knowing the use to which these articles are generally applied.

The plaintiffs also called another class of witnesses, three in number, who are connected with the customs service of the United States, namely, Mr. Sharretts, a member of the board of general appraisers, Mr. Corbett, assistant appraiser at the port of New York, and Mr. Clark, assistant appraiser of the port of Philadelphia. You will recall the testimony of these witnesses. I ought, however, to add that while Mr. Sharretts testified that the chief use of gauzes, satins, and velvets, represented by the samples numbered 4, 5, 9, 11, and 12, was for making or ornamenting hats, bonnets, and hoods, he expressed the opinion that the crepon and crepe, represented by samples numbered 6 and 8, were not chiefly used for that purpose.

The defendant has examined a very large number of witnesses belonging to various trades and occupations, dry goods men, dressmakers, manufacturers of novelties, undertakers, and others, who have testified that the chief use of the goods here in dispute was for purposes other than that of making or ornamenting hats, bonnets, and hoods. These witnesses, as you will recall, testified that these goods were chiefly used for making or trimming dresses and fancy articles of different kinds, and for various other special purposes by them named. A great many of the defendant's witnesses, perhaps the greater number of any class testifying, are connected with the dry goods trade, and acquired the knowledge upon which they testify in that line of business. They speak more particularly of satins and velvets, and testify as to their comparative sales of such articles to dry goods houses and to millinery houses. But you will remember that some of them state that many of the large dry goods houses to which they sell satins and velvets have millinery departments; and, further, that throughout the country, in the smaller towns and communities, those in the dry goods business supply the local demand for millinery articles. Do these witnesses, then, certainly know the ultimate use to which the satins and velvets are applied? Some of them admit that they do not know, and have no certain means of knowing.

The article of velvets calls for special observation. Witnesses on both sides of the case speak of and describe "millinery velvets," which they state are particularly adapted for trimming hats, bonnets, and hoods. There seems to be no difference between the witnesses on the two sides of the case as to the distinguishing characteristics of millinery velvets. It is testified that they are made of lighter material and are softer and more pliable than dress velvets and velvets for other uses. The witnesses further state that the millinery velvets are intended more for show than for wear. Some of the millinery velvets, the evidence tends to show, are of a low grade and price, and others are of a much higher grade and price.

The velvets, of which we have samples numbered 11 and 12, are undoubtedly of a low grade, and many witnesses state that they are light, soft, and pliable, and belong to the low grade of millinery velvets. You can yourself handle the samples, and thus form some judgment as to whether they do not have the characteristics which all the witnesses ascribe to millinery velvets. Now, if these velvets, represented by samples Nos. 11 and 12, are millinery velvets, (and whether they are or not is for your determination,) the fact ought to be taken into consideration in connection with the testimony of those witnesses who testify that their chief use is for millinery purposes, or to make and trim hats, bonnets, and hoods. For, if they are millinery velvets, what would naturally and probably be their chief use?

In determining the question of chief use,—which is the only question now open,—you should give effect to and be governed by the preponderating weight of the evidence in the case. The weight of the evidence does not always lie on the side having the greater number of witnesses. Only such value should be given to the opinion of any witness as it deserves by reason of his means of knowledge, whereby he can form a correct judgment. Regard should be had not only to the character, disinterestedness, and intelligence of the witnesses, but also to their opportunities of becoming acquainted with the subject-matter now under investigation, namely, the chief use made of the several articles involved in this controversy.

I will now read to you and answer certain points which have been submitted to me by counsel for the respective parties. I am requested by defendant's counsel to charge you as follows:

"(1) Your verdict must be for the defendant if you believe that the goods and merchandise in suit were chiefly used, in March, 1883, for purposes other than for making and ornamenting hats, bonnets, and hoods, even if you believe that they were 'trimmings' used for making and ornamenting hats."

That point is affirmed.

"(2) It is the purpose for which these articles are chiefly used that determines their dutiability, within the meaning of this clause of the tariff act. It would not be a proper construction of the meaning of this act to say that, because certain articles are indifferently adapted for use for different purposes, either of these purposes may determine the rate of duty. It is the predominant use to which these goods and merchandise are applied that determines their character. If you find the goods and merchandise to be chiefly used for other purposes than for making or ornamenting hats, bonnets, and hoods, you will find for the defendant. The question is purely one of fact, namely, what is the predominant use to which these articles are devoted?"

That point is taken from the charge of my distinguished predecessor in a cause tried here in this court, and I affirm it, and give you the instruction prayed for by the point.

"(3) The burden of proof is upon the plaintiffs in this case to show that the classification of the goods and merchandise in suit was erroneous, and that they are 'trimmings,' chiefly used for making or trimming hats, bonnets, or hoods."

This point is affirmed. The meaning of the point is simply this: that it is incumbent upon the plaintiffs to establish by sufficient evidence the allegations made by them, and upon which their case depends.

I am asked by plaintiffs' counsel to answer a number of points, but I shall answer but four of them, because the others, as I understand them, relate to the question whether these articles are trimmings, which has been eliminated from the case by the concessions of the defendant at the close of the testimony:

"(1) If the jury find that any of the articles in controversy are hat materials, so known and recognized in trade and commerce, and are distinctively adapted for as well as chiefly used as trimmings in making or ornamenting hats, bonnets, and hoods, the verdict should be for the plaintiffs upon such articles."

The point is affirmed.

"(2) If the jury find that any of the articles in question are adapted to use and are used for various purposes other than for trimming hats, but also find that the use to which they are chiefly applicable is in making or ornamenting hats, bonnets, and hoods, the verdict should be for the plaintiffs upon such articles as are chiefly so used."

This point is affirmed.

"(3) The circumstance that any of the articles in question may be used for purposes other than the making or ornamenting of hats, bonnets, and hoods is not controlling, and does not of itself subject them to the higher rate of duty, if the fact be that the distinctive feature of the articles consists in their adaptation to use for making or ornamenting hats, bonnets, and hoods, and that they are chiefly so used."

The point is affirmed.

"(18) In considering the question of chief use, it is your duty to give more attention to the course of trade in the original distribution of the goods among those who import them than to the guesses of individuals as to the various uses to which the articles may be put by individual consumers."

The point is affirmed.

And now, in conclusion, I have only to remind you that the single question submitted to you is, what is the chief use of the several articles represented by the samples Nos. 4, 5, 6, 8, 9, 11, and 12? and as you determine that question as respects each of these articles so should your verdict be. I commit the case to you, confident that it will receive the careful consideration which it deserves, and that your verdict will be in accordance with the law and the evidence in the case.

MEYER *et al.* v. CADWALADER, Collector.¹

(Circuit Court, E. D. Pennsylvania. December 8, 1891.)

1. NEW TRIAL—NEWSPAPER COMMENTS DURING TRIAL—PUBLISHED REPORTS OF INTERVIEWS WITH PARTIES.

Where evidently inspired newspaper comments and reports of interviews, of so gross a nature as to be well calculated to prejudice a jury against one of the parties to a cause, have been published during a trial, and presumably seen by the jury, a new trial will be granted where the verdict is against the parties attacked.

SAME—PRESUMPTION THAT JURY READ ARTICLES.

Where, during a trial extending over several days, the jury separating after each daily session, leading newspapers in the city in which the trial was taking place published matter calculated to prejudice the jury against one of the parties, it will be presumed that the jury saw the matter published.

3. SAME—WAIVER OF OBJECTION.

After the publication during a trial of the first of a series of newspaper articles reflecting against one of the parties, motion by that party was made for withdrawal of a juror and a continuance, which motion was refused. *Held*, that he was not bound to renew his motion upon the subsequent publication of other and more offensive articles, and that his failure to do so was no ground for refusing his application for a new trial.

At Law.

This was a motion by plaintiffs for a new trial in an action at law to recover an excess of duty alleged to have been exacted on hat trimmings. Reported, 49 Fed. Rep. 26. The grounds of the motion were that the verdict was against the weight of the evidence, and that, during the progress of the trial, statements had been publicly made on behalf of defendant calculated to prejudice the minds of the jury. In support of the latter ground, various newspaper articles and reports were relied on. Of these, the two following, published during the trial in leading daily newspapers, will serve as illustrations:

"The Twenty-Million Raid on the Treasury—Special Agent Hanlon Tells Some of Its Inner History—The Twelve Contested Samples under Close Scrutiny—Silks, Dress Trimmings, Ruchings, Linings, and Almost Everything Else Imported, Asked to be Classified as Hat Trimmings, to the Great Loss of the Government.

"There was much comment in mercantile circles yesterday over the verdict in the celebrated *Hat-Trimming Case*, decided on Friday against the government. The prompt notice of government officials that the case would be appealed, was not a surprise to the victors in the first stage of the warfare, while those who had battled to save the government millions of dollars were confident that the verdict would not stand. Among those who, officially, have given the subject under dispute the gravest study, is Special Agent Marcus Hanlon. He plainly showed yesterday how earnest he was in his endeavor to prove that the suits of the importers were such as should not secure verdicts for them from intelligent jurymen, and, concerning the cases now on trial, said: 'I am only too glad to give my views, as I think that the people should know all of the facts in this attempt to loot the United States treasury. The issue is simply a question of fact,—whether the goods were chiefly used for making or ornamenting hats. There is no question of law involved; all such questions having been raised in the case that was decided on Friday.

¹Reported by Mark Wilks Collet, Esq., of the Philadelphia bar.

There are twelve samples in the case now on trial. Samples Nos. 1, 2, and 3 are ribbons; No. 1 being cotton-back velvet ribbons, the same as those in the *Langfeldt Case*, and cannot be seriously claimed by the importers as hat trimmings. In fact, they have said that they would abandon them.'

"MYSTERIES TO BE EXPOSED.

"Being asked if he meant to imply that the ribbons which were the subject of the supreme court's decision in the *Langfeldt Case* were not hat trimmings, notwithstanding the decision, Mr. Hanlon said: 'I do, most assuredly; and the jury in that case found that they were not chiefly used for making or ornamenting hats. It was one of the many mysteries that have occurred in these hat-trimming litigations, which I will expose when this case is decided.' The second sample in the present case is of silk and cotton binding ribbons, chiefly used for binding blankets. The third is a plain black satin velvet ribbon, seventeen to twenty-six lines, or about one and a half to two inches wide, almost exclusively used for dress trimmings, as every woman in America knows. Of course, an infinitesimal quantity may be used for trimming ladies' hats.

"SOME GAUZY EXCUSES.

"The next class of goods consists of samples 4, 5, 6, 7, and 8. No. 4 is a silk guipure gauze, about eighteen inches wide, chiefly used for dress purposes, as every dressmaker can testify, but considerable of it is used occasionally, when fashion dictates, for hat materials or trimmings; but that is not anything like its chief use. Sample No. 5 is silk and wool crepes, almost exclusively used for dress purposes. The same applies to samples 6 and 8, which are silk crepons and crepes, nineteen and nineteen and a half inches wide. I do not think a fashionable dressmaker can be found in the United States to testify that these are used to any extent for trimming or making hats. They are well-known dress materials, beyond a question. Sample No. 7 is thirty-six inch crepe lisse, a well-known article, principally used for making ruchings; and it is an audacious thing for any person to claim they are chiefly used for hat trimmings.

"MR. TREMAINE'S CHANGE OF HEART.

"Sample No. 9 is white and colored satins, seventeen and one-half to twenty-four inches wide. Almost every man and woman knows that these goods are chiefly used for linings or dress purposes, and the small percentage of these importations used in lining men's hats gives no warrant for importers to claim that their chief use is for hat trimmings. In fact, Mr. Tremaine, the chief lawyer for the hat-trimming syndicate, told Mr. Corbett, assistant appraiser at New York, (at least, so Mr. Corbett has repeatedly told me,) that, just before the board of local appraisers decided that they were hat trimmings, Mr. Tremaine stated that the importers did not claim, nor did they expect to have, colored satins seventeen and one-half to twenty-four inches wide classed as hat materials; but he now comes here, and will vigorously contest that they are. Samples Nos. 10, 11, and 12 are common chappe plushes and velvets. No. 10 is an eighteen-inch plush; the chief use being for dresses and dress trimmings and manufacturing purposes, such as albums, etc. No. 11 is fifteen and one-half, sixteen, and eighteen inch colored velvets, chiefly used for dresses and dress purposes, scarcely ever used either as hat materials or trimmings, except a small quantity for children's hats. The same applies to sample No. 12, which is fifteen and one-half, sixteen, and eighteen inch black velvets; being always used for dress trimmings and dress purposes. Mr. Hanlon says that regarding satins, velvets, and plushes the government will present overwhelming evidence from every leading dry-goods house, from Chicago to Boston, that they are not chiefly used for hat trimmings.

'It must be remembered,' concluded the special agent, 'that this is not a fight of the treasury department alone to protect the United States treasury, as every citizen of the United States is as much interested as the government. At the same time, I want to be distinctly understood that if Meyer and Dickinson can find people to prove that these twelve samples, or any of them, are chiefly used for hat trimmings, they can rely on it that I will give them all of the aid in my power to obtain their money.'

"The Customs Decisions—Millions of Dollars Recovered from the Government on Technical Errors in Tariff Laws—Costly Hat-Trimming Cases—Sharp Attorneys Who Prosecute Claims on Contingent Fees—The Claimant Sometimes Gets Fifty Per Cent., and Sometimes Even Less.

* * * * *

"In the *Hat-Trimming Case* there was no question of the intent of the law-making power. Under the act of March 3, 1883, hat trimmings were made dutiable at twenty per cent., and manufactured silks at fifty per cent. A reference to the debates of congress, or to the minutes of the committee on ways and means, would show that congress intended that silks, whether used for hat trimmings or for any other purpose, were intended to pay a duty of fifty per cent. The treasury department interpreted the law in this way, and collected duty at fifty per cent. A sharp attorney saw the technical flaw in the act, and undertook to prosecute the claim for the difference between fifty per cent. and twenty per cent. The suit has been successful, and the claimants, who have paid duty on these goods for many years at fifty per cent. under the treasury decision, will recover millions of dollars, of which it is understood the attorneys in the case will receive fifty per cent. It is, indeed, a phenomenal case, in which the attorneys' fees aggregate possibly \$10,000,000. Chief Special Agent Tingle, of the treasury department, speaking of the result of this suit, said to me a few days ago: 'There is a multitude of such cases coming before the department every year. There is no justice in them, for the importer has already sold his goods to the consumer on the basis of a fifty per cent. duty. This duty has been paid by the consumer, therefore, and what the importer recovers from the government is simply an additional profit to him. If the tariff is ever a tax upon the people, it is in such a case as this. If these people had an equitable claim against the government,—that is, if they felt they had been obliged to pay an unjust duty,—they would hire an attorney, as any other claimant would, and go to law about it. But, instead of doing this, they listen to some attorney who thinks he has found a technical flaw in the law, and, as the suit costs them nothing, they allow it to be brought in their names. The chances are against their recovering; but the litigation costs nothing, and so the fifty per cent. of their claim, if they recover it, is so much clear profit.' * * *

After the appearance of the first of the newspaper articles published, a motion was made to withdraw a juror and continue the case. This motion was denied. Afterwards, articles of the same tenor, and more objectionable, continued to be published; but no further motion for continuance was made. The verdict was in favor of plaintiff only for a small amount admitted by defendant to be due, and was a practical defeat of plaintiff on the issues of fact disputed.

Frank P. Prichard and Henry E. Tremain, (Cyrus E. Woods, Harry T. Kingston, Augustus R. Stanwood, and John G. Johnson, with them,) for plaintiff, cited Hil. New Trials, 202; 2 Grah. & W. New Trials, p. 484.

John R. Read, U. S. Atty., and *William H. Taft*, Sol. Gen., (*W. W. Carr*, Asst. U. S. Atty., and *W. P. Hepburn*, Sol. of Treasury, with them,) for defendant.

There is no presumption that the jury read the articles. *U. S. v. McKee*, 3 Cent. Law J. 258. Plaintiffs, by allowing the trial to proceed without renewing their objection, waived the right to move for a new trial on that ground. *Davis v. Allen*, 11 Pick. 468; *McCorkle v. Binns*, 5 Bin. 348; *Fessenden v. Sager*, 53 Me. 536; *Bulliner v. People*, 95 Ill. 394; *Hunter v. Georgia*, 43 Ga. 483.

ACHESON, Circuit Judge. This action was brought by importers against the collector of the port of Philadelphia to recover back an alleged excess of duties paid under protest upon certain imported goods claimed by the plaintiffs to be "trimmings," chiefly "used for making or ornamenting hats, bonnets, and hoods." As to all the articles involved in the suit, upon which there was any controversy before the jury, the verdict was for the defendant. The plaintiffs move for a new trial, and in support of their motion assign several reasons. But, in the view the court takes of the case, it is only necessary to consider one of these reasons, which is based upon the fact, that, during the course of the trial statements highly prejudicial to the plaintiffs appeared from time to time in several daily newspapers of large circulation and influence published at the place of trial; some of these statements purporting to have been made to the newspapers by government officials, and all of them calculated to bias the minds of the jury, and prevent them from rendering a fair and impartial decision. The general character of all these publications can be inferred from the following head-lines, which appeared over an article relating to the trial, published while it was in progress, namely: "Importers and the Government;" "Blocking the Twenty Million Dollars Raid on the Treasury;" "Experts Give Testimony;" "Practical Business Men Come to the Aid of the Treasury, and Help to Shatter the Raiders' Claims." Another publication, during the trial, which was a special dispatch from Washington, and purported to quote remarks of the chief special agent of the treasury department to the newspaper reporter, condemning as unjust, for reasons stated, claims of importers to recover back excess of duties exacted from them, had, in conspicuous letters, these introductory head-lines: "The Custom's Decisions;" "Sharp Attorneys who Prosecute Claims on Contingent Fees;" "Millions of Dollars Recovered from the Government on Technical Errors in Tariff Laws;" "Costly Hat-Trimming Cases;" "The Claimant Sometimes Gets 50 per Cent. and Sometimes Even Less." These striking head-lines are indications of the character of the statements which followed.

But the most objectionable of all these publications was what purported to be an interview between the newspaper reporter and a special agent of the treasury department, who seems to have had charge of the preparation of the government's case, and who was present at the trial. This interview, in substantially the same form, appeared on the same day in the issue of two different newspapers, and the statements therein contained, as coming from this government official, bear marks of very

deliberate preparation. This official, as reported, undertook, in a newspaper interview intended for publication, to discuss the merits of the case on trial with respect to each particular kind of goods involved in the controversy, and to pronounce that their chief use was for other specified purposes than the trimming of hats, stating facts to support his assertions; and he further stated that one of the plaintiffs' counsel, whose name was given, and who was described as "the chief lawyer for the hat-trimming syndicate," had declared to a certain named government appraiser that the importers did not claim nor expect to have certain satins in controversy in this case classed as hat materials, but, he added, "he now comes here, and will vigorously contest that they are." In one of the newspapers containing this interview this treasury agent is represented as declaring: "I am only too glad to give my views, as I think that the people should know all the facts in this attempt to loot the United States treasury." There has been no sort of denial of either the genuineness or the accuracy of these published interviews.

It is idle to say that there is no direct evidence to show that the jury read these articles. They appeared in the daily issues of leading journals, and were scattered broadcast over the community. The jury separated at the close of each session of the court, and it is incredible that, going out into the community, they did not see and read these newspaper publications. That these published statements were well calculated to prejudice the jury against the plaintiffs and deprive them of a fair trial is a proposition so plain that it would be a sheer waste of time to discuss it. Good ground, therefore, here appears for setting aside the verdict.

But it is strenuously urged on behalf of the government that counsel for plaintiffs "waived all right to object to a verdict on account of these articles, because they did not openly call the attention of the court to the same, enter their objection to further proceeding with the trial, and except to an adverse ruling on the application." The fact, however, is that, immediately after the earliest of the newspaper articles appeared, the plaintiffs' counsel did make an application at chambers to the judge presiding at the trial for the withdrawal of a juror, and the continuance of the case until the next term, on the ground that a fair trial had become impossible by reason of said publications. This application was resisted by counsel for the government, and, for reasons which then seemed satisfactory to the judge, was refused. What more, then, was incumbent upon the plaintiffs? It is true that the articles which they brought to the attention of the judge were less objectionable than those which subsequently appeared, and to which particular reference has been made in this opinion. But we think the plaintiffs' counsel had done their whole duty in the premises, and were under no obligation to renew their application to stop the trial. Under all the circumstances, a waiver cannot justly be imputed to the plaintiffs. For the reason we have discussed, the verdict must be set aside, and a new trial granted; and it is so ordered.

BUTLER, District Judge, who, at the request of Judge ACHESON, sat with him at the hearing of the motion for a new trial, concurs in the opinion and order.

SEAMAN v. SLATER.

(Circuit Court, S. D. New York. January 26, 1892.)

1. COUNTER-CLAIM—WHEN MAINTAINABLE—TORT AND CONTRACT.

When an action, brought under the New York Code, sounds partly in contract and partly in tort, a counter-claim may be maintained for a balance due under the contract; and the fact that the evidence is directed mainly to proof of the tort does not deprive the defendant of the benefit of the counter-claim.

2. SHIPPING—BREACH OF CHARTER-PARTY—COUNTER-CLAIM.

In this action by a charterer for damages caused by the breach of a charter-party, in that the vessel was delayed by the defective condition of her machinery and the negligence of the engineer, the charterer was entitled to recover extra expenses and probable profits lost by the delay, and the owner may set off against this sum an unpaid balance due for the use of the vessel.

3. SAME—PARTNERS AS OWNERS.

Where one member of a partnership which owns a vessel is alone sued for the breach of a charter-party, he may counter-claim for the entire balance due under the contract for the use of the vessel.

Hopkins v. Lane, 87 N. Y. 501, distinguished.

At Law. Action by Samuel H. Seaman against John W. Slater for damages for breach of a charter-party. For former report, see 18 Fed. Rep. 485. Now heard on motion for a new trial. Granted.

John E. Parsons, for plaintiff.

Franklin Bartlett and *Wm. G. Willson*, for defendant.

SHIPMAN, District Judge. This is a motion by the plaintiff for a new trial upon the ground of errors in the charge of the court, and that the verdict of the jury was against the evidence in the cause. This action was brought to recover damages which the plaintiff, as surviving partner of Cromwell & Co., who were charterers of the steamer Hagar, had sustained, either by the breach of the charter-party, arising from the unfit condition of the boiler, or by the negligence of the engineer, whereby the vessel was injured, the voyage was delayed, extra expenses were caused to the charterers, and consequential damages were caused by their inability, in consequence of said delay, to obtain a return cargo, which had been agreed to be furnished, and which was not furnished by reason of the non-arrival of the vessel. The plaintiff also claimed to recover, and this claim was not denied upon the trial before me, \$1,734.10, and the interest thereon; that principal sum being the amount paid by the plaintiff's firm for the vessel's share of general average. The charter-party provided that the owners were to receive \$7,000 for the use of the vessel, and for each day's detention above seven days, through the fault of the charterers, the sum of \$250 per day; \$3,000 of the \$7,000 was paid. The defendant's answer contained a counter-claim for \$4,000, and \$1,250 for five days' detention in New Orleans. The substantial question of fact for the jury was the amount, if any, of consequential damages arising from the loss of return freight. The jury reported that they could not agree upon this point, but were urged by the court to come to an agreement, and returned a verdict from which it appeared that they found the

sum of \$1,787.20 as principal for loss of freight money upon the return voyage.

The plaintiff's motion for a new trial, upon the ground of verdict against evidence, is based upon the alleged palpable disregard of the testimony in regard to consequential damages. I am fully aware of the importance of trial by jury under the federal system, of the weight which is properly attached to a finding by the jury, and that mere dissatisfaction on the part of the court with the verdict does not justify the granting of a new trial. I am also aware that the question is not free from uncertainties, one of which arises from the length of time which has elapsed since the transaction. But I am convinced that justice requires that a new trial should be had. There are occasional mishaps which are incident to the system of trial by jury. When one of those mishaps occurs, the stability of the system, and a due regard to its importance and dignity, require that the case should be submitted for renewed, thoughtful, and unprejudiced consideration. With such consideration, whatever the conclusion, the court will be content.

The next ground for a new trial relates to exceptions to the charge of the court. This case has been tried twice in this court. Upon the first trial Judge WALLACE was of opinion that there was not evidence sufficient to justify a recovery by the plaintiff for the loss of the prospective profits of the return trip, and held that the plaintiff's recovery must be limited to the extra expenses incurred by reason of the detention and delay. The plaintiff thereupon elected to abandon the cause of action arising from breach of contract, and put his case to the jury upon the question of negligence. Upon the plaintiff's motion for new trial, the court was of opinion that the question of the loss of prospective profits should have been submitted to the jury, and directed a new trial. Upon the second trial there was no election to withdraw or abandon the cause of action founded upon contract. The case stood as presented in the complaint, wherein a double cause of action was alleged. No demurrer was pleaded, and the defendant interposed his counter-claim for the unpaid charter money, and an allowance for detention, which was proper, inasmuch as the action did not sound wholly in tort. If the action had been purely in tort, the construction of the New York statute is that "a counter-claim founded upon contract could not properly here have been allowed." *People v. Dennison*, 84 N. Y. 272; *Smith v. Hall*, 67 N. Y. 48. It is not claimed that in an action for breach of contract, which is in affirmance of the contract, the unpaid amount due to the defendant may not be the subject of a counter-claim, but it is said that this action was, in substance, in tort. It is true that the testimony showed that the injury to the vessel happened through the negligence of the engineer; but it cannot be that the defendant's right to a counter-claim, which exists upon the pleadings, can be taken away by the manner in which the case is presented in the testimony.

The plaintiff, upon the trial, acquiesced that if he were to be allowed to recover, as one item of his damages, his prospective profits, it would be necessary that in fixing their probable amount the jury should be al-

lowed to offset against the probable gross receipts the probable gross expenses, viz., the unpaid charter money, and possibly some allowance for detention, but he objects to the charge that the sum of \$4,000 and interest thereon were to be deducted from the total amount of damages and the \$1,734.10 and interest thereon. In the majority of cases the plaintiff sues for the unpaid contract price, and the question of damages for breach of contract is presented by the defendant in defense, but the parties need not necessarily be arranged in this way. *Warfield v. Booth*, 33 Md. 63. When the damages to which a person has been subjected by the inability of the contractor to comply with his warranty or his contract are believed to be in excess of the money due on the face of the contract, the injured party can stop paying, and sue for the breach of contract. *Moulton v. McOwen*, 103 Mass. 587, 594. And in such case the defendant can show, by set-off or by counter-claim, the unpaid value of his services or work. The object of the statutory system of set-off or counter-claim is to avoid circuity of action; but the principles upon which the result is reached, whether in favor of the plaintiff or defendant, do not differ materially from those which were recognized when each contracting party brought his action.

In Massachusetts the two cross-actions were wont to be tried together; and when there were two such actions, "one for the price of property sold, and the other for fraud in the vendor," it was held that the proper course was for the jury, "if they find the fraud, and that the damages equaled or exceeded the purchase money," to "render a verdict for the defendant in the first action, and for the plaintiff in the second action, for the excess of such damages, if any, over the purchase money. If the damage is less than the price sued for, it should go in reduction of the price in the first action, and the verdict should be for the defendant in the second action." *Cook v. Castner*, 9 Cush. 266. The rule was the same when the alleged damages were for defective work. *Moulton v. McOwen*, 103 Mass. 590. Where the plaintiff sues for damages arising from breach of the contract, and the defendant has not been paid the contract price, and, by the verdict, the plaintiff has been compensated for the damages arising from the breach of the contract, it is proper that the defendant should be allowed the unpaid value of his services or work, and, in determining the amount due to the contractor, the contract is to be followed so far as may be, (*Dermott v. Jones*, 2 Wall. 1;) and, "so far as the work was done under the contract, the prices specified in it are, as a general rule, to be taken as the best evidence of the value of the work," (*Koon v. Greenman*, 7 Wend. 121.) In this case the jury were instructed to find and allow the plaintiff his extra expenses resulting from the delay, and his prospective profits and the money paid for the benefit of the vessel; in other words, to place the plaintiff in the position in which he would have been had no calamity happened, and had his voyage been a prosperous one. When this had been done, the amount which was due to the defendant for the use of the vessel, according to the charter-party, which, in this case, was the true measure of the defendant's demand, was properly deducted

from the sum due to the plaintiff. The cases cited *supra* support the charge. *Warfield v. Booth*, 33 Md. 63.

The plaintiff says that the sums named in the counter-claim did not belong to the defendant, but to all the owners of the Hagar, and that the defendant alone could not set up a counter-claim. When one of the owners or partners is sued for the entire amount of damages, resulting from the breach of the charter-party, and is to be compelled to pay the entire sum, I think that he can set off the amount due upon the charter-party. If he could not, great injustice might be done. The case of *Hopkins v. Lane*, 87 N. Y. 501, which was cited by the plaintiff, rests upon a different state of facts. A new trial is granted.

MAYOR, ETC., OF CITY OF NEW ORLEANS *v.* UNITED STATES *ex rel.*
STEWART.

(Circuit Court of Appeals, Fifth Circuit. December 7, 1891.)

1. MANDAMUS TO MUNICIPAL BOARD—RES ADJUDICATA.

On an application for a writ of *mandamus* to compel the city of New Orleans to pay a judgment regularly obtained against it, such judgment is conclusive as to the city's liability, and no defense can be made on the ground that the debt was not paid out of the revenues of the year for which it was contracted, in accordance with Acts La. 1877, (Ex. Sess.) No. 80, p. 47, providing that no municipal corporation shall expend any money in any year in excess of the actual revenue for that year, and that the revenue for each year shall be devoted to the expenditures thereof. *U. S. v. New Orleans*, 98 U. S. 395, followed.

2. SAME—POWERS OF COUNCIL—TAXATION.

The legislature having declared that a 10-mill tax is sufficient to provide for the city's unbonded expenditures, it is not within the discretion of the council to exhaust the entire revenue with one class of disbursements, and leave others to accumulate; and a writ of *mandamus* will issue to compel it to pay a valid judgment against the city, either out of surplus revenues for the current year, or, if there is no available surplus, to include it in the budget for the ensuing year.

3. SAME.

A claim that the city is not bound to pay the judgment out of the revenues for the current year, because the whole thereof was necessary for ordinary expenses, is without merit when it appears that \$30,000 of such revenues was expended for a drainage machine, which is a permanent improvement, and that the surplus was over \$350,000, a large portion of which remained unexpended.

4. SAME—EXTENT OF REMEDY.

The fact that other judgments besides the relator's have been recorded under the act of 1877 does not require that the writ of *mandamus* applied for by him shall direct all the judgments to be paid in their proper order, since the court will not undertake to enforce the rights of persons who do not invoke its aid.

Error to the Circuit Court for the Eastern District of Louisiana. Affirmed.

STATEMENT BY LOCKE, DISTRICT JUDGE.

This was a petition by C. H. Stewart, the relator, filed December 31, 1890, in the circuit court of the United States for the district of Louisiana, for a writ of *mandamus* to compel the mayor and council of the city of New Orleans to put upon the budget and appropriate money for the payment of a judgment for \$2,484.92, which had been recovered

against the city of New Orleans in said circuit court in June, 1888, and filed and registered in the office of the comptroller of the city of New Orleans, for payment, according to the provisions of the act of March 17, 1870, being Act No. 5, session of 1870. The writ was granted, and from this judgment the case is brought to this court.

The original petition in the suit in which the judgment was obtained shows that the suit was founded upon certificates issued by the city of New Orleans for services rendered that city, namely, street wages, during the year 1882, and alleges that they were made payable out of the revenues of said year, but that the city of New Orleans misappropriated the funds which were so set apart, and destroyed the restriction hitherto existing. The record does not show any traverse or plea to said original petition, but the case went to trial by the court, the parties in the cause having waived a jury trial, and, the cause having been submitted upon the issues of fact as well as law, a final judgment was rendered thereon, which was made general and unrestricted. In the return to the alternative writ of *mandamus*, the judgment was admitted, but it was urged in defense that it was not a liability of the kind contemplated by the act of 1870;¹ that by Act No. 30 of 1877 the obligations contracted during any particular year are confined to the revenues of that year; that unless such revenues pay the claims, it is not an indebtedness of the corporation, and consequently not a liability of the city; and that no liability can be budgeted for out of the regular revenue constituting the alimony of the city, unless there is more thereof than is necessary to carry on the government satisfactorily, and provide for the peace, happiness, health, and comfort of its inhabitants.

Francis B. Lee, for plaintiffs in error.

Chas. Louque, for the relator.

Before LOCKE and BRUCE, District Judges.

LOCKE, District Judge, (*after stating the facts as above.*) The question as to whether the debt for the collection of which a *mandamus* was prayed was a liability of the city of New Orleans or not has been determined by the judgment. If there could have been any defense made to the action on account of the debt having been contracted for the purposes of the year 1882, and not paid from the revenues of that year, and therefore involving the accumulation of an indebtedness such as was prohibited by the act of 1877, it should have been made at the trial of the cause in the court below. In *U. S. v. New Orleans*, 98 U. S. 395, the court says:

"In the present case the indebtedness of the city of New Orleans is conclusively established by the judgments recovered. The validity of the bonds

¹ Acts La. 1870, No. 5, abolished the writ of *feri facias*, as against the city of New Orleans, and substituted therefor the registration of the judgment with the comptroller of the city, and payment by appropriation by the common council in the order of registration. Section 1 takes from the creditors the right to resort to *mandamus* upon the fiscal officers of the city before judgment. Section 2 prohibits the issuance of executions (writs of *feri facias*) to enforce the payment of any final judgment against the city, "condemning said corporation to pay any sum of money," and provides for their registration. Section 3 provides for the payment of judgments against the city which are "final and executory."

upon which they were rendered is not now open to question. Nor is the payment of the judgments restricted to any species of property or revenues, or subject to any conditions. The indebtedness is absolute. If there were any question originally as to a limitation of the means by which the bonds were to be paid, it is cut off from consideration now by the judgments. If a limitation existed, it should have been insisted upon when the suits on the bonds were pending, and continued in the judgments. The fact that none is thus continued is conclusive on this application that none existed."

Also, *Nelson v. Police Jury St. Martin's Parish*, 111 U. S. 716, 4 Sup. Ct. Rep. 648.

But it is urged that, although this may be a judgment absolute, yet it may be sufficiently examined, for the purpose of ascertaining if it is such a liability as was entitled to registration under the act of 1870. If we yield to the arguments of counsel so urgently made, and go back of the judgment for that purpose only, we find that the cause of action was on contract for services and supplies for the year 1882; and that the original petition alleges that the funds of that year were misappropriated by the city of New Orleans. Upon these allegations the case was tried, and an absolute judgment given.

The allegations of the petition upon which the judgment was based, in the absence of any further record, are sufficient to show the nature and character of the debt, and the reason why it was not paid from the revenues of that year. There is nothing to show that any provision of the act of 1877 was violated, that any money was appropriated for the year 1882 in excess of its revenues, nor that any warrant or evidence of indebtedness was issued, except against money actually in the treasury. It certainly cannot be contended that the act of 1877 was intended to invalidate a debt which was just and legal when incurred, on account of a misappropriation of funds from which it should have been paid. The reason why the judgment was not made payable from the revenues of the year 1882 is plainly apparent from the allegations of the record that those funds had already been misappropriated. But we consider that the judgment has determined all those questions, and must be accepted as final and conclusive.

In every act in which the budgeting or estimating for the amount of revenue required for the ensuing year has been considered, it has been expressly stated, in terms, that the liabilities should be included in the estimates. That the policy of legislation and will of the legislators is against permitting an increase of indebtedness, from which so much financial trouble has come in the past, is distinctly shown. If the liabilities of one year's unpaid bills can be ignored, so can those of another, until the accumulation of a floating indebtedness comes to be regarded as a matter of no importance. In order to prevent this, it appears that the duty of municipal officers has been made plain and distinct in this respect. It has been repeatedly established, by a line of decisions, both in the supreme court of the United States and of this state, that it is the duty of the common council of the city to budget, provide for, and pay its liabilities. Where it has been found that there had been a more extended power of taxation at the time of the contract upon which the in-

debtedness was founded, it has been ordered that that be resorted to; and, where it has been considered that the revenues of the city were only sufficient for the alimony, or, in other words, the running expenses, of the city for the then present year, resort has been had to future budgets, and the writ issued accordingly. But in no case has it been declared that it is within the discretion of the city government to pay or to refuse to pay its liabilities, and permit the accumulation of the same.

We most cheerfully accept the principle that in all matters of state and municipal law, the construction of the supreme court of the state must control, but we fail to find therein such construction or principle established. In *State v. Mayor*, 30 La. Ann. 129, a case in which the question was fairly presented, demanding a positive answer, whether or not it was the duty of the city government to provide in the yearly budget out of the funds to arise from the general tax means for paying judgments against the city, and whether a writ of *mandamus* would issue for the purpose of compelling a performance of this duty, the question was answered in the affirmative. In the case of *Moore v. City of New Orleans*, 32 La. Ann. 726, it does not appear by the statement of the case and questions under consideration, as found in the opinion of the court, that such question was involved in the determination of the case; nevertheless, the writ was issued to compel the performance of what the court termed a ministerial duty in levying and applying the tax. The same may be said in the case of *Saloy v. City of New Orleans*, 33 La. Ann. 79. This question does not appear to have been involved in the determination of the case at issue. In no case has an applicant for a writ of *mandamus* to compel a performance of the duty of providing for the liabilities of the city been refused, but in numerous cases has it been granted. The legislature has declared a 10-mill tax to be sufficient to provide for the city's unbonded expenditures and liabilities, and it is not within the discretion of the council to exhaust the entire revenue with one class of disbursements, and leave the other to accumulate. In truth, it seems to be the plainly expressed intention of both legislative and judicial branches of the government to protect the city of New Orleans from the shoals and quicksands of financial embarrassment on account of any further accumulation of unfunded indebtedness.

In this case it is claimed that the entire revenues of the city have been appropriated and are necessary for alimony,—the running expenses,—necessary for nourishing, protecting, and preserving the peace and welfare of the city. This is not conceded by relator, but it is contended that several items of appropriations are for permanent improvements, which should not be paid from the four-fifths of the revenues which are set apart for the purposes of providing for the liabilities and ordinary expenses. It is not within the province of a court to interfere with the distribution of the revenues of a city when the plain duties of its officers are performed. Nor do we assume to be vested with the power to frame a budget for the city of New Orleans, but we do consider that we are vested with the power to examine such budget, when made, and to determine therefrom the compliance or non-compliance with a plain

and positive duty, when it is based upon an allegation of insufficient revenues, and an exhibit presented to substantiate such allegation.

By an act of the legislature, No. 109 of 1886, it is provided that 20 per cent. of the revenues shall be reserved for the purposes of permanent public improvements. This would necessarily imply that the other four-fifths were to be devoted entirely to the budget of liabilities and expenditures. Permanent public improvements could not, even in the absence of such legislation, be considered and deemed the necessary alimony of the city under any proper construction of that word, and this conclusion simply declares this well-established principle. Upon an examination of a copy of the budget of 1891, an exhibit filed with respondent's answer, to justify the allegation that the entire revenues are necessary for the alimony of the city, we find in item 41 an appropriation of the amount of \$20,000 for a purpose, of which the respondents in their answer say: "It is equally clear that a drainage machine is a permanent public improvement." Accepting respondent's own representation of the character of this appropriation, it would certainly appear to be improperly taken from the amount claimed to be so necessary for the alimony of the city. We say nothing of several other items of appropriations which have been objected to by relator, and only accept respondent's declaration of the character of the item mentioned. All of these are doubtless proper and just, but, when they are offered as an excuse for the non-payment of an amount incurred for the necessary alimony of the city in a past year, it seems that they should be paid from the reserve set apart for that purpose. To show that such appropriation from such portion of the revenue was not absolutely necessary, we can but refer to the exhibit of the reserve fund. This fund amounted, it appears by ordinance 4987, to \$362,060.24. Of this amount but \$165,000 was appropriated, leaving a large proportion of the reserve revenues undisposed of. We make no comment upon this further than to mention it in answer to the plea of insufficient revenues and inability to pay declared liabilities.

We fail to find in the answer of respondents and the exhibit of the budget of 1891 such evidence of the necessity for the entire revenue of the city for the purpose of its alimony as would justify the neglect of a performance of a plain and declared duty.

But one point remains, and that is that relator, if entitled to the writ, is only entitled to it to pay the entire list of judgments recorded under the act of 1877, and that his judgment be paid only in order of recordation. To this it is only necessary to say, as the supreme court of the state have said in *State v. City of New Orleans*, 37 La. Ann. 18:

"We are not called upon to consider the rights of other judgment creditors whose judgments rank that of relators in order of registry. The record does not advise us whether their judgments are based on contracts, or whether they rest upon causes of action arising prior to the constitutional amendment of 1874. It may be that none of them can compete with relators in the relief sought; but at all events, the unexhausted powers of taxation are ample to satisfy all; and if they are entitled to like rights with relators, and have neglected to exercise them, there is no reason why relators should suffer."

We find, therefore, no error in the action of the court below, and the judgment for a peremptory writ of *mandamus* must be affirmed, with costs; but so much time has been occupied by the delays of this case that the budget of 1891 may no longer be available, and it is ordered that this case be remanded to the court below, with instructions that a peremptory writ of *mandamus* issue, commanding the respondents herein to appropriate and pay from any appropriation of 1891, of which there is any surplus remaining in the treasury after all liabilities and expenditures have been paid, as contemplated in section 5 of Act No. 38 of 1879, a sum sufficient to pay said judgment and interest and costs in the court below and herein; and, if no such sum remains of any appropriation of the said budget of 1891, after all such liabilities and expenses have been paid, to proceed at their first regular meeting after service of said writ to budget and appropriate in the estimate and appropriations for the year 1892 such sum, as aforesaid; and it is so ordered.

PARDEE, Circuit Judge, did not participate in the hearing or determination of this case.

BRUCE, District Judge. I concur in the conclusion and judgment of my Brother LOCKE in this case. It is my opinion that it was the duty of the common council of the city to put the relator's judgment upon the budget for the year 1891; that it was an act ministerial in its character, and mandatory, under the provisions of the act of Ex. Sess. 1870; that it was not within the discretion of the common council to postpone the relator's judgment upon the ground that all the revenues of the city for the year 1891 are required to provide for what is called the alimony of the city, or on any other ground, and that the decisions of the supreme court of the state cannot be held, upon a fair consideration, to have settled the law in Louisiana otherwise.

FIRST NAT. BANK OF CLARION, PA., v. HAMOR.

(Circuit Court of Appeals, Ninth Circuit. January 25, 1892.)

DEFECT OF PARTIES—PLEA IN ABATEMENT.

The non-joinder of a co-debtor in a contract or judgment can only be taken advantage of where such omission does not appear on the face of the complaint, by a plea in abatement, and a defendant who fails to so plead is deemed to have waived the objection.

(Syllabus by the Court.)

Error to the Circuit Court of the United States for the District of Washington.

At Law. Action by the First National Bank of Clarion, Pa., against George D. Hamor on judgments obtained in Pennsylvania. From a judgment for defendant, plaintiff brought error. Reversed.

W. C. Sharpstein, for plaintiff in error.

Before DEADY, HAWLEY, and MORROW, District Judges.

DEADY, District Judge. The plaintiff in error brought an action at law against the defendant in error on three several judgments given on warrants of attorney in Clarion county, state of Pennsylvania, against the defendant and one E. Kuntz, for the sum, in the aggregate, of \$6,374.45, with interest from dates in 1888 at the rate of 6 per centum.

The action was brought against Hamor alone, and the complaint states that the judgments were given against him, without mention of Kuntz.

The defendant answered, denying knowledge or information of the matter alleged sufficient to form a belief, and also made a defense to the effect that he was not a resident of the state of Pennsylvania at the date of the judgments, but of Washington, and that no process was ever served on him in the actions in which said judgments were given, nor did he appear therein, and that the appearance of any attorney for him was unauthorized.

The defense was contradicted by a reply, and the case was tried by the court without a jury.

To support his case the plaintiff offered in evidence duly-certified transcripts of the several judgments sued on, from which it appeared that they were given against Kuntz, as well as the defendant.

Objection was made to their admission, on the ground of variance between them and the complaint because of the non-joinder of Kuntz. The objection was sustained, and the defendant had judgment.

Various other rulings and proceedings appear in the record which have nothing to do with the merits of the case, or are not reviewable here. For instance, there was a motion for a new trial, which was denied. Now, the granting or denying a motion for a new trial rests, in the national courts, as at common law, in the discretion of the judge.

But it is clear that the learned judge of the court below erred in refusing to admit the transcripts in evidence on the ground of variance. They were undoubtedly admissible in support of the complaint, and fully proved the plaintiff's case.

It was long since settled at common law that one of several joint debtors on a contract or judgment may be sued alone, as upon a sole indebtedness; and, unless the non-joinder of his co-debtor is taken advantage of by a plea in abatement, it is waived. *Cocks v. Brewer*, 11 Mees. & W. 51; *Carter v. Hope*, 10 Barb. 180; 1 Chit. Pl. 48.

The codes of modern procedure have given this rule the force of statute. That of Washington provides, (section 189:) "The defendant may demur to the complaint when it shall appear upon the face thereof, either * * * (4) that there is a defect of parties plaintiff or defendant."

This defect (the non-joinder of Kuntz) did not appear on the face of the complaint; and the case is provided for in section 191, which reads: "When any of the matters mentioned in section 189 do not appear upon the face of the complaint, the objection may be taken by answer."

This answer is a substitute for the common-law plea in abatement, and only differs from it in name.

Section 193 provides: "If no objection be taken by either demurrer or answer, the defendant shall be deemed to have waived the same, excepting," etc., not including defects of parties. *Lee v. Wilkes*, 27 How. Pr. 336; *Parisich v. Bean*, 48 Cal. 364.

The judgment is reversed, and the case is remanded for a new trial.

CAMPBELL v. SILVER BOW BASIN MINING CO.

(Circuit Court of Appeals, Ninth Circuit. January 25, 1892.)

ACTION TO RECOVER POSSESSION OF REAL PROPERTY.

By the law of Oregon, which is in force in Alaska, a person in possession may maintain an action to recover possession of real property from which he has been ousted by a mere intruder.

(Syllabus by the Court.)

Error to the District Court of the United States for the District of Alaska.

At Law: Action of ejectment by Archibald Campbell against the Silver Bow Basin Mining Company. From a judgment sustaining defendant's demurrer to plaintiff's complaint, plaintiff brought error. Reversed.

C. S. Johnson and John G. Heid, (W. S. Wood, of counsel,) for plaintiff in error.

Before DEADY, HAWLEY, and MORROW, District Judges.

DEADY, District Judge. This action is brought to recover the possession of a dump claim for mill tailings, situate in Harris mining district, in the district of Alaska.

It is alleged, in the amended complaint, that the claim does not contain five acres, and is of no value, either as agricultural or mineral land; that the plaintiff is the owner in fee of the mining claim known as the "Fuller First Lode," situate in Silver Bow basin, in the district aforesaid, which is very valuable for the gold it contains; that the plaintiff, for the purpose of mining said lode, has built a quartz-mill, and located and appropriated said dump claim, which is about 1,150 feet south of said quartz-mill, and worth more than \$5,000, and is essential to the proper working of said lode; that while the plaintiff was so possessed and entitled to the possession of said dump claim the defendant entered upon the same, and ousted plaintiff therefrom, and still wrongfully withholds the possession thereof from the plaintiff.

There was a demurrer to the complaint, which was sustained by the court. The case is here on error, for review of the decision on the demurrer. There is no opinion of the court below in the record, nor is there any brief or appearance of counsel for the defendant.

Upon the facts stated in the complaint, and admitted by the demurrer, the plaintiff is entitled to recover. He appears to have had, at least, possession of the claim, and the defendant ousted him without a shadow of right, and is, in fact, a naked trespasser.

The laws of the state of Oregon govern this procedure, (23 St. p. 25,) and by them any "person who has a legal estate in real property, and a present right to the possession thereof, may recover such possession, with damages for withholding the same, by an action at law." Hill's Comp. 1887, § 316.

In *Wilson v. Fine*, 14 Sawy. 38, 38 Fed. Rep. 789, it was held, in the United States circuit court for the district of Oregon, that a person in the possession of real property might maintain this action to recover the same against a mere intruder or wrong-doer.

The judgment of the court below is reversed, and the cause is remanded for further proceedings in accordance with this opinion.

In re BOYD.

(Circuit Court of Appeals, Eighth Circuit. January 25, 1892.)

1. HABEAS CORPUS—SUBSTITUTE FOR WRIT OF ERROR.

A writ of *habeas corpus* cannot be used as a mere substitute for a writ of error, but will only be issued if applied for to relieve from imprisonment under the order or sentence of some inferior federal court, when such court has acted without jurisdiction, or has exceeded its jurisdiction, and its order is for that reason void.

2. SPIRITUOUS LIQUORS—INTRODUCTION INTO INDIAN COUNTRY—INFORMATION.

An information lodged with a United States commissioner charged the accused with "introducing ten gallons of beer into the Indian country, the same being then and there spirituous liquor, in violation of section 2189, Rev. St. U. S." Held, that introducing spirituous liquor into the Indian country was an offense under section 2189; that the commissioner had jurisdiction of such offenses, and the power to determine if beer was a spirituous liquor; and that his decision on that question could not be reviewed on a writ of *habeas corpus*.

Appeal from the United States Court in the Indian Territory.

Application by Silas J. Boyd for a writ of *habeas corpus*. The writ was denied, and he appeals. Affirmed.

W. B. Johnson and C. B. Stuart, for appellant.

Before CALDWELL, Circuit Judge, and SHIRAS and THAYER, District Judges.

THAYER, District Judge. This is an appeal from an order of the United States court in the Indian Territory, denying an application for a writ of *habeas corpus*. An information appears to have been lodged with a United States commissioner¹ in the Indian Territory, which was intended to charge the appellant with the commission of an offense under section 2139, Rev. St. U. S. The commissioner issued a warrant, and, after an arrest and hearing in due form, committed the accused in default of bail for trial before the United States court in the Indian Territory. Thereupon the

Albert Rennie.

appellant applied for a writ of *habeas corpus*, which was refused, and the present appeal was taken.

The petition for the writ had annexed to it a full transcript of all the proceedings before the commissioner, and the same has been incorporated into the record. From such transcript it appears that the appellant was charged in the information lodged with the commissioner with having "introduced ten gallons of beer into the Indian country, the same being then and there spirituous liquor, in violation of section 2139 of the Revised Statutes of the United States, and against its peace and dignity." It was claimed by appellant in the lower court, and the same contention is made here, that the affidavit or information did not charge an offense against the laws of the United States, because beer is not a "spirituous liquor;" that the commissioner accordingly acted without authority, and that the order committing the appellant in default of bail was and is unlawful and void. We are of the opinion that the lower court properly refused to grant a writ of *habeas corpus*. The information, as we construe it, in effect charged the accused with "introducing spirituous liquors into the Indian country," which is an offense under section 2139, *supra*, in that it alleged that the beer introduced was "spirituous liquor." It was the duty of the commissioner to hear and determine the issue thus tendered, and to hear and determine it like any other question of law or fact that might arise in the course of the trial. It was as much within his jurisdiction to decide whether the liquor in question was "spirituous" as it was to determine whether a liquor of any kind had been introduced into the territory by the accused, if that fact had been denied and put in issue. According to our view, the information charged an offense under the laws of the United States. The commissioner had authority to commit persons charged with such offenses, and, as the record shows, he had acquired full jurisdiction of the person of the accused. Under these circumstances, the order of commitment was not void; and, such being the case, a writ of *habeas corpus* will not lie, no matter how erroneous the order may have been. The writ cannot be used as a mere substitute for a writ of error, to reverse an erroneous judgment, but will only be issued (if applied for to relieve from imprisonment under the order or sentence of some inferior federal court) when it is shown that such inferior tribunal has acted without jurisdiction, or has exceeded its jurisdiction, and that its order was and is, for that reason, void. This doctrine is fundamental, and has often been stated and applied. *Ex parte Parks*, 93 U. S. 18; *Ex parte Bigelow*, 113 U. S. 328, 5 Sup. Ct. Rep. 542; *Ex parte Yarbrough*, 110 U. S. 651, 4 Sup. Ct. Rep. 152; *Ex parte Ulrich*, 43 Fed. Rep. 663. In *Ex parte Bigelow*, *supra*, it was held that a district court has jurisdiction to determine in the first instance whether a particular act set out and described in an indictment as a crime under the laws of the United States is or is not a crime; and that the supreme court would not, under a writ of *habeas corpus*, review the decision of the lower court on that point, although no writ of error could be sued out to reverse the judgment. This decision illustrates

the scope and stringency of the rule to which we have referred. Without pursuing the subject further, it will suffice to say that the order refusing the writ was clearly right, and is hereby affirmed.

UNITED STATES v. FOWKES.¹

(District Court, E. D. Pennsylvania. January 5, 1892.)

1. CRIMINAL LAW—REMOVAL OF PRISONER TO ANOTHER DISTRICT—EVIDENCE.

Evidence which does not form the subject-matter of a defense, but merely tends to show that the indictment had been irregularly found, or that the offense charged could not have been committed by the prisoner, will be heard in his behalf in proceedings for warrant of removal, under Rev. St. § 1014.

2. SAME—DISCHARGE ON HABEAS CORPUS.

Where a prisoner has been arrested on a warrant founded on an indictment found by a federal grand jury of a district in which he did not reside and was not found, which presumably had not been instructed by the court as to the constituents of the crime charged, and when there had been no previous arrest, hearing, or binding over, the court of the district in which the arrest is made will discharge the prisoner on *habeas corpus*.

Habeas Corpus by Frank W. Fowkes, relator, and motion to court for warrant of removal, under section 1014, Rev. St., commissioner's return 93, of 1891, of a prisoner committed by a commissioner on a warrant issued under an indictment found by the federal grand jury of the eastern division of the eastern district of Missouri, for offense against the interstate commerce act, (Act Cong. Feb. 4, 1887,) as amended March 2, 1889.

The indictment charged that the Wabash, the New York, Chicago & St. Louis, the Central of New Jersey, the Philadelphia & Reading, and the Delaware, Lackawanna & Western Railroads, each being a corporation, a common carrier, and engaged in the transportation of property wholly by railroad, under an agreement operated a continuous line from East St. Louis to Philadelphia; that they had established a joint tariff of rates for continuous carriage, and filed a copy thereof with the interstate commerce commission, for locomotive brakes, of 38½ cents per cwt.; and that certain named persons, acting for the several railroads,—among them, said Frank W. Fowkes, for the Philadelphia & Reading Railroad,—willfully charged, etc., and caused to be charged, etc., a less compensation than the joint tariff rates (31½ cents per cwt.) to the American Brake Company for carrying locomotive brakes from East St. Louis to Philadelphia over their railroads. The second count of the indictment charged that said charge of less than tariff rates was willfully permitted, by means of a rebate allowed by said officials. The indictment had been found merely on presentation by district attorney, and without arrest or binding over. The prisoner was allowed to testify, and deposed that he was never in the state of Missouri; that his business was only to

¹Reported by Mark Wilks Collet, Esq., of the Philadelphia bar.

adjust claims for overcharges; that he had no authority to make rates; but acknowledged that claims for overcharges of freight would come before him, and that he would sign vouchers for rebates for overcharges, but stated he had no memory of the transaction charged. Further testimony of the prisoner and another developed that the prisoner had no authority to allow any drawback which would make the freight less than the through tariff rates, though he could sign a "voucher," which would bind his railroad for the repayment of excessive rates, which was done by signing a "line voucher," which was signed in turn by an official of each road forming the through line, and authorized the initial road to repay the shipper the excess, charging each of the other roads with its quota. Prisoner discharged.

John R. Read, U. S. Atty.

Thos. Hart, for relator.

The judge, before the warrant of removal is asked, may go behind the indictment. *U. S. v. Rogers*, 23 Fed. Rep. 658; *In re Wolf*, 27 Fed. Rep. 606. And some cases ruled there must be other evidence than this indictment. *U. S. v. Martin*, 17 Fed. Rep. 150; *In re Burkhardt*, 33 Fed. Rep. 25. Where the indictment shows an impossible offense, it will not be followed. *U. S. v. Pope*, 24 Int. Rev. R. 290. The prisoner can produce evidence on his own behalf. *In re Buell*, 3 Dill. 116; *In re Mohr*, 73 Ala. 508.

BUTLER, District Judge. The relator, having been arrested and bound over to court, charged with the commission of a crime in the state of Missouri, sued out a writ of *habeas corpus*; and the district attorney, at the same time, applied for a warrant of removal. On return of the writ an indictment—found in Missouri—charging him with violation of section 10 of the interstate commerce statute, was presented, in justification of the arrest and detention. In answer, his counsel represented that the indictment was found without previous hearing, and that no hearing (except in form) has yet been allowed him; that no evidence can be produced to support the charge; that he has never been within the state of Missouri; that he has no connection with any other railroad than that of the Philadelphia & Reading Railroad Company, and that his connection with it when the indictment was found, and previously, conferred on him no authority whatever over the freight rates, or charges for transportation, and that he had never assumed or attempted to exercise such authority; that he was simply "freight claim agent" of the company, and that his duties as such consisted in passing upon claims—and certifying his conclusions—for compensation on account of erroneous exactions, in excess of established rates, and for loss of, or damage to, property received by the company for transportation. In view of these representations the relator was permitted to introduce evidence in support of them. The testimony heard, (the truth of which is not questioned, as I understand,) fully supports the representations. The case was held over for several weeks, to allow the government to produce evidence in support of the charge. None, however, has been produced.

It is urged, on behalf of the prosecution, that the indictment itself is sufficient to require the detention and transfer of the relator, and that the court should not inquire further. This must be regarded as an appeal to the court's discretion. There can be no doubt of its authority to make such inquiry. The case is before us, not simply on the motion for a warrant of transfer, under section 1014 of the Revised Statutes, but under the writ of *habeas corpus*; and in such cases the court may treat an indictment as sufficient authority for holding the relator, or it may not, as the circumstances seem to require. Whenever there is cause to believe the detention improper, the court may, and should, inquire further. Under ordinary circumstances an indictment is treated as sufficient. Here, however, the circumstances are extraordinary. The indictment, as we have seen, was found at the instance of the prosecuting officer, without previous commitment or binding over; and the relator has, consequently, never had opportunity to know anything of the circumstances out of which the alleged crime is supposed to arise, or the nature of the evidence by which it is to be proved; and it is proposed to transfer him, under these circumstances, to a distant state for trial—while the undisputed testimony before me seems, at least, to justify belief, not only that he did not, but also that he could not, commit the offense charged in Missouri, or, indeed, elsewhere.

In view of the circumstances under which the indictment was found, I do not regard it as entitled to any greater weight than a magistrate's commitment after hearing. I doubt whether it is entitled to as much. The practice pursued in obtaining indictments where there has been no commitment or binding over (which is so well understood that I must take judicial notice of it,) is to prepare the bill on information furnished, and, without communicating with the court, present it to the grand jury—which has not been instructed respecting the crime charged, and, presumably, is ignorant in many cases of its essential constituents. The government claims a right to pursue this practice, and I am not called upon to question it. When, however, indictments so obtained are presented as authority for imprisoning men, and transferring them to distant states to stand trial among strangers, the circumstances under which they are obtained must be considered in determining their value and effect. I think the jury's finding in such cases may be regarded as little more than matter of form. It is not improper to say, in passing, that the practice is, in my judgment, attended with serious danger to the rights of individuals, inasmuch as it affords convenient opportunity for the perversion of criminal process to the advancement of private interests. The cases of *In re Mohr*, 73 Ala. 508; *Jones v. Leonard*, 50 Iowa, 106; and *Wilcox v. Nolze*, 34 Ohio St. 520,—exhibit glaring instances of such perversion. In each it appears that the relator was arrested on an indictment so procured, in a state distant from his home, charging the commission of crime there, without any evidence to justify the grand jury's finding—the object of the proceeding in each case being, manifestly, the extortion of money. It is not improper to say further, that, during my

experience several similar instances of the abuse of criminal process have come to my knowledge, and that, in one of the judicial districts of this state, the court was called upon by rule to provide that no such bill should be laid before the grand jury without its special permission, accompanied by *prima facie* evidence to support the charge, or the assurance of the prosecuting officer that he had personally investigated the case, and had such evidence to submit. The danger of abuse may be less in the federal courts; I do not know, however, that it is.

It was said, during the argument, that the practice referred to was, to some extent, departed from in procuring the indictment before me, but it was not said from personal knowledge. Without regard, however, to the circumstances under which indictments are found, the courts will go behind them whenever it appears that the relator's safety from unjust imprisonment requires it. The right to personal liberty is too important to be overborne by anything short of evidence that it has been forfeited. Mere matters of form, and considerations based on notions of comity between courts, have no proper place in trials on *habeas corpus*. In the case of *U. S. v. Rogers*, 23 Fed. Rep. 658, and *In re Buell*, 3 Dill. 116, the court went behind the indictment to ascertain whether an offense had been committed within the jurisdiction where it was found, as therein charged, and numerous similar cases might be cited. In *In re Mohr*, *supra*; *Hartman v. Aveline*, 63 Ind. 344; *Wilcox v. Nolze*, *supra*; and *Jones v. Leonard*, *supra*, the court went behind the governor's hearing and warrant of extradition, and inquired whether there was evidence to show that the crime charged had been committed where the indictment (on which the warrant issued) was found, as it averred. The court will not, of course, hear the relator's defense and try the case; it requires simply to be satisfied that there is evidence on which a jury may convict. In the case before me there is no evidence whatever produced on which a jury could proceed, notwithstanding the fact that the circumstances shown call for its production if any exist.

The suggestion that the government would be subjected to inconvenience and expense in producing evidence here, is entitled to no weight. The relator would be subjected to greater inconvenience and expense if held in custody, and transferred to Missouri to hear it. For these reasons the relator is discharged.

UNITED STATES v. BEDGOOD.¹

(District Court, S. D. Alabama. July 28, 1891.)

1. **PUBLIC LANDS—PRE-EMPTION—PERJURY IN "FINAL" PROOF.**
Under Rev. St. § 2262, the proof required of a pre-emptionist is original, and he cannot be convicted of perjury on indictment alleging perjury in making "final" proof.
2. **PERJURY—WHAT CONSTITUTES.**
Perjury consists of a false oath to a material point, administered by one having the legal authority, in a proceeding valid and regular in law.
3. **PROBATE JUDGE—AUTHORITY TO ADMINISTER OATH.**
In Alabama the probate judge is not the clerk of the probate court, and he is the principal judge and not the clerk of the court of county commissioners, (Code Ala. 1886, §§ 789, 795, 819, 827;) and so in neither capacity is he clerk of a court of record, authorized to administer the oath in pre-emption cases, within the purview of Rev. St. § 2262, as amended June 9, 1880.
4. **REVISED STATUTES—REPEAL OF EARLIER STATUTES.**
When a portion of an earlier statute is incorporated in the Revised Statutes, the remainder of the enactment not so embraced is repealed.
5. **CRIMES—REPEAL OF ACT MARCH 3, 1857.**
The act of March 3, 1857, (11 St. at Large, p. 250,) as to crimes, is repealed by the Revised Statutes. *Babcock v. U. S.*, 84 Fed. Rep. 873, distinguished.
6. **PRE-EMPTION—RULES OF SECRETARY OF INTERIOR.**
The secretary of the interior, and not the commissioner of the general land-office, is authorized to designate the rules in relation to pre-emption entries. Rev. St. § 2263.
7. **EVIDENCE—JUDICIAL NOTICE—REGULATIONS OF LAND-OFFICE.**
Regulations of the land-office, whether prescribed by secretary of the interior or by the commissioner, are not known judicially, and must be pleaded.
8. **LAND-OFFICE REGULATIONS—NOT LAW.**
Congress cannot confer law-making power on the secretary of the interior or the commissioner of the general land-office. They may prescribe rules and regulations for the better transaction of business, but cannot make a rule which shall have the force of law, and whose infraction can be punished as a crime.
9. **PERJURY—PRE-EMPTION OF PUBLIC LANDS.**
The statutes as to pre-emption entries prescribe that false oaths, knowingly and willfully made, in cases arising under the land-office rules, constitute perjury.
10. **SAME—MATERIALITY OF EVIDENCE.**
The materiality of the matter sworn to must appear in the indictment for perjury. Such matters as are not required by law are not material.

At Law. Prosecution of Frances F. Bedgood for perjury. On demurrer to the indictment. Demurrer sustained.

The indictment was in the following words:

"The grand jurors of the United States of America, chosen, selected, and sworn within and for the southern district of Alabama, in the name and by the authority of the United States of America, upon their oaths do find and present that Frances F. Bedgood, whose other name to this grand jury is unknown, late of the district aforesaid, heretofore, to-wit, on or about the thirtieth day of December, A. D. eighteen hundred and eighty-nine, and before the finding of this indictment, and within the said southern district of Alabama, in giving her testimony and making final proof of her pre-emption entry No. 1,397, for the south-east quarter of section ten, in township two north, of range nine east, in Escambia county, within said southern district of Alabama, was duly sworn by, and took his corporal oath before, N. R. LEIGH, judge and *ex officio* clerk of the probate court of said Escambia county, (he, the said N. R. LEIGH, judge and *ex officio* clerk as aforesaid, then and there

¹Reported by Peter J. Hamilton, Esq., of the Mobile bar.

having sufficient and competent power and authority to administer an oath to the said Frances F. Bedgood in that behalf,) whereupon it then and there became material in making the said final proof for her pre-emption entry ~~homestead~~ [sic] as aforesaid, whether the same was made for the interest and benefit of the said Frances F. Bedgood, and not for the interest and benefit of any other person or persons whomsoever, and also whether he had made actual settlement and cultivation thereon, and also whether the said Frances F. Bedgood had resided continuously on the said land, and whether he had made a *bona fide* improvement and settlement thereon; and the said Frances F. Bedgood, being then and there sworn as aforesaid, knowingly, falsely, and willfully did substantially depose and say, among other things, (which said oath and testimony, in that behalf made, was used and filed in the local land-office of the United States at Montgomery, Alabama, and was subsequently filed in the general land-office of the United States at Washington, D. C.,) that she made the pre-emption ~~homestead~~ [sic] entry as aforesaid for her interest and benefit, and not for the interest and benefit of any other person or persons whomsoever; and that she had made actual settlement and cultivation thereon; and that she, the said Frances F. Bedgood, has resided continuously on the said land since February, 1889, up to December 30, 1889; and that she had made a *bona fide* improvement and settlement thereon; and that said improvements were of the value of fifty-four dollars. Whereas, in truth and in fact, the said Frances F. Bedgood did not make the said pre-emption ~~homestead~~ [sic] entry for her own interest and benefit; and whereas, in truth and in fact, the said Frances F. Bedgood did make said entry for the interest and benefit of other persons, whose names to this grand jury are unknown; and whereas, in truth and in fact, the said Frances F. Bedgood did not make actual settlement and cultivation thereon; and whereas, in truth and in fact, the said Frances F. Bedgood had not resided on the said land continuously since February, 1889, up to December 30, 1889; and whereas, in truth and in fact, the said Frances F. Bedgood had not then a *bona fide* improvement and settlement on the said pre-emption ~~homestead~~ [sic] entry; and that the value of her improvements was not fifty-four dollars, as stated in her said testimony and final proof aforesaid. All which statements then and there made," etc.

M. D. Wickersham, U. S. Atty., for the United States.

M. A. Rabb and W. D. McKinsty, for defendant.

TOULMIN, District Judge. The defendant is charged in this indictment with false swearing in making final proof of her pre-emption entry. The affidavit alleged to have been made by her is set out substantially in the indictment, and it is averred that she made oath to the affidavit before N. R. LEIGH, judge and *ex officio* clerk of the probate court of Escambia county, Ala. There is no such thing as final proof required by the statute in pre-emption entries. The proof is primary or original, and the proof required, and therefore material, is as to settlement and improvement. Sections 2259-2263, Rev. St. This is to be made agreeably to rules prescribed by the secretary of the interior. Section 2262 prescribes the oath to be taken by the pre-emptionist as a prerequisite to entitle him to the benefit of the law in such cases. The defendant was the pre-emptionist if the procedure was that of a pre-emption entry. The false affidavit and oath alleged in the indictment to have been made by him in no respect conform to the statute. Section 2262. It does not contain what is required by that statute to be sworn to, but contains statements of fact

that, so far as it provides, are wholly immaterial. The statute makes the existence of certain facts, and requires certain declarations to be made, and oath thereof by the applicant or claimant, prerequisites to securing the rights of a pre-emptionist; and oath of other facts made by him in connection therewith not required by law, however false, is not perjury. The oath must be administered in a proceeding that is valid and regular. It must be authorized by law. The false testimony must be material, and the oath must be administered by one having legal authority to administer it. 2 Bish. Crim. Law, §§ 982, 984, 991; *Silver v. State*, 17 Ohio, 368; *White v. State*, 1 Smedes & M. 156; *Gibson v. State*, 44 Ala. 17; *Hood v. State*, Id. 81; *Jacobs v. State*, 61 Ala. 448, 454; *Collins v. State*, 78 Ala. 434; *U. S. v. Howard*, 37 Fed. Rep. 666; *U. S. v. Mansion*, 44 Fed. Rep. 800; *U. S. v. Nickerson*, 1 Spr. 232; *U. S. v. Curtis*, 107 U. S. 672, 2 Sup. Ct. Rep. 507; *U. S. v. Hall*, 131 U. S. 50, 9 Sup. Ct. Rep. 663; *State v. Lloyd*, 46 N. W. Rep. 898, where the supreme court of Wisconsin say that "the principle is elementary that the statute must be strictly pursued, or the affidavit is unknown to the law. What he [the defendant] has stated in the affidavit in place of what was required to be stated by the statute is as immaterial as if he had stated nothing. The perjury being assigned on what the statute does not require to be stated in the affidavit, the indictment states no crime."

The false statements alleged to have been made must have been made in a proceeding valid and regular; that is, in a proceeding or procedure authorized by law. The averments in the indictment on this subject are somewhat ambiguous. The word "final" precedes the word "proof," and the word "homestead" immediately follows the word "proof." The word "homestead" is immediately followed by the word "pre-emption," and a black mark is drawn through the word "homestead," as if to strike it out of the indictment. It is commonly known, and, therefore, judicially known, by the court, that there is "final proof" (as it is called) made in homestead entries, but not in pre-emption entries. From an inspection of the indictment, the court cannot say whether the word "final" was inadvertently inserted in the indictment, or whether the word "homestead" was inadvertently stricken out, and the word "pre-emption" inserted instead. Reasonable certainty is required as to the proceeding showing the occasion for the oath, as was said by the court in *Jacobs v. State*, *supra*. The indictment in this respect is at least uncertain. But, considering the procedure as that of a pre-emption entry, I think either of the other points raised by the demurrer is fatal to the indictment: (1) That the oath set out therein is extrajudicial, not authorized by law, and will not sustain an indictment for perjury; and (2) that the oath was not administered by one having legal authority to administer it. See authorities cited, and section 2262, Rev. St., and Supp. Rev. St. p. 542.

But it is claimed that the judge of probate is *ex officio* clerk of the probate court, and is therefore clerk of a court of record. The judge of the probate court is not clerk of that court. His duties are prescribed by the statute, (Code Ala. § 789;) and, among other duties, he is required

to record the proceedings of the court. He can employ a clerk. See Code Ala. § 795. But he is nowhere made or designated as such clerk. It is further contended that he is the clerk of the court of county commissioners. This is refuted by the express language of the statute, which says that he is the principal judge of that court, (Code Ala. § 819;) and the duty of recording its proceedings is expressly required of him as judge, (Code Ala. § 827.) He cannot make himself clerk by affixing the words "*ex officio*" to his signature as judge. Adding these words gives no greater authority to the officer or virtue to his acts. *Coleman v. State*, 63 Ala. 93.

If the act of congress of March 3, 1857, (11 St. at Large, p. 250,) is repealed, as is contended by the defendant's counsel, the judge of probate had no authority to administer the oath or take the affidavit required by law of the defendant in her pre-emption entry. If that act is still in force, he had such authority. Is said act repealed? To determine this question, we must consider the purpose and effect of the act of June 20, 1874, and the act of March 2, 1877. They are found on pages 1085, 1092, Rev. St. Section 5596, Rev. St., being a part of the act of June 20, 1874, provides that "all acts of congress passed prior to the first of December, 1873, any portion of which is embraced in any section of said revision, are hereby repealed, and the section applicable thereto shall be in force in lieu thereof." The act of March 3, 1857, is entitled "An act in addition to an act more effectually to provide for the punishment of certain crimes against the United States, and for other purposes." It is not special in its operation, nor temporary nor local in its application. It provides for the punishment of certain crimes, etc., and is a general and permanent law, as shown by its provisions. If any portion of this act is embraced in any section of the revision of the statutes under the act of June 20, 1874, then said act of March 3, 1857, is repealed. At least three sections of the act of 1857 are in express words embraced in said revision. See sections 5341-5343, Rev. St. The fifth section of the act, and which is here invoked by the United States attorney, is not in express terms embraced in the revision; but section 5392, Rev. St., is applicable thereto,—is applicable to the crime defined and made punishable by said section 5 of the act of 1857.

In *Babcock v. U. S.*, 34 Fed. Rep. 873, the court says that "section 5392, Rev. St., is general in its terms, applying to all cases in which a false oath or false testimony is taken or given before any competent tribunal, officer, or person." If, as we have seen, the greater portion of the act of 1857 is embraced in the revision of 1874, and there are sections in the revision applicable to every portion of the said act, and shall be in force in lieu thereof, then, it seems to me, the repeal of the act cannot be questioned. And when we consider the fourth section of the act of March 2, 1877, as amended by the act of March 9, 1878, on page 1092, Rev. St., all doubt on the subject must be removed. In the *Babcock Case*, *supra*, the contention of defendant's counsel was that the act of 1857 repealed section 5392, Rev. St., "being of later date as passed by congress, and being special in its provisions as to cases before the land-

office." On this proposition the court says "that section 5392, though one of long standing, was reaffirmed in the revision of 1874, and for all questions of validity and extent may be taken as of later date than the act of 1857;" and declares that section 5392, Rev. St., is general in its terms, applying to all cases in which a false oath or false testimony is taken or given before any competent tribunal, officer, or person. The court was not called on to decide whether the act of 1857 was repealed, either impliedly by the reaffirmation of section 5392 in the revision of 1874, or expressly by the act of June 20, 1874. Indeed, the attention of the court was not called to the latter act, and there was no occasion for the court to consider it. There were 16 counts in the indictment then being considered, and the court said that 8 of them were good under section 5392, Rev. St., and that any one good count was sufficient to sustain the verdict. It is true that the court also said that section 5392 and the act of 1857 may stand and be considered together, unless there is a manifest repugnancy between their provisions, or it can be said that obviously one was intended as a substitute *pro tanto* for the other, and, considered together, the other eight counts would be good under the two statutes. It will be remembered, however, that the point then before the court was on the contention of counsel that the act of 1857 repealed section 5392, Rev. St. No reference being made to the operation and effect of the acts of 1874 and 1877, they evidently were not considered by the court.

But it is contended by the United States attorney that, if said act of 1857 is repealed, the commissioner of the general land-office has authority to designate by regulations before or by what officers such an oath may be taken, and, I understand, contends that the commissioner is authorized to designate the character of the oath and the matters to be sworn to. Under the authorities already cited, we have seen that perjury cannot be assigned on any such oath. The commissioner of the general land-office, under the direction of the secretary of the interior, is authorized to enforce and carry into execution, by appropriate regulations, the provisions of the law relating to the public lands, not otherwise specially provided for. Rev. St. § 2478. But section 2263, Rev. St., specially provides for the rules to be prescribed by the secretary of the interior himself in relation to pre-emption entries.

But, whether the commissioner or the secretary has the authority or not in these cases, there is no averment in the indictment of the existence of such regulations, or what they are. The court does not judicially know what such regulations are, or of any usage under them, and cannot know them, or decide what the effect of them is, until they are shown by proof, and such proof cannot be taken or considered on a demurrer to the indictment. If such regulations have the force of law, (which, however, is not admitted,) some reference to or averment of them should have been made in the indictment. But, in my opinion, no rule or regulation can become or have the force of law. Congress cannot, if it would, confer law-making power on the commissioner or secretary. Congress having expressly declared what officers are au-

thorized to take the affidavits and administer the oaths required by law in pre-emption entries, and having expressly prescribed what statements the affidavit of the pre-emptionist shall contain, neither the commissioner nor the secretary has the legal authority to designate other officers before whom such oaths may be taken, or to prescribe oaths to the existence of other facts than those required by the statute. The law makes the existence of certain facts and oath thereof the only prerequisites to demanding a particular right, and oath of other facts in connection therewith, however false, is not perjury. See authorities cited *supra*. If the department of the interior requires anything more to be done, or the existence of any other facts to be shown, it is only for the satisfaction of the department. It may exact from those who transact business with it compliance with the rules and regulations which it is authorized to make, but it cannot prescribe a rule which can have the force of law, and the violation of which can be punished as a crime. Authorities *supra*, especially *U. S. v. Manion*, 44 Fed. Rep. 800.

But, as I have said, such rules or regulations and usage thereunder as have been invoked in the argument in this case, not having been pleaded, the court cannot take cognizance of or consider on demurrer to the indictment. If, however, the court is in error as to this, and it should take judicial knowledge of such rules and regulations, then what has been said as to the authority of the commissioner of the general land-office to make them, and as to their effect when made, is pertinent. Again, if the court is in error in the opinion that the act of March 3, 1857, is repealed, then, while under that act the judge of probate has authority to administer the oath prescribed in pre-emption entries, the act does not confer on any officer of the government of the United States authority to prescribe the particular oath or affidavit. Neither does it provide that, for the willful and false taking of any oath or affidavit prescribed by any such officer, the person so taking the same shall be guilty of perjury. What it does do, as I understand it, is to declare generally by and before what officers or persons oaths, affidavits, and affirmations may be taken or made; and then provides that any such oaths, affidavits, and affirmations taken, used, or filed in any of the land-offices, as well in cases arising under any orders, regulations, or instructions issued by the commissioner of the general land-office, or other proper officer of the government of the United States, as in cases arising under the laws of the United States, if knowingly, willfully, and falsely made, shall be perjury.

It will be observed that this act does not say that the knowing, willful, and false taking of any oath that may be prescribed or required by any orders, regulations, or instructions of the commissioner of the general land-office, or other proper officer, shall be perjury; but it says that any oath taken, used, or filed in cases arising under any orders, regulations, etc., of that officer, etc. The orders, regulations, and instructions mentioned relate to cases, and not to oaths or affidavits. That is to say, all oaths on which perjury can be assigned must be

taken or used in some proceeding or procedure that is valid and regular. To make such procedure or proceeding valid, it must be recognized by the law as such. It must be one authorized by law. Now, the statute did expressly provide what the procedure was for entering land under the pre-emption, homestead, mineral lands, and timber-culture acts, and prescribed the prerequisites for demanding and securing rights under these acts. But it did not provide for or prescribe the mode of procedure or proceeding in cases of contested entries, of conflicting entries, of transferring entries, in cases for the issue of new warrants in lieu of lost warrants, and the like. Congress recognized the fact that such cases would arise, and it conferred on the land department of the government the authority to enforce and carry into execution, by appropriate regulations, the provisions of the law relating to the public lands not otherwise specially provided for. Rev. St. § 2478. On a charge of perjury the materiality of the matter sworn to is determined by the character of the proceeding in which the oath is taken and the point of inquiry involved in it, and the question of materiality is for the court to decide, in view of the law as applicable to the particular proceeding, and it must appear by the indictment. The object and effect of the fifth section of the act of March 3, 1857, as I construe and understand it, is to declare who are authorized to administer oaths and take affidavits in the particular matters therein referred to; to declare that cases arising under the orders, regulations, or instructions of the land department of the government of the United States are valid and regular proceedings; and to provide that any willfully false oaths or affidavits made or used in such proceedings, if material to the issue involved therein, shall be perjury. The indictment under consideration sets up matters, on which the perjury is assigned, that are not required by law to be sworn to, and, so far as the court is advised, not material as prerequisites to claiming a pre-emption entry; and it avers that the oath thereto was administered by one who, in the opinion of the court, did not have the authority to administer it. The indictment, therefore, charges no crime; and the demurrer to it must be sustained.

DUDLEY E. JONES CO. v. MUNGER IMPROVED COTTON MACH. MANUF'G CO.

(Circuit Court of Appeals, Fifth Circuit. December 7, 1891.)

1. PATENTS FOR INVENTIONS—NOVELTY—COMBINATION.

Letters patent No. 308,790, issued December 2, 1884, to R. S. Munger, are for an apparatus designed to take loose cotton from the wagon or store-house into the gin-house, clean it of dust and dirt, and feed it directly to the gin. The second claim, which substantially covers the whole device, is for the "combination with a cotton-gin of a pneumatic conveyer for the cotton, a screen arranged in the conveyer, and exhaust chamber inclosing the screen, means for delivering the cotton from the conveyer to the gin, and an exhaust fan for creating an air current through the conveyer, substantially as described." *Held*, that this is only a combination of well-known elements, but, as it appears to have produced a new and useful result, the patent is valid as to the specific device, taken as a whole.

2. SAME.

Claim 4 is as follows: "In an apparatus for handling seed cotton, the combination of a pneumatic conveyer, of a telescopic drop-pipe communicating therewith by a flexible joint, a valve placed in said pipe, substantially as described." *Held*, that this drop-pipe is merely the equivalent of an extension of the pneumatic conveyer, with a flexible joint, and is not a patentable novelty.

3. SAME—EQUIVALENTS.

A cap used in defendant's machine to fit over the end of the pneumatic tube is merely the equivalent of the valves of the patent, which are located within the tube.

4. SAME—CONSTRUCTION.

The patent, being for a combination of old elements, must be limited to the specific devices used or suggested, and, although the claims sued on describe one element as "means of conveying cotton to the gin, substantially as described," the court may refer to other claims and to the specifications for a description of the specific means used or suggested for that purpose, and must limit the claim thereto.

5. SAME.

The designs filed by the patentee with his application show that the means used by him for conveying the cotton from the cotton chamber downward to the gin consists of a valve chamber with a valve shaft, upon which are mounted valves or buckets of flexible material, each closely fitting the walls of the chamber, so as to prevent the upward passage of air by reason of the suction of the fan. The means used in defendant's machine is a square box, with two stiff sides and two flexible or collapsible ones, the same being fastened at its upper end to the cotton chamber. When the fan is in operation the lower end is drawn together by the suction, making a wedge-shaped cavity into which the cotton falls; the cotton being delivered therefrom to the gin by means of a valve in the pneumatic tube between the cotton chamber and the fan, which, being periodically closed, stops the suction, and allows the stiff sides of the box to drop apart. *Held*, that this device is not the equivalent of the valve chamber, shaft, and buckets, and hence defendant's machine does not infringe the patent.

6. SAME.

The fact that the box, with collapsible sides, was used prior to the granting of the patent, for the purpose of delivering grain from a pneumatic tube, does not affect the question of infringement, it appearing that its lower end was there opened by the weight of the accumulating grain, whereas, by reason of the lightness of the cotton, it was necessary to check the air current by means of the additional device of the periodically acting valve.

Appeal from the Circuit Court for the Northern District of Texas.

Suit by the Munger Improved Cotton Machine Manufacturing Company against the Dudley E. Jones Company for infringement of a patent. Decree for complainant. Defendant appeals. Reversed.

M. L. Crawford, for appellant.

L. L. Bond and J. R. Beckwith, for appellee.

Before PARDEE, Circuit Judge, and LOCKE and BRUCE, District Judges.

LOCKE, District Judge. This is a bill in equity filed in the circuit court for the northern district of Texas charging infringement of certain

letters patent No. 308,790, granted to R. S. Munger, December 2, 1884, held by complainant as assignee, and praying an injunction and accounting. This patent was for apparatus for handling seed cotton, consisting of a combination of elements by which cotton is taken from the wagon or store-house to and into the gin-house, thoroughly cleaned of dust, dirt, and other foreign substances, and fed directly to the gin. The defendant, by its answer, denies the novelty of said apparatus, or that said Munger was the original inventor, or that it has ever made or sold any apparatus or machine covered by said letters patent; but admits that it has been making and selling machines manufactured under letters patent No. 362,041, granted B. A. Saylor, April 26, 1887; but denies that such machines are an infringement of the patent of the complainant.

The 1st, 2d, 4th, and 9th claims of complainant's application upon which the infringement is alleged are as follows:

"(1) The combination with a cotton-gin of a pneumatic conveyer for the cotton, means for delivering the cotton from the conveyer to the gin, and an exhaust fan for creating an air current through the conveyer, substantially as described. (2) The combination with a cotton-gin of a pneumatic conveyer for the cotton, a screen arranged in the conveyer, and exhaust chamber inclosing the screen, means for delivering the cotton from the conveyer to the gin, and an exhaust fan for creating an air current through the conveyer, substantially as described." "(4) In an apparatus for handling seed cotton, the combination with a pneumatic conveyer of a telescopic drop-pipe communicating therewith by a flexible joint, a valve placed in said pipe, and a second valve placed in the conveyer beyond said drop-pipe, substantially as described." "(9) In an apparatus for handling seed cotton, the combination of the ginning-house, the pneumatic conveyer entering the same, an exhaust chamber communicating with the conveyer, and a chimney communicating with the exhaust chamber, for removing the dust and leaf trash from the cotton, and carrying it out of the ginning-room, substantially as described."

A careful examination of these claims shows that the 1st, 4th, and 9th describe and claim only a portion of the several elements which go to make up the entire machine, and which, with the exception of some enlargement of description found in the 4th, are all included in the 2d, which then only needs demand our attention; for, if the entire combination contains no element of patentability, no division of it can.

The first question presenting itself for consideration is whether this patent is for a combination of well-known elements which had been in common use, and therefore not patentable, unless shown to be a useful and novel combination, or whether there is entering into it any novel and newly-invented device. Taking each element separately, and examining the prior patents, we find that the pneumatic tubes have been known and used for years in various forms and for various purposes, and numerous patents have been granted for machines in which they have been found as an important element. In patent of Johnson, No. 56,948, and Von Schmidt, No. 185,600, the pneumatic tube was used for dredging purposes; in that of Beach, No. 96,187, for conveying letters, parcels, and other freight; in that of Penman, 124,851, for conveying wool; in that of Pearce, 168,282, for conveying cotton; in those of Taggart, 213,709, and Reynard and De la Haye, 219,019, and several others, for con-

veying grain. The telescopic drop-pipe claimed in the claim No. 4 can only be considered as an equivalent for an extension of said pneumatic conveyer in another form, and would not be patentable for novelty; the flexible joint being but an equivalent for any other means by which the pipe or conveyer could be turned in any direction, and is found in the flexible hose in the invention of Taggart, or the ball and socket joint of the telescopic pipe of the Von Schmidt patent. Similar valves to those found in the pneumatic tube are found in the pneumatic tubes in the patent of L. Smith, 305,976; the exhaust chamber and wire screens of the claimant's patent are found in the air-tight box and wire gauze of the Beach patent. The means for conveying the cotton from the exhaust chamber to the gin, which is found in the specifications and in actual use in complainant's machine,—i. e., the shaft upon which are affixed certain valves working in an air-tight box,—is found in the receiving boxes of said Beach's patent. The exhaust fan for the purpose of producing the air current is found in the Penman, the Craven, the Pearce, the Taggart, and the Williams patents. The dust chimney is found in the conductor of the Craven machine. It appears, therefore, that every element found in the complainant's machine is found in a prior patent, and was well known to the art. His patent, therefore, must be treated as for a combination of well-known elements and devices.

The testimony has been very full as to the effect which the patenting and introduction of complainant's apparatus has had upon the handling of cotton between the field and the gin; of the saving in labor; in risks from fire; in the improved condition of the cotton; the health of those compelled to work in the gin-house and around the gin; and the exemption from damage to the seed to which it was exposed when the seed cotton was driven through the fan for the purpose of cleaning; and there can be no question but what the revolution and improvement in this province of industry, all of which may be directly traceable to this combination, has been great. We find, therefore, the patent of the complainant to be for a combination of well-known devices, but producing a new and useful result, and entitled to letters patent under the second claim. *Loom Co. v. Higgins*, 105 U. S. 591; *Gill v. Wells*, 22 Wall. 1; *Collar Co. v. Van Deusen*, 23 Wall. 538; *Fuller v. Yentzer*, 94 U. S. 297.

But while the law recognizes the patentability of such combination of known devices, it patents the entire combination of the elements, and not any single element of it, nor any combination containing any different or other elements. The patent of the complainant must be considered to be for the entire apparatus, and, in order to claim damage for infringement, it is necessary to show that each and every element of complainant's machine, or its equivalent, entered into respondent's machine.

In *Fuller v. Yentzer*, the court say:

"Valid letters patent undoubtedly may be granted for an invention which consists entirely in a new combination of old elements or ingredients, provided it appear that the new combination produces a new and useful result. But the rule is equally well settled that the invention in such a case consists

merely in a new combination, and that a suit for infringement cannot be maintained against the party who constructs or uses a different combination."

Commencing with the pneumatic conveyer, and examining each element of the two machines, the first difference found is the alleged absence from the machine of defendant of the two valves situated in the pneumatic conveyer of the complainant. His apparatus has a valve in each of the branches or divisions of the pneumatic tubes,—i. e., the so-called conveyer leading to the store-house or elsewhere,—and a telescopic drop-pipe fitted to reach the wagon; while the defendant's, instead of having valves so arranged, uses a cap or removable valve or cover at the end of each division of the pipe whenever it is desired to close it. The valve is a gate, a door, or anything used to open or close at will a passage-way; and, unless the location tends to affect the action in some other way, it is immaterial whether it is inserted in the body of the pipe or put upon the end. In this case there can be no different effect, and the cap or stop put over or against the end of the pneumatic tube or the drop-pipe, when it is desired to have it closed, must be considered equivalent to the valve inserted in it in complainant's machine.

The so-called "deflector" inserted in the so-called "Y" in defendant's machine can answer no further purpose than to act as a portion of the wall or partition of either tube which may be in use for the time being, and cannot be considered as being of any other use or service in the function of the machine. With a suction or current of inrushing air sufficient to bring in from the wagon or store-house unconfined cotton, certainly a small space opening through the wall of one tube into the other can have no effect either beneficial or injurious. The dust escape in both machines is through the fan-box and fan into the open air. In complainant's it is shown to be upward through the roof, and in defendant's through the side of the gin-house; but such direction is of no materiality or importance, and the devices must be considered equivalent.

But when we approach the means by which the cotton is passed from the exhaust chamber of the complainant's combination—which is equivalent to the cotton-box of the defendant—to the gin, a greater difference appears, and the most difficult question of the case is reached. In the first claim, complainant claims for this element of his combination "means for delivering the cotton from the conveyer to the gin." In the second, the language is the same; but in the third (which has not been urged in this suit) is claimed "the rotating shaft, the buckets, and means for delivering the cotton from the conveyer to the gin, substantially as described." It is true that the claim No. 3 has been stricken out of the complainant's bill, and there is no suit for infringement under it; but, in each of the claims sued upon, there is a provision "for means of conveying cotton to the gin, substantially as described," and reference may be had to the other claims of the same patent and the specifications for ascertaining what those means might be. In *Evans v. Kelly*, 9 Biss. 251, 13 Fed. Rep. 903, the court say:

"Where the patent claims the whole as described, we cannot sever one part of the description from another, but we must take it in its totality, and apply

the description to the claim." *Turrill v. Railroad Co.*, 1 Wall. 491; *Tompkins v. Gage*, 5 Blatchf. 268.

It is true that the claims must be construed according to the language of each, but specifications and designs may be referred to to limit or explain, if not to enlarge. Can we consider that the patent of complainant may be held to cover any and every means that might possibly be used to convey the cotton from the exhaust chamber to the gin, or must it be limited to the actual means claimed, described, or suggested in the specifications? This is, as has been herein decided, a patent for a combination, and each and every element of such combination must be used as patented, or the entire result is changed, and the machine sought to be held as infringing is a different one. In *Vance v. Campbell*, 1 Black, 427, the court say:

"Unless the combination is maintained, the whole of the invention fails. The combination is an entirety. If one of the elements is given up, the thing claimed disappears."

In determining what the combination is, for which letters patent have been granted, the entire designs, specifications, and claims may be considered. It is this special combination which has been held to be patentable on account of its producing a new and useful result; and, should it be held that this patent could cover every means that could be used for this function, there might be a new and other combination which would be valuable and useful, yet would be covered by these letters patent.

The design filed upon application for a patent by complainant shows that the means used by him for the purpose stated is a valve chamber, with a peculiar form of valve shaft upon which are mounted valves or buckets, preferably of leather or other flexible material, so constructed and arranged that each fits the inner wall of said chamber closely. It is also provided in one clause of the specification that it may be possible to employ a screw conveyer or other suitable means which will not only carry the cotton downward, but will cut off the upward air current. This language shows conclusively complainant's ideas of what means he suggested using in his combination, and upon which the patent was obtained, *i. e.*, some device or contrivance which would carry the cotton downward to the gin, and at the same time prevent an upward circuit of air; or, in other words, some kind of a valve that, while permitting the cotton to pass down, would be air-tight to an upward current. In the model presented in the evidence, the same device that was declared in the design, specification, and claim was shown, and we consider that he must be held to such a device or means, and not be permitted to extend his claim to anything of a different character or description, although he has omitted from his bill the claim particularly describing this special element. Has the defendant adopted, used, and sold a machine containing such device or any equivalent to it in the means used for conveying the cotton from the chamber to the gin? What in patent law is an equivalent, or what may be so considered, is a question upon which no positive rule nor any harmonious line of decisions can be in-

voked. It is an important and delicate question in any case in which it may arise. The general principle is that, in order to be considered an equivalent of another, one device must perform the same functions, and perform them substantially in the same way; but this principle in many cases leaves the question open for a determination according to the facts and circumstances of each particular case, and an examination of the numerous instances in which devices or appliances have been held to be or not to be equivalents of others affords but little aid in determining a new question.

In place of the rotary shaft and valve affixed thereto working in an air-tight chamber, as heretofore described, defendant uses a square box, or "valve," as it is termed, with two stiff or solid sides, and two collapsible or elastic ones, the upper end of which is made fast by hinges or flexible material to the enlarged chamber or cotton-box. The lower ends of the two solid sides, whenever the machine is in operation, are drawn together by the pressure of the atmosphere, making a tight wedge-shaped cavity into which the cotton falls. This form of the box is only maintained by the upward draught or current of air to the fan above; and, whenever such current ceases, the stiff sides fall apart by their own weight, and the cotton is delivered to the gin. This so-called "flexible valve" is the same as is found in the Taggart patent, but in that case, the apparatus being used for grain, its weight alone was sufficient to open the valve whenever any desired amount had accumulated, and permit it to pass into the receptacle below. But in defendant's, the weight of the cotton being insufficient for such purpose, it was necessary to provide some other and further device. The current of air or force of suction being what brought the two stiff sides together and held them in that position, the suspension of this force would permit them to fall apart. The suspending of this current of air in said machine was successfully accomplished by inserting a valve in the pneumatic tube between the enlarged screen chamber and the fan, the closing of which shut off the current, suspended the force, holding the sides of the cotton-box together, and permitted the cotton to fall through to the gin. This valve was so arranged that it was worked automatically by the same force that drove the fan, opening and closing as often as desired by a chain belt, with catch links inserted at such distances as was required.

Were or not these appliances or devices equivalent as means of feeding the clean cotton to the gin? It has been frequently determined that one point which may be considered in determining equivalents is the age of the two devices, or whether the alleged infringement was known and in force at the time of the granting of the complainant's patent; the presumption being in such case that it was used as an equivalent, only to avoid the charge of infringement, and not as an improvement. *Refinery v. Matthiessen*, 2 Fish, Pat. Cas. 629; *O'Reilly v. Morse*, 15 How. 123.

It is true that the flexible valve was a well-known and patented device at the granting of complainant's patent, but the manner in which

it worked was entirely different, on account of the weight of the material handled, and, in order to make it a success in this case, it was necessary to provide a supplementary appliance,—the automatic arrangement which opened and closed this flexible valve by means of a second valve in the chamber,—which became a part of the mechanical device, and does not appear to have been known at the time of complainant's patent. Therefore we consider that, as a whole, the means for feeding the cotton to the gin was not known or in use at the time of complainant's patent. But this is not a final nor conclusive test, (*Blake v. Robertson*, 94 U. S. 732;) and the question is still open, if, notwithstanding the lack of age of defendant's device, it may be considered to be an equivalent. Not only must the device charged to be an infringement perform the same functions, but it must perform them in the same manner, with substantially the same result. In complainant's machine, the controlling idea is to maintain a constant and continuous current of air from the cotton in the wagon or store-house to the final exit of the dust from the chimney, with the means for permitting the cotton to be passed out to the gin without admitting any air. For this means the rotary or box valve was provided, and a screw or any other means that would pass out the cotton and not admit air suggested. The checking of the current would, for the time being, directly combat and conflict with this idea. It would permit the cotton, in the portion of the pneumatic tube having a perpendicular position, to fall back to the cotton pile, and the dust in the flue or screening chamber to fall back into the cotton. It is claimed by the defendant that the checking of the air current assisted in the clearing of the screen from the accumulated cotton, but if it did so, whether it was an improvement or not, when taken in connection with the several undesirable results, is not for the court, but for those who use the different machines, to determine.

But it appears to us plain that the functions of that element, the feeding of the cotton to the gin, after being cleaned, is not performed in the same manner in the defendant's machine as in complainant's. The one operates by maintaining the current; the other by interrupting it. The one requires and maintains a comparative vacuum; the other requires for its operation the destruction of the vacuum. The one feeds regularly and continuously; the other by entirely different means feeds intermittently. In short, in construction, operation, and result, there is a decided difference between "the means for delivering the cotton from the conveyer to the gin," as claimed in complainant's second claim, and the apparatus used by the defendant in discharging cotton from "the receiver." In combinations, the doctrine of equivalents is construed most strongly against him who alleges an infringement, and each party is held to his own element or device, or a positive and exact equivalent which performs the same functions, in the same manner; the burden being upon the complainant to show this. In this case we cannot consider that the flexible expanding valve of the defendant, opened and closed by the automatic arrangement of the second valve with the chain belt and catch links, is an equivalent of the rotary valve of the com-

plainant, and we must find the charge of infringement has not been sustained; and the bill must be dismissed, with costs. And it is ordered that this cause be remanded to the court below with orders to dismiss said bill, with costs.

REGAN VAPOR-ENGINE CO. v. PACIFIC GAS-ENGINE CO. et al.

(Circuit Court of Appeals, Ninth Circuit. January 30, 1892.)

1. INVENTION TO BE MADE—CONTRACT CONCERNING.

A contract by which A. does "license, grant, and convey" any invention he may thereafter make in gas-engines to B. does not operate as an assignment of such invention when made, and, at most, gives to A. the right in equity to have an assignment of such invention to him, which may be defeated by a prior assignment of the same, to a purchaser without notice of such contract, in good faith, and for a valuable consideration.

2. SAME—ASSIGNMENT OF SUCH CONTRACT.

An indorsement of such contract by B. in these words: "I hereby sell, assign, and transfer unto M. M. Barrett all my right, title, and interest in and to the above agreement,"—only passes the paper on which it is written, with such rights of action thereon as have not become vested in the indorser.

3. RECORD OF THE ASSIGNMENT OF A PATENT.

The record of the assignment of two patents contained the words, "contracts concerning the same." *Held* to mean "concerning the rights and privileges granted by said patents, and thereby assigned;" and also that constructive notice could not be predicated of such record, as to the *status* or ownership of another patent. 47 Fed. Rep. 511, reversed.

(Syllabus by the Court.)

Appeal from Circuit Court of the United States for the Northern District of California.

J. H. Miller, for appellant.

John L. Boone, for appellees.

Before DEADY, HANDFORD, and MORROW, District Judges.

DEADY, District Judge. On May 12, 1890, the appellant brought suit against the appellees, in the circuit court of the United States for the northern district of California, for an alleged infringement of reissued letters patent numbered 11,068, for a gas-engine, issued to the appellant, as the assignee of Daniel Regan, the inventor, on April 1, 1890.

The appellees pleaded in abatement that the Pacific Gas-Engine Company, one of the appellees, was the owner of all rights under said patent for the Pacific coast. To this plea a replication was filed. The case was then referred to the master, who reported against the plea. Exceptions were taken to the report, which were sustained, and the bill was dismissed. The plaintiff appeals to this court.

On May 15, 1886, Regan and Garratt entered into an agreement wherein they stated that we "do hereby license, and grant and convey, each to the other," throughout certain states and territories,—the license to Garratt being for the Pacific coast,—"all such inventions and improvements, whether patented or not, which may be hereafter made by either of us," in gas-engines and the mechanism by which they are operated.

This agreement was never recorded in the patent-office, nor was it even recordable. It forms the basis of the appellees' claim to be the owner of patent numbered 408,356, issued to Regan on August 6, 1889, and upon which this suit is brought. On September 10, 1889, Regan assigned to Sanford S. Bennett, in consideration of \$3,000, the undivided one-half of said patent for the whole United States, which assignment was duly recorded on September 17, 1889. On October 22, 1889, Regan and Bennett, for a valuable consideration, assigned to the appellant the entire patent for the United States. On December 21, 1889, M. M. Barrett, one of the defendants, took an assignment from Garratt of all his right, title, and interest in the Regan-Garratt agreement of May 15, 1886. At this time Barrett had full knowledge of appellant's claim to patent 408,356. On May 6, 1890, Barrett assigned the interest acquired from Garratt to the Pacific Gas-Engine Company.

On March 3, 1890, the appellant surrendered its patent, under section 4916 of the Revised Statutes, and had a reissue on April 1, 1890. It is numbered 11,068, and grants to the Regan Vapor-Engine Company, its successors or assigns, the exclusive right to make, use, and vend the said invention for the term of 17 years.

The lower court decided that the Regan-Garratt agreement of May 15, 1886, operated as an assignment of an invention which Regan, three years afterwards, on August 6, 1889, made and secured a patent for, as well as the patent issued on April 1, 1890, the same being a reissue thereof, and which was issued to and in the name of the appellant. Accordingly a decree was entered which, in effect, decides that the appellant has no title to the patent in suit for the Pacific coast, and that the Pacific Gas-Engine Company has.

The agreement of May 15, 1886, is not the assignment of a patent, though it contains language—"grant and convey"—sufficient for that purpose, if there was anything to assign. It may be good as an agreement to sell and assign a future invention, but it cannot operate as a sale or assignment of such an invention, even when made. No one can sell that which he hath not. Comyn's Dig. tit. "Grant," D. A man cannot grant all the wool that shall grow upon his sheep that he shall buy afterwards, for there he hath it not actually or potentially. Bac. Abr. tit. "Grant," D.

Chancellor Kent says, (2 Comm. 468:)

"The thing sold must have an actual or potential existence, and be specific or identified, and capable of delivery; otherwise it is not strictly a contract of sale, but a special or executory agreement. * * * But, if the article intended to be sold has no existence, there can be no contract of sale."

Benjamin, in his work on Sales, (section 78,) says:

"In relation to things not yet in existence, or not yet belonging to the vendor, the law considers them as divided into two classes, one of which may be sold, while the other can only be the subject of an agreement to sell,—of an executory contract. Things, not yet existing, which may be sold, are those which may be said to have a potential existence; that is, things which are the natural product or expected increase of something already belonging to the vendor. A man may sell the crop of hay to be grown on his field, the wool

to be clipped from his sheep at a future time, the milk that cows will yield in the coming month, and the sale is valid. But he can only make a valid agreement to sell, not an actual sale, where the subject of the contract is something to be afterwards acquired, as the wool of any sheep, or the milk of any cows, that he may buy within the year, or any goods to which he may obtain title within the next six months."

A man may make a valid agreement to sell an invention not yet made by him, but he cannot make a valid sale thereof.

Curtis on Patents (section 160) says:

"The statutes, however, which authorize the assignment of an invention before the patent has been obtained, appear to embrace only the cases of perfected or completed inventions. There can, properly speaking, be no assignment of an inchoate or incomplete invention, although a contract to convey a future invention may be valid, and may be enforced by a bill for specific performance. But the legal title of an invention can pass to another only by a conveyance which operates upon the thing invented after it has become capable of being made the subject of an application for a patent."

Mr. Robinson, in his work on Patents, (volume 2, § 771,) says:

"A contract for the transfer of inventions not yet in being is valid as a contract, but is not an assignment. The subject-matter of an assignment is an existing invention, not only conceived as an idea of means, but actually reduced to practice, and thus invested with the inchoate or perfected right to that monopoly which must always pass with the invention in this form of conveyance. An intended or incomplete invention rests merely in purpose and expectation. It does not clothe the proposed inventor with any special privileges, or entitle him to any special rights in the monopoly which, if his purposes were accomplished, he might be able to secure. The transfer of such future inventions is a mere executory contract, to assign them if they happen to be made."

To this general rule there appears to be one exception, and that is where a patentee assigns a patent already issued, together with all future improvements thereon. It has been held that such assignments pass the title to the future improvements.

But that is not this case. Here there is no assignment of a patent, with any improvements thereon. The document which constitutes the basis of appellees' claim is, at most, an attempted assignment of any independent inventions to be thereafter made, by either of the contracting parties, in gas-engines.

The case of *Littlefield v. Perry*, 21 Wall. 226, is cited in support of this doctrine. This case is very different from the one in hand. There the patentee had assigned a subsisting patent, with all future improvements thereon. Subsequently he made and patented an improvement on the same, and used it without the consent of his assignee. The assignee sued for infringement, and the court held the assignor was estopped by his deed. The case arose between the assignee and the patentee, and not two persons claiming to be the assignees of the same thing. Between the two cases there is no analogy.

The evidence is satisfactory that the plaintiff took the assignment of this patent for a valuable consideration, in good faith and without notice of the Regan-Garratt contract, and it is so admitted in the examination before the master by counsel for the appellees.

Whatever effect the Regan-Garratt contract may have in equity, as against Regan, or those claiming under him with notice thereof, upon these facts it appears the legal title to the invention is in the appellant, and the defendant's plea that it is the owner or assignee of the patent for any part of the United States must be found not true.

A point is sought to be made for the appellees, on the language of the assignment by Regan and Bennett to the appellant under the decision in *Turnbull v. Plow Co.*, 6 Biss. 225, on rehearing, 9 Biss. 334, 14 Fed. Rep. 108. In that case the patentee assigned for the counties of Warren and Henderson, in the state of Illinois. Subsequently to this assignment the patentee assigned "all his right, title, and interest in the patent in the state of Illinois." The first assignment was not recorded in time to prevent the second assignment from prevailing against it. The second assignment being merely a quitclaim, the court held, in a suit by the first assignee for infringement, that, under the circumstances, it only conveyed such interest as the patentee then actually had left in him, which was the state of Illinois, less the two counties disposed of by the first assignment.

This case was decided on the language of the assignment, and not upon the record of the same, or the want thereof. Judge DRUMMOND held, in analogy to conveyances of real property, that the subsequent assignment of the patentee's "right, title, and interest" could not be construed to pass an interest which had already been assigned to another, and which, in fact, he did not then have.

He says :

"Where a man assigns all the right which was conveyed to him by letters patent, the meaning is that the assignment take with it everything that the letters patent conveyed. It is certainly different from an assignment which declares merely that he assigns all the interest which he, at the time he makes the assignment, has in the letters patent, provided, as in this, he had previously assigned a part of the interest which he had to another person." 14 Fed. Rep. 110.

But the facts of that case are very different from the one under consideration. The assignments under which the appellant claims are not mere quitclaims. The one from Regan to Bennett is of "one undivided half of all the right, title, and interest granted to him (Regan) in and to said invention by said letters patent;" and in the one from Regan and Bennett to the appellant the assignors do "bargain, sell, convey, and assign * * * the said patents, and each of them, * * * and all their right, title, and interest * * * in and to said patent."

These assignments are of the inventions, and the patents to which they relate, as fully as when granted to the patentee. The fact that the second one also contains the words, "and all their right, title, and interest," does not change the character of the instrument. The first and greater words, "bargain, sell, convey, and assign," give scope and effect to the writing, and express the full intention of the persons who executed it. The latter ones may and should be regarded as surplusage.

But admitting that the Regan-Garratt contract operated, as claimed by appellees, as an assignment of the patent in suit, as soon as it came into

existence, the plea of the appellees that they are the owners of the patent must be found not true, because they do not so far connect themselves with that instrument.

The supposed assignment from Garratt to Barrett is indorsed on the Regan-Garratt contract. It reads as follows:

"SAN FRANCISCO, CAL., Dec. 21, 1889.

"For and in consideration of five dollars, to me in hand paid, the receipt of which is hereby acknowledged, I hereby sell, assign, and transfer unto M. M. Barrett all my right, title, and interest in and to the above agreement."

At the date of this indorsement the original patent, of which the one in suit is a reissue, had been issued. Whatever right Garratt had therein, so far as this case is concerned, had already accrued. These rights did not pass to Barrett by this indorsement, but only his right, title, and interest in the contract,—the paper as it then stood, with such rights of action thereon as had not become vested in Garratt.

If Garratt had similarly indorsed a promissory note to Barrett, on which a payment had been made, an indorsement in like manner would only confer the right to collect the unpaid remainder.

On May 14, 1886, Regan, Eichler, and Rauer assigned to Garratt two patents for improvements in gas-engines, being patents numbered 333,336 and 320,285, and dated, respectively, December 29, 1885, and June 16, 1885, "with each and every one of the inventions and improvements therein described, and all rights, liberties, and privileges that were granted and secured to us, and each of us, by the said letters patent, and the assignment thereof, and contracts concerning the same." This assignment was recorded in the patent-office, March 10, 1888.

It is claimed that the record of the words in this assignment, "and contracts concerning the same," gave notice to the appellant of the contents of the contract of May 15, 1886, which was not recorded, and that such words referred to and included such contract. If we may use the expression, this conclusion appears to us very "far fetched;" in fact, it is purely imaginary. "Contracts concerning the same" plainly refers to the antecedent part of the sentence, which speaks of inventions and improvements described in said letters patent, and "the assignments thereof." The improvements and privileges mentioned, and which the supposed contracts "concern," are plainly of the two patents assigned. Not a word therein can be tortured into referring to the contract of May 15, 1886, which relates wholly to the independent inventions and improvements in gas-engines contemplated and described in that writing.

Nor is it apparent how any words in the record of the assignment of May 14, 1886, could be notice to any one of the *status* or ownership of the patent sued on. Actual notice of the existence of the writing, if it was material, might be shown, but how constructive notice can be predicated of such a record against the assignee of this patent defies comprehension.

The decree of the circuit court is reversed, and the case is remanded, with directions to affirm the master's report.

BRUSH ELECTRIC CO. *et al.* v. ELECTRIC IMP. CO. OF SAN JOSE.

(Circuit Court, N. D. California. January 18, 1892.)

PATENTS FOR INVENTIONS—LICENSE—RIGHTS OF LICENSEE.

A grant by the owner of a patent of an exclusive license to sell the patented article carries with it an implied authority to sue in the owner's name, even against his will, for the *bona fide* purpose of preventing infringement. *Brush-Swan Electric Light Co. v. Thomson-Houston Electric Co.*, 48 Fed. Rep. 224, followed.

In Equity. Suit by Brush Electric Company, the California Electric Light Company, and the San Jose Light & Power Company, and others, against the Electric Improvement Company of San Jose, for infringement of a patent. Heard on motion of the Brush Company to strike out its name as party plaintiff. Motion denied.

Estee, Wilson & McCutchen and *Langhorne & Miller*, for California Electric Light Company.

Lloyd & Wood, *Henry P. Bowie*, and *E. P. Cole*, for Brush Electric Company

Louis T. Haggin, for defendant.

HAWLEY, District Judge, (*orally*.) This case was presented to me on a motion of the Brush Electric Company to strike out its name as a party plaintiff, because the bill had been filed without its authority or consent. A large number of affidavits were submitted on the motion, and a very extensive argument was presented by both sides. It appears that the Brush Electric Company, the owner of certain patented improvements in electric arc lamps, has had considerable litigation in order to maintain its patent-rights in various states of the Union, and in a number of the states its patent has been sustained. After these proceedings in the courts, rival companies—the Thomson-Houston Electric Company—bought up a majority of the stock of the Brush Electric Company, and immediately stopped, or endeavored to stop, the litigation that was being conducted in different courts by parties who held the exclusive agency from the Brush Electric Company to sell its patented rights.

I shall not attempt to make a statement of all the facts in this case. They are very novel, and somewhat complicated in many respects. I have carefully read over all of the affidavits, and have examined all the authorities that were cited by the respective counsel. It has been a serious question with me whether or not, under the affidavits that are presented, they do not show full authority and consent on the part of the Brush Electric Company to the California Electric Light Company, who holds an exclusive agency for the sale of the patented improvements of the Brush Electric Company, to bring this suit. It had given consent to bring several suits, and from the correspondence, as I have said, it is a very close question whether they have not given authority to bring any suits. It is unnecessary, however, to decide that matter. It is sufficient to say that I have arrived at the conclusion that, whether the California Electric Light Company had express author-

ity to bring the suit or not, it certainly has, under the law, the implied authority and power to bring the suit in order to maintain and defend its rights. Since this motion was submitted, the same question has been decided in the circuit court of the district of Connecticut by Judge SHIPMAN, in a case almost identically the same as this, viz., *Brush-Swan Electric Light Co. v. Thomson-Houston Electric Co.*, 48 Fed. Rep. 224, wherein the Thomson-Houston Electric Company had bought up the control in the other corporation, and sought to prevent litigation of the same character instituted here by the California Electric Light Company against the Electric Improvement Company of San Jose. In a discussion of the legal questions involved, he says:

"If the interest of the owner, who has merely given his agent a license to sell within a specified territory, and who is still the owner of the substantial and important portion of the patent, can be, against his will, and without the service of process, subjected to litigation and judicial decree, there is danger that the power of the licensee will be wantonly exercised. On the other hand, it is reasonably certain that a licensee can, in an action at law, use the name of the owner of the patent, (*Wilson v. Chickering*, 14 Fed. Rep. 917; *Goodyear v. McBurney*, 3 Blatchf. 32; *Same v. Bishop*, 4 Blatchf. 438;) and it has also been declared with positiveness that a licensee of a patent cannot bring a suit in his own name, at law or in equity, for its infringement by a stranger, (*Birdsell v. Shattol*, 112 U. S. 486, 5 Sup. Ct. Rep. 244.) In this case the Cleveland Company is really a co-defendant, in view of the Thomson-Houston Company's controlling ownership of the stock; but, being a resident of Ohio, it cannot be served with process as a co-defendant in this suit. Though it cannot be compelled to come into court as a defendant, 'a court of equity looks at substance, rather than form. When it has jurisdiction of the parties, it grants the appropriate relief, where they come as plaintiffs or defendants,' (*Littlefield v. Perry*, 21 Wall. 205,) and places them according to the real positions which they respectively occupy in the controversy. The necessity of making the owner of the patent a party in an action for infringement is authoritatively declared in *Waterman v. Makenzie*, 138 U. S. 252, 11 Sup. Ct. Rep. 334, as follows: 'In equity, as in law, when the transfer amounts to a license only, the title remains in the owner of the patent, and suit must be brought in his name, and never in the name of the licensee alone, unless that is necessary to prevent an absolute failure of justice, as when the patentee is the infringer, and cannot sue himself.' In this case, it is true that the Cleveland Company is called upon to attack the acts of its controlling owner, and, in a certain sense, to sue for its own infringement; yet the two corporations are separate, legal entities. One can sue the other, and it is not necessary for the licensee to sue alone, in order to prevent an absolute failure of justice. When the owner is not the infringer, and therefore cannot be made a defendant, if the licensee is to have an opportunity to assert his alleged rights, he is at a great disadvantage, unless he has the power of bringing a suit in equity in the name of the owner, though against his will. In my opinion, he has, *prima facie*, such an implied power. Whether a court of equity would permit a wanton or unjust or inequitable use of the name of the owner of the patent by the licensee of the bare right to sell within a limited territory is a question which does not affirmatively arise, and upon which I express no opinion."

There is no pretense in this case that the California Electric Light Company is making a wanton, unjust, or inequitable use of the name of the Brush Electric Company. On the other hand, it clearly and affirma-

tively appears that it is absolutely necessary that it should have the power to bring this suit, in order to defend its rights, and protect its own interest, under the contracts made with it by the Brush Electric Company. Any other rule would, it seems to me, amount to a complete and absolute denial of justice, and no court would be justified, upon the facts in this case, in granting the motion. I think the opinion, from which I have read, is logical, sound, and just, and ought to prevail. Upon the authority of that case, and the authorities therein cited, which are the same as were cited to me on the oral argument, the motion will be denied, and it is so ordered.

NOPPLE v. DORN.¹

(Circuit Court, E. D. Pennsylvania. December 20, 1890.)

PATENTS FOR INVENTIONS — WHAT CONSTITUTES INFRINGEMENT — CONSTRUCTION OF PATENT.

The class of devices employing the same process for refining oil as the device covered by complainant's letters patent No. 411,646 was well known, and some of the prior devices of such class were substantially identical with complainant's device in result and mode of operation. The defendant's did not embrace all the special devices and combinations forming the elements of complainant's claims. *Held* that, on account of the state of the art, the patent must be construed strictly and specifically, and that the defendant's device did not infringe.

In Equity.

Bill by Emil Nopple to enjoin Christian Dorn from infringing letters patent No. 411,646 for apparatus for refining oil. The answer set up non-infringement as sole defense. The first claim of defendant's patent was "an apparatus for refining oil and purifying oil consisting of a tank, a receiving reservoir, in the upper part of said tank, *a horizontal plate surrounding said discharge pipe in said plate, depending cylinders secured to said plate, forming chambers communicating at alternate ends,* a heating pipe within said chambers, said parts being combined, substantially as described." The elements in italics were contained in all complainant's claims but not in defendant's device which was manufactured under letters patent No. 427,421. Decree for respondent.

Colesbury & Shattuck, for complainant.

Strawbridge & Taylor, for respondent.

BUTLER, District Judge. The plaintiff sues for infringement of patent No. 411,646, covering "apparatus for refining oil." The answer denies infringement and this is the only question presented and raised. A very few words will explain all we need say respecting it. Apparatus for cleaning and refining oil, and other liquids, by the process employed, are old. This abundantly appears from the history of the art as exhibited

¹Reported by Mark Wilks Collet, Esq., of the Philadelphia bar.

by the record. Some of such apparatus is strikingly similar to the plaintiff's; in mode of operation and effect it is substantially identical. The plaintiff's claims must therefore be construed strictly, and thus confined to the specific devices and combinations described. So construed does the defendant infringe them? It must not be overlooked that the defendant has a patent, also, and consequently is entitled to a presumption that his patent is novel, and therefore does not infringe the plaintiff's. The office, with the plaintiff's claim before it, and fresh from their consideration, must be regarded as deciding that they did not cover the defendant's apparatus. This decision is necessarily involved in granting the later patent. To overcome the presumption arising from it, the proofs should show with reasonable clearness, that the decision is wrong. On the other hand, it seems in the light of the proofs to be right. The defendant's apparatus does not, we think, embrace the special devices and combinations specified in the claims. Indeed it seems easier to distinguish the defendant's apparatus from the complainant's than to distinguish the latter from some of those that preceded it. The bill must therefore be dismissed and a decree may be prepared accordingly.

THE INDIA.

THE INDIA AND OWNERS *v.* DONALD *et al.*

(Circuit Court of Appeals, Fifth Circuit. December 7, 1891.)

1. DEMURRAGE—"WEATHER WORKING DAYS."

The term "weather working day," when used in a charter-party, means a day, otherwise a working day, when the weather will reasonably permit the carrying on of the work contemplated.

2. SAME—COMPUTATION OF LAY-DAYS.

"Three clear working days" notice, required by a charter-party to be given by the master to the shipper before lay-days commence, does not begin to run until such notice reaches the shipper.

3. SAME—EXCEPTION IN CHARTER-PARTY—DROUGHT CLAUSE.

A charter-party of a vessel at Limerick chartered to proceed to Ship Island, there to load with lumber, provided that the shipper should be allowed a certain number of days "to deliver the cargo," and that in the computation of lay-days "shall be excluded any time lost by reason of quarantine, drought, * * * or any extraordinary occurrence beyond the control of the shippers." The custom of the port was to collect and prepare cargoes at Moss Point, between which place and Ship Island no drought can affect communication. *Held*, that the exception in case of drought did not apply to previous droughts in the streams down which the lumber is floated, making a scarcity in the market and preventing the securing of a cargo as required. *Paterson v. Dakin*, 31 Fed. Rep. 682, distinguished.

Appeal from the District Court of the United States for the Southern District of Mississippi.

Libel by Donald Bros. & Co. against the Norwegian bark *India* for damages for failure of her master to give a clear bill of lading. Judgment for libelants, and dismissing cross-bill for demurrage. The owners appeal. Reversed.

J. D. Rouse and Wm. Grant, for appellants.

R. T. Ervin, for appellees.

Before PARDEE, Circuit Judge, and LOCKE and BRUCE, District Judges.

LOCKE, District Judge. This vessel, the owners of which are appellants herein, being at Limerick, was chartered to appellees, Donald Bros. & Co., of Mobile, to proceed with dispatch to Pensacola or Ship island, at the option of charterers, there to load with sawn timber or boards, as the shipper might direct. The terms of the charter-party, as far as necessary to a determination of the questions in this case, are:

"The shippers shall supply, if legal, and if required by the master, the deck-load, to consist (at shippers' option) of sawn timber and or deals and or boards at full freight. The cargo shall be delivered along-side vessel, at her ordered loading berth, at shippers' risk and expense; the master giving shippers a written notice of three clear working days before cargo is required, after vessel being at her ordered loading berth. * * * Eighteen weather working days shall be allowed the shippers in which to deliver the cargo along-side of vessel at port of loading, which is understood to mean actual 'delivery of cargo along-side,' and not 'completion of loading,' and the cargo to be unloaded with all customary dispatch at port of discharge. Ten like days shall be allowed on demurrage at the rate of 4d. per ton register per day. For all such like days as the vessel may be wrongfully detained after such demurrage days, damages for detention shall be paid at the rate of 4d. per ton register per day. Any demurrage or damages for detention shall be settled at the place where incurred. In the computation of lay-days at port of loading shall be excluded any time lost by reason of quarantine, drought, flood, storms, strikes, fire, or any extraordinary occurrence beyond the control of the shippers. The master shall sign shippers' bills of lading as presented, without prejudice to this charter-party, but any difference in freight shall be settled on signing bills of lading."

The ship, having arrived at Ship island under the charter-party, December 25, 1890, discharged ballast, and the master reported as ready to receive cargo, mailing the letter giving notice the 14th January, 1891. This letter it appears from the evidence was received at 9 o'clock the morning of the 16th January. The vessel remained taking in cargo as delivered along-side until March 6th, when she completed her loading. The charterers and shippers presented a clear bill of lading for the master to sign, but he, considering and claiming that his ship had been detained beyond the legal lay-days, and that he was justly entitled to demurrage, refused to sign such clear bill of lading; whereupon a libel was filed, alleging that owing to storms and high winds and stormy bad weather the number of weather working days of the shipper were never exhausted; that storms and high winds and bad weather affected the points where the libelants had under the custom of the port collected and prepared the cargo; and that they were by these causes prevented from delivering the cargo within 18 consecutive days subsequent to the notice; but that these causes were wholly beyond their control, and they had delivered the cargo within the first 18 weather working days, and that the master had refused to sign a clear bill of lading, but had protested against said clear bill of lading, which had destroyed its negotia-

oilily, and the salability of the cargo, greatly to their damage. To this the owners of the vessel, appellants, filed a cross-libel, alleging that the lay-days, the 18 weather working days allowed by the charter, expired on the 12th of February, and that their vessel had been wrongfully detained, and that there was due them for 10 days' demurrage and 8 days' detention the amount of \$1,162. In answer to this cross-libel, appellees alleged that "in the computation of lay-days there shall be excluded any time lost by reason of quarantine, drought, floods, storms, strikes, fire, or any extraordinary occurrences beyond the control of shippers; and that, owing to droughts, storms, and floods, they were unable to have their timber delivered at Moss Point, the port where or from which the cargo is ordinarily delivered to Ship island, and that owing to said circumstances, which were wholly beyond their control, they were excused from sooner delivering said cargo." They also denied that, owing to the condition of the weather from the 16th January to the 6th March, the 18 weather working days had expired at the time the delivery of the cargo was completed. Upon these pleadings, the case being heard, judgment was found for libelants for one cent and costs, and the claimants' cross-libel was dismissed, with costs, from which the claimants have appealed.

Besides the question of demurrage, other questions arose in the court below, as to certain minor claims of the master of the vessel, for an amount paid as quarantine fees; for damage for breaking a knee of the vessel; and for a difference in exchange; but none of these have been assigned in error, and they will receive no consideration. There appears to be much uncertainty in the allegations of the libelants both in the libel and the answer to the cross-libel as to what condition of facts was to be relied upon; whether droughts, storms, or floods; and whether, according to the allegations of the libel, it was to be understood that the cargo was collected at Moss Point, and they were prevented from delivering it, or, according to the answer to the cross-libel, they were unable to collect it there; but, taken in connection with the evidence, there are plainly presented two questions for examination: Whether there were more than 18 weather working days between the time when the lay-days commenced to run (three clear working days after notice by the master) and the final delivery of the cargo; and, if so, whether such time should be excluded from the time subject to demurrage under the eighth article of the charter-party.

The term "working day" has so entered into commercial language and received judicial construction that its force and meaning is beyond a question or doubt. It has ceased to be an ambiguous phrase; but when the expression is further modified or limited by the word "weather" we find the new combination not so general in its use or so well established in its force; but its construction, and the manner and connection of its use, can permit but one meaning, namely, a day, otherwise a working day, when the weather would reasonably permit the carrying on of the work contemplated. In this case the kind of work contemplated was towing timber in rafts or lumber on lighters and delivering it along-side

of vessel. This is an exceptive term, withdrawing from ordinary working days certain days in which it is claimed that one is unable to work, and the burden of proof is upon him who alleges the exception. The presumption is that every working day is a day in which work may be done, and he who alleges to the contrary takes the affirmative.

Upon the question of the number of weather working days which elapsed between the master's notice and the completion of loading, several witnesses have testified generally to the bad character of the weather during the months of January, February, and March, but their testimony is so uncertain and conflicting that it cannot be relied upon in determining any question of any particular day. Jackson, employed at one of the mills, says the weather for those months "was dull, heavy, and a little rainy; windy also, and foggy." Chambers, foreman of stevedores, thought the weather "unusually severe." Danzler, a lumber merchant, states generally that "it was very bad weather." The captain reported "bad weather so thick and foggy they could not do anything." "There is not much wind when there is a fog." Howze, also a lumber merchant, says: "My recollection is the weather was rainy and foggy. I don't remember anything about high winds." "As for towing timber, foggy weather is better than any other." Hearin, manager of the Pascagoula Lumber Company, says: "It was blowing, rainy, and foggy; a great deal of fog."

There were 5 days marked "stormy" by the records of the signal office of Mobile, and 7 upon which the wind reached at some time during the day 20 miles an hour. There were 46 days from the beginning of the lay-days until the vessel had completed loading, and it may have been that the weather was generally bad during the time, and yet there have been 18 or more days in which work may have been carried on; and the only way to arrive at a satisfactory conclusion is to examine the testimony touching each individual day in question. The first question is, when did the lay-days begin? The charter-party provided that the master, when his vessel was fully ready, should give three clear working days' notice. This notice cannot be considered as given until it is shown to have reached the shipper. This the evidence shows was at 9 o'clock, forenoon of Friday, the 16th February. It was not received so that Friday could be considered a clear working day, and Saturday, Monday, and Tuesday must be allowed, and the lay-days considered to have begun on Wednesday, the 21st. This is the first day in question, the master of the bark claiming it a weather working day, and libelants not admitting it. Martin, who is engaged in the lumber business at Mobile, and who had kept a record and presented an exhibit of the weather working days for the entire time in question, says "it was a heavy rain." Donald, in his diary, says it was "a wet day; strong S. W. wind. No lay-day." Rudolph, the managing man for Keyser & Co., a lumber shipping firm at Moss Point, the nearest point to where the bark was lying; and who had kept a regular record of the weather working days, which he presented, does not call it a weather working day. The signal service record at Mobile has it marked "stormy," and shows that the south-

west wind reached 30 miles an hour. This certainly cannot be counted as a weather working day.

Carefully examining the several days in dispute claimed by the claimants, and not allowed by libelants, in the light of the testimony of Martin's, Rudolph's, and the signal service records, libelant Donald's diary, and the bark's log-book, we have arrived at the conclusion of fact that the 21st, 28th, 29th January, and the 3d of February, were not weather working days, and the 2d, 6th, 7th, 12th, 21st, 23d, 24th, and 25th of February, not allowed by libelants, were weather working days, and should be allowed as such. These days, together with those allowed by libelants or classed as good in Donald's diary, make 22 weather working days to this time, deducting from which the 18 lay-days allowed, leaves 4 days for which demurrage should be allowed. It appears that the cargo, excepting the deck-load, was delivered along-side the vessel February 25th, at which time it is found that there had been 22 weather working days. The charter-party provides that this time allowed for delivering cargo "shall mean actual delivering of the cargo along-side, and not completion of loading." This would therefore complete the furnishing of cargo, all except the deck-load, as far as the shippers could be held responsible. The language of the charter-party also shows conclusively that it was the ship's duty to take cargo on board, one provision of it being "the vessel shall discharge barges and railroad cars sent along-side without unreasonable detention." The shippers, having furnished on the 25th all the cargo so far called for, were no longer chargeable with demurrage until notified by the master that a deck-load would be required. The deck-load was only to be furnished if required by the master, and the shippers were entitled to a notice of three clear working days for this. This notice was received by the shippers at 2 o'clock Saturday, February 28th. The three clear working days would be Monday, Tuesday, and Wednesday of the next week, or the 2d, 3d, and 4th of March. The deck-load was furnished on the 6th. There being no question but what the 5th and 6th were weather working days, they must be held to be subject to demurrage, which makes six days in all for which the vessel is entitled.

This brings us to the second question in the case,—are these six days to be excluded in the computation of lay-days as time lost by reason of quarantine, drought, flood, storms, strikes, or fire, under the exceptions of the eighth article of the charter-party? The evidence shows that the libelants had no cargo collected at Moss Point, but that they had to procure it from the lumbermen as they could. There have been no allegations or evidence of quarantine, drought, flood, strikes, fire, or any extraordinary occurrence happening since the computation of lay-days commenced, and the days of storms have already been excluded in considering the weather working days; but it is claimed that this clause applies, not only to the time lost during the running of the lay-days, but to previous droughts, which had for months before caused low water in the streams from which the logs were usually received, and had therefore produced a scarcity in the market, so that libelants lost time in pro-

curing cargoes as required. Such construction of the terms of the charter-party would result in so different a relation between the shippers and ship-owners, in regard to the duties of the former in supplying cargoes, from what has been fully established by law and in all commercial transactions touching the matter, that it cannot be accepted without the most conclusive and convincing argument.

First, let us consider the language of the contract. The sixth and eighth articles are to be read together. "Eighteen weather working days shall be allowed the shipper to deliver the cargo;" and "in the computation of lay-days shall be excluded any time lost by reason of drought," etc. Shall this be read that any time that may have been previously lost, or that any time lost by any drought which may have previously existed, shall be computed and excluded from the running days? or shall the words "to procure and" be interpolated before the "to deliver?" The term used, "excluded," instead of what might have been used, "deducted," does not favor such construction. Is there anything that requires it? The case of *Paterson v. Dakin*, 31 Fed. Rep. 682, is relied upon by libelants in the position taken by them. In this case the question appears to have been carefully considered, and the learned judge to have arrived at the conclusions therein stated upon two grounds: *First*, a desire to give force to every term used; and, *secondly*, to construe the contract according to the peculiar usages of the port of loading, as they appeared in that case. It is claimed that unless the term "drought," as here used, can be applied to droughts existing throughout the states from which lumber is supplied, causing the low water which prevents obtaining logs, it can have no force or operation in this contract, as no drought could affect the waters over which the delivery of cargo between Moss Point and Ship island was made. This may be true, that no drought could affect the delivery of cargoes at Moss Point any more than quarantine, fire, or strikes have affected the case; but it is not shown that the ship-owners were aware of that fact at the time of making the charter. We recognize the general principle that, where a construction may be given a contract which will give force to every term and provision of it, it should be done; but such construction must be reasonable, just, and consistent with well-established law and the apparent intention of the parties. In construing charter-parties, which are almost always made upon prepared and printed forms, and into which terms and conditions are introduced to cover every case which might arise, it is impossible to give force and operation to every term so used in every case, and come within this rule of construction. The intention of the parties is the principal point to be aimed at, and it is to be looked for as well in the surrounding circumstances and usage of general and local trade as in the language. It appears by the allegations of both the libel and answer to the cross-libel that it was the custom and usage of the port to have timber cargoes collected and prepared at Moss Point, where, as the libel asserts, libelants had, "under the custom of the port, collected and prepared the said cargo," and in the answer to the cross-libel they "were unable to have their timber delivered at Moss Point, the port where or

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from which cargo is ordinarily delivered to Ship island." This being the customary point at which to have cargoes collected and prepared, can it be held, for the purpose of giving force and operation to the term "droughts," that the forests of the back country are to be considered as the store-houses of the cargoes, the points from which the delivery begins, and the owner to assume the risks and uncertainties of getting them to market?

It is urged in behalf of libelants that it was well known that the timber of the contemplated cargoes came from the head-waters of the rivers, and that frequently droughts prevented getting it down the streams to the mills, where it was prepared for shipment, and that it should be presumed that the charter-party was made with that knowledge, and the drought clause should therefore be held to apply. We do not think so. Such construction would completely revolutionize the law of shippers and ship-owners; make the ship-owner responsible for what was plainly the duty of the shipper; excuse the shipper of grain for the detention of a vessel at New Orleans on account of seasons of drought on the wheat-fields of the north-west, and the shipper of coal from Philadelphia for strikes months before in the coal mines of Pennsylvania of which the shipper had knowledge at the time of chartering a vessel in Liverpool. It cannot be assumed that the ship-owner assumed such risks and responsibility without the most direct and unequivocal language in the charter-party. In the case of *Hudson v. Ede*, L. R. 2 Q. B. 566, the shipper was excused only because, according to the custom of the port of Sulina, the grain was stored higher up the river at Galatz, and on account of ice it could not be brought down; but in this case the custom is shown to be the other way,—that cargoes are to be collected and prepared at Moss Point.

In *Grant v. Coverdale*, L. R. 9 App. Cas. 470, cited by appellants, it is said:

"There is no contract as to the particular place from which the cargo was to come, no contract as to the particular manner in which it was to be supplied, or how it was to be brought to the place of loading, and that, therefore, it could not be supposed that the parties were contracting about any such thing." "It cannot be denied that unless those words of exception, according to their proper construction, take this case which has happened out of the demurrage clause, the mere fact of frost, or any other thing, having impeded the performance of that which the charterer, and not the ship-owner, is bound to perform, will not absolve him from the consequences of keeping the ship too long."

It is true that in that case the term "loading" was directly used, but in the present case the language of the section relied upon would, we consider, as strongly confine the loss to the exclusion of those days which were lost in delivering, not in procuring. In that case the loading was prevented because the ice prevented bringing the iron through the canal to the dock, but the cause was considered too remote to excuse the shipper. In this case the same reason holds with more force. The libelants themselves show that the custom of the port is that cargoes are collected and prepared at Moss Point, between which place and Ship

island no drought can affect communication. Can it be reasonably presumed that in making such charter the owners were aware of the fact that the term could have no force unless it was extended to the woods of Louisiana, Alabama, or Mississippi, and intended to take the chances of a drought there? We are clearly of the opinion that no such intention can be presumed from the language of the contract; general custom and usage is directly opposed to such construction; and we find nothing in local custom or usage to demand it.

This precludes the examination further as to whether it has been proven that it was the drought that caused any loss of time to the shippers in this particular case. The charterers (the libelants) were loading some 10 vessels at Mobile and several others at Ship island. It appears that they were loading ships at Mobile, Pensacola, Horn island, and Ship island; that from January to the time of taking the testimony they had loaded at Ship island alone some eight or nine, taking between five and six million superficial feet of lumber; that as a rule they kept a very large stock in the booms at Mobile; that the Pascagoula Lumber Company had in their booms on the 1st of January a good many more than 5,000 logs,—the manager would not say quite 10,000, but a good many over 5,000. Was it a scarcity of timber or an excess of vessels? Was it the drought and low streams or scarcity of lumber and lumbermen in the forests to supply such an active demand? None of these things appear, and it certainly cannot be presumed that the ship-owner contracted against all of these exigencies.

We do not consider that the shipper was excused for the delay of the vessel on account of any of the exceptions of the eighth article, and find, therefore, that, at the time of refusal of the master to sign clear bills of lading as demanded of him, there was an amount of demurrage due him which he had a right to demand should be settled at the place of loading, or for which he had a lien upon the cargo, and he was fully justified in such refusal, and the libel should be dismissed with costs. We further find that, under the cross-libel, the libelants, Donald Bros. & Co., as charterers of the bark India, are indebted to the owners in demurrage for 6 days, or £79 12s., at the rate of \$4.83½, or \$384.87, for which judgment would follow, with costs; and it is ordered that the cause be remanded by said district court, with instructions to dismiss said libel, with costs, and enter judgment for the claimants on the cross-libel for \$384.87, and costs, together with the costs of this appeal.

THE VIRGINIA and THE LOUISE.

(District Court, D. Maryland. May 8, 1891.)

1. COLLISION BETWEEN STEAMERS—SIGNALS—FAILURE TO REVERSE.

A collision happened in the night-time at the junction of the Ft. McHenry and Brewerton channels of the Patapsco river between two side-wheel passenger steamers, the Virginia and the Louise. The Louise, the incoming steamer, at a proper distance signaled to the Virginia by two blasts that she desired to take the southerly side of the channel, being the side which was on her port. The signal was answered by a steam-tug, which was between her and the Virginia. Without getting any reply from the Virginia, the Louise put her helm to starboard, and continued, at her full speed of 11 miles an hour, until she was about a quarter of a mile from the Virginia, when she again gave a signal of two blasts. The Virginia being then over on the southerly edge of the channel with her wheel to starboard, and the channel being obstructed by a schooner, the Virginia was unable to avoid the Louise, and they collided just at the bend of the channel. *Held*, that the Louise was in fault (1) in putting her helm to starboard, and taking the side of the channel which was on her port, without getting an assenting signal from the Virginia; (2) also in not obeying the rule which required her, having the Virginia on her starboard side, to keep out of the Virginia's way; (3) also because, when the risk of collision was apparent, the Louise did not stop and reverse her engines, but merely slowed.

2. SAME—RATE OF SPEED—MUTUAL FAULT.

The Virginia, the outgoing steamer, heard the signal of two blasts given by the Louise, and when it was answered by the tug supposed it was intended for the tug. She continued her full speed of 14 miles an hour, and ported her helm to avoid the schooner, and went over to the southerly edge of the channel; but she did not make out the side lights of the Louise, nor did she signal herself until the Louise came out from behind the schooner, and signaled a second time when the steamers were not over a quarter of a mile apart. Then the Virginia blew danger signals, and reversed her engines, and did all she could to avoid the collision. *Held*, as to the Virginia, that, as she was nearing a bend of the channel obstructed by the schooner, and had not made out the side lights of the Louise, she was in fault in maintaining such a high rate of speed in a place of such danger, under such uncertainty with regard to the Louise's course, without having a distinct understanding by interchange of signals before the steamers had approached so near to each other. Experience has demonstrated that the strict observance of every precaution prescribed by statutory regulations and by good seamanship is necessary for the safe navigation of steamers at high speed in the channels of the Patapsco river. *Held*, that both steamers were in fault.

(Syllabus by the Court.)

In Admiralty. Libel for damages by collision between steamers.

Thomas W. Hall and H. V. D. Johns, for the Louise.

John H. Thomas and George Lieper Thomas, for the Virginia.

Archibald Sterling, Thomas G. Hayes, Robert H. Smith, and Beverly W. Mister, for petitioners.

MORRIS, District Judge. About 8 o'clock on the evening of July 28, 1890, the steamer Virginia and the steamer Louise, both side-wheel passenger steamers, came into collision in the Patapsco river, near Ft. Carroll, about six miles from Baltimore. The Virginia was on her regular trip from Baltimore to Norfolk, and received considerable damage from the breaking of her stem, which was twisted to starboard, but neither her passengers nor cargo were injured. The Louise was a large excursion steam-boat, returning to the city from Tolchester Beach, with 1,500 excursionists on board. She was cut into on her starboard side, about 30 feet from her stern, the bow of the Virginia penetrating through her

guards, and cutting her hull to the water's edge, doing her considerable injury, and with the lamentable result that 14 of her passengers lost their lives and a number were injured. The case is now heard upon the libels and petitions of the injured passengers of the *Louise*, and of the persons who, under the Maryland statute, are entitled to sue for the death of those who were killed, these libels and petitions alleging that both the steamers were in fault; and upon the cross-libels of the owners of the steamers, each alleging that the other was in fault for the collision. The collision took place at from 100 to 200 yards to westward and southward of the bend at the junction of the Ft. McHenry and Brewerton channels of the Patapsco river. These are deepened channels of the river, in which, near the place of collision, there is a depth of 27 feet for a width of 500 or 600 feet; but the natural depth of the river at that point, and for a considerable distance above and below, is navigable for steamers of the draft of the *Virginia* and the *Louise* for a distance of nearly half a mile on each side of the deepened channels. The course of the Ft. McHenry channel is N. W. $\frac{1}{2}$ N., and of the Brewerton channel W. N. W. $\frac{1}{2}$ N.; so that the difference in the courses is two points. As these channels are the most direct route for vessels approaching or leaving Baltimore, and are marked with buoys on the northern and eastern side, and range lights are maintained to guide vessels in them, they are commonly followed by all steamers, including those whose shallow draught does not require that they should keep in them. The testimony on behalf of the *Louise* shows that she left Tolchester Beach at 7 o'clock, to bring her passengers to Baltimore, and that when she was in the Brewerton channel, some distance below the bend, her pilot saw ahead of her a three-masted schooner, the *Yale*, proceeding under sail up the Brewerton channel in the same direction as the *Louise*, and that he saw the *Virginia* coming down the Ft. McHenry channel. He blew a signal of two blasts, intending to indicate to the *Virginia* that the *Louise* would starboard her wheel, and desired to take the southerly and westerly side of the channel, and to pass on the *Virginia*'s starboard side. This signal was immediately answered with an assenting signal of two blasts, not by the *Virginia*, but by a steam-tug, which was just coming up to the schooner *Yale* to speak her, and which was outside the channel to the northward. The pilot of the *Louise* did not immediately repeat his signal, but, putting his helm a little to starboard, he proceeded on up the channel, getting a little more to the southerly side of it, until, when not far from the bend, he saw the *Virginia*'s red light coming around the southerly side of the *Yale*. He then again blew two blasts to the *Virginia*, expecting, as he says, that the *Virginia*, after clearing the *Yale*, would starboard her wheel and change her course to straighten down the Brewerton channel, and would come in between the *Yale* and the *Louise*. This the master of the *Virginia* states he had never intended to do, and that, when he got the signals from the *Louise*, it was impossible for him to do it, as, when he had cleared the *Yale*, he was under a port helm, and had the *Louise* two points on his port bow, and his position was such that he had every reason to conclude that it was

impossible for him to break his sheer and change his course, and pass in between the Louise and the Yale. Up to the moment of the Louise giving her second signal, both steamers were under full speed, the Virginia making not less than 14 miles an hour, and the Louise not less than 12 miles an hour. Both the pilot and the master of the Louise claim that the Virginia did answer the Louise's second signal with an assenting signal of two blasts, and afterwards blew danger signals. The witnesses on behalf of the Virginia deny that she ever answered with assenting signals, and testify that she blew danger signals just as soon as the Louise blew the two blasts, and showed her green light on the southerly side of the Yale, and that she continued to blow repeated danger signals almost to the moment of collision.

Assuming, however, as is contended on behalf of the Louise, that the Virginia did answer with two blasts, and in a very short interval afterwards blew the danger signals, still, even if we take the testimony of the master and pilot of the Louise more favorably for her than the inconsistencies in the master's testimony and the conflicts between his statements and those of the pilot would warrant, I think there can be no doubt that the case made for the Louise condemns her. Taking the situation to be as those in charge of the Louise evidently considered it to be at the time they gave the first signals, they were then expecting, and based their actions upon the expectation, that both steamers would keep to the channels, and they recognized the fact that neither was to be expected to pursue any course independently of the course of the channels. The master and pilot of the Louise both say they expected that the Virginia, which was then in the Ft. McHenry channel, would change her course when she got to the Brewerton channel, and they evidently expected to pass her in one or other of the channels, or in the bend. Under these conditions, they were bound by article 21 of the international rules to keep the Louise to that side of the mid-channel which was to her starboard side. Furthermore, in passing in either of the channels, the steamers would be meeting end on, or nearly end on, so as to involve risk of collision, and the Louise would be bound to direct her course to the starboard, so as to pass on the port side of the Virginia. Also, by rule 1 of the pilot rules, they would be bound to pass port to port, and bound to signal with one blast of the whistle. These rules, applicable to the navigation of the Louise, those in charge of her, without any compelling reason except their own convenience, desired to reverse, and to take the side of the channel which was on their port side, and to have the Virginia pass them on their starboard side. Such a course, especially near the bend of a river channel, requires the most cautious seamanship; but they had the privilege of attempting it upon one simple, but absolutely essential, condition, which was that, at a sufficient distance apart, they first obtained the agreement of the Virginia by getting her assenting signals. That agreement they attempted to obtain at the distance at which they thought they ought to have it. Their signal was not answered by the Virginia, but was answered by another nearer steamer, and yet they kept on with a starboard wheel, just

as if they had obtained the agreement, and maintained their full speed of 11 miles an hour, approaching rapidly the schooner, which was an obstruction to both steamers; approaching the bend in the channel where they supposed both steamers would alter their courses, and where there is always greatest necessity for caution, and where, if both steamers kept to the southerly side of the channel, they must almost certainly collide.

It clearly appears from the case made for the Louise by the testimony of her master and pilot, that, without getting any agreement by interchange of signals, and without slackening speed, and while violating all the rules prescribed to avoid risk, and seeing all the time the red light of the Virginia open off their starboard bow, they kept on, trusting solely to an expectation that when the Virginia had reached the turn and had cleared the Yale she would starboard her wheel and change her course so as to pass the Louise on her starboard side. This was leaving all to chance in a situation which called for a distinct understanding with the approaching steamer, and the strictest observance of all the rules for safe navigation. If, on the other hand, it can be said, as was earnestly urged on behalf of the Louise, that, both being side-wheel steamers of shallow draught, they were not confined to the channels, and that they are therefore to be treated as vessels in wide navigable waters, then the Louise is equally in fault. She had the Virginia on her starboard side, and by article 16 the Louise was bound to keep out of the way of the Virginia. This she did not do, and did not intend to do, but those navigating her relied upon the expectation that the Virginia would keep out of her way by changing the Virginia's course to haul into the Brewerton channel. It is plain, also, that, after the Virginia ported to avoid the schooner, and the Louise starboarded upon giving her first signal, the steamers were in the fourth situation shown in the diagrams of the pilot rules illustrating the use of the side lights. The Louise was showing her green light, and was seeing the red light of the Virginia, and was bound to put her helm to port, and the Virginia was bound to continue her course.

It is obvious that the pilot of the Louise, without any indication from the Virginia, proceeded upon a theory that it was the intention of those navigating her when they had cleared the Yale to starboard her wheel, and go to the eastward; and upon this theory he kept on at full speed, without repeating his signal, until it was discovered that he had misapprehended the intention of those in charge of the Virginia. Nor did the master of the Louise, when he assumed full control, after the second signal of the Louise was given, and when he heard the danger signals of the Virginia, take proper steps to avoid the impending collision. He neither stopped and reversed his engines, as required by article 18, nor did he hard a-starboard his wheel, and go full speed ahead, either of which maneuvers might possibly have been successful; but he put his wheel somewhat to starboard, but not hard a-starboard, and merely slowed his engines. It does not seem to me that there is any view that can be taken of the navigation of the Louise which does not inculpate that steamer.

The case of the Virginia presents much greater difficulty. Unless the Virginia delayed too long, considering her high rate of speed and the

want of certainty as to the movements of the Louise, in taking the initiative and giving the proper passing signals prescribed by the pilot rules, I can find no other fault which can be imputed to her navigation. She was on her proper side of the middle of the channel from the time she straightened down the Ft. McHenry channel, and, in avoiding the Yale, had got over to the southerly edge, and probably outside of it. The Yale, being about the middle of the channel, and the Virginia on her proper side, in clearing the Yale the Virginia rightly ported and kept well away from her. The Virginia was also justified in supposing that the first signal of the Louise was not intended for her, as it was immediately answered by the tug, which was much nearer to the Louise, and it was not repeated. When the Virginia got the second signal from the Louise, whatever may have been the impression on the minds of the officers of the Louise, I think it is abundantly proved that the Virginia did not answer with an assenting signal of two blasts, but she at once blew danger signals, and at once rang to reverse full speed astern. This was the proper thing to do, and is prescribed by article 18 and by rule 3 of the pilot rules. This prompt reversing doubtless prevented the collision from being much more calamitous in its results, as the Virginia had nearly stopped her headway when the vessels came together.

It is urged on behalf of the Virginia that, as she was the privileged vessel, pursuing the course which, under the law, she was entitled to hold, she had a right to maintain her speed, relying upon the approaching vessel performing her duty, to keep out of her way, or, at any rate, to keep away from the Virginia's side of the channel. But, between two steamers which are approaching each other, either head and head, or in an oblique direction, safety of navigation requires that there shall be no uncertainty as to how they propose to pass each other; and therefore the pilot rules peremptorily require that they shall interchange signals at the distance of half a mile apart, or, if they do not, that, when they get within half a mile of each other, they shall slow down until proper signals are interchanged and a definite understanding is arrived at. It is quite true that, often in harbors and with small steam-vessels, the opportunity to interchange signals or the necessity for an understanding with each other does not arise until the vessels are nearer than half a mile, and it is also true that the estimation of distance is so difficult on the water that admiralty courts are careful not to hold navigators to an impossible accuracy as to distances, provided, having due regard to the speed of the vessel and the other circumstances of the case, the signal is given at a perfectly safe distance, and the rule is substantially complied with. It is therefore necessary that the court should ascertain, as nearly as the testimony will disclose, what was the distance between the two steamers when the second signal was given by the Louise, and whether, considering their speed and the place where they were to pass and the circumstances attending their approach to each other, the Virginia was in fault in not taking the initiative, and signaling before the Louise. The Louise was seen from the Virginia at least as soon as she gave her first signal. It was not quite dark, all her saloon lights were seen, and she was

known to be the Louise, a large excursion steamer of considerable speed. It was known to those in charge of the Virginia that the Louise's course was up the Brewerton channel towards Baltimore. It was known to them that the two steamers would pass each other somewhere near the bend in the channel, and somewhere near the schooner Yale. It was known to them that the combined speed of the two steamers was not less than 25 miles an hour, approaching each other at the rate of half a mile in less than a minute and a half. These facts, known to those in charge of the Virginia, presented to them, it seems to me, a case in which, if their speed of 14 miles an hour could be allowable, it could only be so if accompanied with the most careful attention to the movements of the other steamer, and an interchange of signals at such a distance apart that misunderstandings could be corrected.

In ascertaining the distances in this case, there is not only the usual difficulty that the direct testimony on the subject is only an uncertain estimate, but the additional difficulty that the officers of both steamers and the witnesses in their behalf are liable to be swayed by the fact that neither steamer can justify herself except by putting the distance at half a mile; so that both sets of witnesses are tempted to make the most favorable estimate of the distance. This influence is observable in some differences between the statements made just after the occurrence and those made at the hearing, when the importance of the distance was more fully appreciated. But among the facts quite accurately established by the testimony is the place of the collision, and the place where the schooner was at that time, and the witnesses pretty well agree in fixing the distance from each of the steamers to the schooner at the time the second signal was given. Capt. Bohannon, the master of the Virginia, testifies that he had just put his hand to the rope to give a signal of one blast to the Louise, when he heard the Louise's second signal of two blasts, and, seeing then that it was impossible for the Louise to pass him by going to his starboard, he without a moment's delay blew the danger signals and rang to stop and back full speed astern. He says that at that time the schooner Yale was off his port beam her jibboom pointed between the Virginia's paddle-box and stern. The lookout of the Virginia says the place of collision was off the Yale's port quarter, a little abaft her beam. The master of the Yale says the collision took place 300 to 400 yards, bearing S. E. by S. off from his port quarter, and would have been abeam of him if he had not luffed, throwing his schooner's head to the northward. He also says that, just before the danger signals were sounded, thinking the Virginia was getting rather close to him, he ported his wheel and luffed, in order to be safe, and be out of the Virginia's way, she being then within hailing distance. With regard to the Louise, the master of the Yale says: "When she got close up under my port quarter she blew two more whistles;" meaning her second signal. It also appears from the testimony of those on the Yale that, when the Virginia reversed her engines, the master of the Yale ordered the peaks of his sails to be dropped, and the schooner to be luffed still more, for fear he might run into the Virginia if she backed. Capt. Boon, of the tug Mamie, which was to the

eastward of the Yale, testifies that when the Louise blew her second signal she was under the Yale's port quarter, and that the collision took place right off the Yale's port bow. Rhuark, the pilot of the Louise, testifies that, when he blew the second signals, the Virginia's bow and her red light had opened clear of the Yale's stern; and Capt. Truitt, the master of the Louise, testifies that when the Louise blew her second signal the Yale was right on the Louise's broadside, abeam, and about 300 yards off. Several of the most observing witnesses from among the excursion passengers on the Louise confirm the nearness of the schooner. Oldfield, being questioned as to the distance of the Yale from the Virginia when the Virginia changed her course to the westward, and gave the danger signals, says: "We had got past the schooner, and the tug was then astern of us." Livingstone, another passenger of the Louise, testifies that they were passing the schooner just as he heard the Louise give the second signals.

It would appear, by a general concurrence of the witnesses from all the vessels, that the Yale, which was luffing and moving very slowly, was, just before the collision, at the very angle or bend of the two channels, and about in the middle of the channel; that both the Virginia and the Louise, although both well off to the westward of the Yale, had approached so near each other before the second signal was given by the Louise as that both appeared to be passing the Yale. Each steamer then saw the other around, either to the westward side or the stern, of the Yale, the Virginia discovering the green light of the Louise, and the Louise seeing the red light of the Virginia, coming out from under the stern of the Yale. It was at this moment that the Louise gave her second signal, and that the Virginia answered with the danger signals. Both were at once aware that there was imminent risk of collision, and both tried to avoid it; the Virginia by backing, and the Louise by continuing her sheer under a starboard helm, and somewhat slackening her speed. The reason why these maneuvers were not successful was that, considering the speed of the steamers, there was not distance enough between them. This, it seems to me, is convincing that the distance between must have been much less than half a mile, and much less than was safe for them to approach each other without an interchange of signals. They were both side-wheel steamers, of shallow draught, not difficult to handle. The master of the Louise says that when she is at full speed she can be stopped in from 600 to 900 feet. The master of the Virginia says she can be stopped and started back in four times her length, which would be about 1,000 feet. Half a mile is 2,640 feet. The engineer of the Virginia says he got the bells to stop and back full speed astern immediately upon hearing the danger signals; that the Virginia can be stopped with about five reversed revolutions of her wheels; and that he had got about two reversed revolutions before the collision. As soon as Capt. Bohannan heard the second signal of the Louise, he exclaimed that it was impossible for her to cross his course. If they were then half a mile apart, it is not easy to understand why he could not have stopped the Virginia before she had gone ahead a quar-

ter of a mile, or 1,320 feet. If, on the other hand, it can be true that when the danger was seen and the signals given the vessels were half a mile apart, then it is evident that the Virginia's speed of 14 miles an hour was dangerous for her to maintain, in the night-time, navigating the channel with a schooner ahead of her and a steamer coming up astern of the schooner, whose course had not been indicated to those on the Virginia by her side lights or her whistle.

There is no question but that there is a great difference between the culpability of the officers navigating the Virginia and those navigating the Louise. The latter were primarily in fault for creating the risk of collision, while those navigating the Virginia did everything to avoid it, and are only in fault for allowing the Louise to get as near as she did without taking the initiative, and giving the proper passing signal; apparently taking for granted that the Louise was coming up on her proper side of the channel, as they supposed the interchange of signals between her and the tug indicated that she would. It is certain, however, that, if the Virginia had signaled before the Louise came out from behind the Yale, the collision would have been avoided. Considering the well-known danger which attends navigating these channels, unless every precaution is taken to avoid misunderstandings, it is the duty of the court to rigidly enforce the regulations. It may be said of the pilot rules for interchange of signals between steamers when navigating these channels, as has been said of the rules governing vessels navigating in a fog, that they are not merely for the purpose of preventing collisions, but of preventing danger of collisions. *The Dordogne*, 10 Prob. Div. 10.

There is another point to which it is proper to advert. It is alleged in the Virginia's libel, and testified to by her master and pilot and lookout, that, although they saw the general saloon lights of the Louise when she gave her first signal, they never made out either of her side lights until her green light came out upon them from under the stern of the Yale. They suggest, as the possible reason for this, that they were too far off at first, and that afterwards the lights were hid by the Yale. But the Louise's side lights could have been seen, especially with the glasses, at two miles off; and, if they remained hid by the Yale for any considerable time that, of itself indicated that the Louise was starboard-ing, or, at least, it was a case of such uncertainty that it was a fault in the Virginia to keep on at full speed without signaling. Those in charge of the Virginia were looking at the Louise's lights across the interior angle formed by the two channels. She was astern of the Yale, and they say she appeared to them to be well on the starboard or northern side of the Yale's course, because, looking to the starboard of the Yale, they saw a long space between her and the Yale. But this was an unreliable inference. They were looking across the bend, and could not well determine how the Louise bore to the Yale; and the fact is that, if they had made out the Louise's side light after she blew her first signal, they would have seen her green light, and might have discovered that she was starboarding. I think, in fact, they were watching the Yale, and were relying on the Louise keeping to her proper side of the channel,

and did not give that attention to her lights which those maintaining such speed, under such circumstances, should have given. *The Manitoba*, 122 U. S. 97, 7 Sup. Ct. Rep. 1158, is an instructive case as to the high degree of diligence and watchfulness required by both approaching steam-vessels when there is uncertainty as to the intention of either. The case was one in which, as in this, the collision was mainly the fault of one of the steamers; but the other was also condemned solely because, having no certain indication of the intention of the approaching steamer, she allowed her to get so near as to produce the risk of collision before signaling or slackening speed. This court had occasion, in 1880, in the case of *The Kate Irving*, 2 Fed. Rep. 919, to call attention to the high degree of caution required to enable steam-vessels to safely pass each other in the Ft. McHenry, Brewerton, and Craighill channels; and the great number of lamentable collisions which have since occurred, resulting in loss of life and destruction of property, demonstrates that, with vessels approaching each other in these channels, risk of collision is liable to arise unexpectedly, at any moment, and that safety can only be secured by the strictest observance of every precaution prescribed by statute regulations and by good seamanship. I find that both the *Louise* and the *Virginia* are in fault.

THE E. A. PACKER.

NEW JERSEY LIGHTERAGE CO. v. THE E. A. PACKER.

(Circuit Court, S. D. New York. January 8, 1892.)

COLLISION—TUGS WITH TOWS—ERROR IN EXTREMIS—FINDINGS OF FACTS.

The tug W. was towing a barge by a hawser from Roberts' store, on East river, to Jersey City, going with the tide about seven miles an hour. The tug P., with a tow lashed on her port side, projecting beyond the bow of the tug, rounded the Battery, from the North river into the East river, going about two miles an hour. The vessels discovered each other when about 500 yards apart, on crossing courses, the P. having the W. on her starboard bow. The P. immediately blew two whistles to indicate that she desired to pass to port and across the bows of the W. The W. made no reply, but kept on her course, without abating speed, until within about 200 feet of the P. The P. then reversed her engines and came to a stand-still, being then almost directly in the path of the W., but somewhat on her port bow; and the W. ported her wheel, thereby changing her course to starboard four or five points. The W. escaped collision with the P., but her tow struck the bow of the P.'s tow. In a suit brought by the owners of the tow of the W. against the P., held: (1) If the P. was in fault the libelant should recover, even though the W. had also been in fault. (2) That, inasmuch as the P. had the W. on her starboard bow when the vessels discovered each other, it was the duty of the P. to avoid the W. and her tow, and the duty of the W. to keep her course; and that, there being no special circumstances rendering a departure necessary from the ordinary rules at the time when the vessels were 500 yards apart, the P. was in fault for attempting to cross the bows of the W., it being apparent that doing so was likely to involve risk of collision. (3) If it was an error for the W. to port at the time she did, instead of reversing her engines, the error was committed under stress of a sudden peril brought about by the original fault of the P., and the P. should be held altogether responsible for the collision. (4) The supreme court having reversed the former decree of this court because of a refusal of the judge to find a certain fact as requested by the defeated party, this court now makes a finding upon the fact, although it is not necessary to do so since the act of March 3, 1891, establishing the circuit courts of appeals.

In Admiralty. Libel for collision. Decree for libellant.

This was a suit in admiralty, instituted by the New Jersey Lighterage Company, owner of the barge Atlanta, against the steam-tug Dr. John Wolverton, which had the Atlanta in tow, and also against the steam-tug E. A. Packer, to recover damages for a collision between the Atlanta and a barge lashed along-side and in tow of the Packer on her port side, known as "Cross Creek Barge No. 5," which occurred in the afternoon of October 25, 1880, near the mouth of the East river, in the harbor of New York. Service never having been obtained upon the Wolverton, the case proceeded against the Packer, and in the district court a decree was granted dismissing the libel upon the ground that the Wolverton was solely at fault for the collision. 20 Fed. Rep. 327. Upon appeal to the circuit court, this decree was reversed upon the ground that the collision was partly, at least, the fault of the Packer, and that, under the rulings of this court, the libellant was entitled to recover its entire damage against her, which amounted, with interest, to \$5,404.31, for which a decree was rendered against her. On appeal to the supreme court, this decree was reversed, (11 Sup. Ct. Rep. 794,) mainly upon the ground of a refusal of the circuit court to make a finding in regard to a certain matter of fact. The findings made by the circuit court were as follows:

"*First.* That on the 25th day of October, 1880, the libellant was the owner of the barge Atlanta, and was a common carrier of a cargo on said barge, as alleged in the libel. *Second.* That on that day, in the afternoon, a collision occurred between said barge and the barge Cross Creek No. 5, then in tow of the steam-tug Packer. *Third.* That the barge Atlanta and her cargo were on that day taken in tow by the steam-tug Wolverton at Roberts' stores, in the East river, to be towed to the Long dock, Jersey City, and were towed astern of said tug by a hawser of one hundred and fifty feet in length between the tug and barge. *Fourth.* That on that day the tug Packer was bound from the North river into the East river, having in tow on her port side the barge Cross Creek No. 5, loaded with about 450 tons of coal, the barge projecting beyond the bow of the tug. *Fifth.* As the Wolverton, with her tow, was crossing the mouth of the East river, the Packer, with her tow, was heading around the Battery into the East river, passing the New York shore opposite the barge office, nearly two hundred yards away. *Sixth.* That the tide in the East river was ebb, and at about full strength. The Wolverton and her tow were going with the tide about seven miles an hour, and the Packer and her tow were proceeding against the tide at a speed of about two miles an hour. *Seventh.* That the Packer and her tow had come so far around from the North river before seeing the Wolverton as to be in the ebb-tide coming out of the East river, and when she saw she was heading up against that tide, and was about 200 yards out from the shore opposite the barge office. *Eighth.* The vessels saw each other when about 500 yards apart, and at that time the course of the Wolverton was about N. W. by N., and the course of the Packer was E. by N., and as they approached each other the Packer had the Wolverton on her starboard bow, and the Wolverton had the Packer on her port bow, the Wolverton being further out in the river from the New York shore than the Packer, and the vessels being upon crossing courses, converging towards the New York shore. *Ninth.* As soon as the Packer saw the Wolverton she blew two blasts of her steam-whistle. She was then under a starboard wheel, and making in somewhat towards the end of the piers, but upon signaling the Wolverton she starboarded the wheel still more. The

Wolverton made no reply to the Packer's signals, but kept on her course, without abating speed, until within about 200 feet. The Packer then blew two more whistles, and reversed her engines, and the Wolverton ported her wheel. The Wolverton passed the bow of the Packer and her tow, but the libellant's barge was unable to do so, and her port side came into collision with the bow of the Packer's tow. *Tenth.* At the time the Wolverton ported her wheel danger of collision was imminent, and a collision seemed unavoidable. *Eleventh.* There was nothing in the river to interfere with the navigation of either vessel. The collision occurred about 400 or 500 feet off the ends of the piers, and just below the slip of the South ferry. *Twelfth.* There was no local usage of navigation applicable to the situation of the vessels when they discovered each other. *Thirteenth.* That between the tide of the East river and the North river there is an eddy, which extends out about 400 feet from the barge office, and the Packer had passed through this eddy and reached the ebb-tide, which struck on the port bow of her tow, and swung the vessels still further off shore before her pilot saw the Wolverton. *Fourteenth.* The libellant's barge was in all respects properly navigated. By reason of the collision the barge and cargo sustained serious injury."

The following conclusions of law are found:

"*First.* The two tugs being on crossing courses, it was the duty of the Packer, having the Wolverton on her starboard hand, to keep out of the way, and the duty of the Wolverton to keep her course. *Second.* It was the duty of the Packer to port her wheel, and stop and reverse her engine in time to avoid the collision. *Third.* The libellant is entitled to recover against the Packer the damages sustained by the collision."

The course of the Wolverton, as stated in the eighth finding, was subsequently changed by the circuit judge from N. W. by N. to W. N. W.

Benedict, Taft & Benedict, for libellant.

Edw. D. McCarthy, for claimant of the E. A. Packer.

WALLACE, Circuit Judge. The decree formerly made in this case, adjudging the libellant entitled to recover against the Packer for the damages sustained by the collision between the libellant's barge Atlanta and the barge in tow of the Packer, having been reversed by the supreme court upon appeal, because this court refused to make a finding of fact which that court, upon the evidence before it, thought the appellant entitled to, the case is now here for a redetermination. Nothing was decided by the supreme court authoritatively, except that, upon the evidence before it, the appellant, the owner of the Packer, was entitled to the finding of fact which he had requested. The facts in the case substantially appear in the statement preceding the opinion of the supreme court.¹ *The E. A. Packer*, 140 U. S. 360, 11 Sup. Ct. Rep. 794. Inasmuch as upon any further review there will be no bill of exceptions, and there is no necessity for any findings of fact by this court, it would seem unnecessary to make the finding which was the subject of the exception upon which the former decree was reversed. Nevertheless, in view of the opinion of the supreme court, it has seemed to me the more proper course to reconsider the evidence, much of which was not embodied in the record on the

¹ The statement preceding this opinion is substantially copied from that of the supreme court.

appeal, with a view of making or refusing to make the finding. In doing this the entire evidence in the case has necessarily been re-examined and reconsidered. I have reached the conclusion, reached before, that the libellant is entitled to a decree against the Packer. I have little to add to my former opinion filed when the cause was originally decided; but it may assist the circuit court of appeals, in case of an appeal from the present decision to that tribunal, to refer to some of the evidence bearing upon the questions of fact and to some additional reasons for my conclusions of law.

The master of the Packer testified originally that the collision took place from 150 to 200 yards off the New York side of the river. This statement is in harmony with the facts set forth in the answer of the Packer. If she was 200 yards off while rounding the Battery, she could not have approached, under the helm she carried, and with the ebb-tide on the port bow of her tow, much nearer than this distance up to the time of the collision. Without referring to other testimony and corroborating circumstances, the place of collision would seem to be correctly located where it was placed in the original findings. It will be observed that, according to the theory of the Packer's answer, there was not any rank change of course made by the Wolverton after the Packer discovered her. Its theory is that the Packer was entitled, because of the situation of the vessels when they first saw each other, to go between the Wolverton and the New York shore. It avers that when she first saw the Wolverton it would have been impossible to clear the Atlanta by going off on a port wheel, and that any movement to the right would have rendered a collision with the Wolverton inevitable. It assumes that the Atlanta was in fault for the collision because she did not follow the Wolverton directly, and it distinctly charges fault in this respect upon the Atlanta; while, in enumerating the faults of the Wolverton, it does not charge any fault upon her because of any change of course on her part. The testimony of Barker, and of Ackerley, each of whom was at the wheel of the Atlanta, indicates that there was no change of course on the part of the Wolverton until collision seemed imminent. These, among other considerations, have led me to the conclusion that there was no change of course on the part of the Wolverton, until, as her master testifies, he ported to avoid destruction when the tugs were within 200 feet of each other. The vessels were not sailing by compass. I have accepted the testimony of Frazer, who was in the pilot-house of the Wolverton, and who seems to be an intelligent and trustworthy witness, as the most reliable by which to ascertain the course of the Wolverton. He says that after she got out from Roberts' stores she headed for about pier 5, on the New York side, and was making allowance for the ebb-tide to carry her opposite pier 1 or 2, when she should reach the New York shore, intending to get in there as close as she could. The testimony of this witness also shows, as does that of the pilot in charge of the Packer, that the Atlanta sagged a little with the tide below the course of the Wolverton, but that she did not sag so much that the Wolverton

could not, while going at the speed she maintained, manage her in a way consistent with her safety or that of other vessels.

The testimony of the various witnesses is practically in accord, making due allowance for the discrepancies which always occur upon such a question, that the tugs were about 500 yards apart when they discovered each the other. I have accepted as substantially correct the statement of Adams, the engineer of the Wolverton, who locates the Wolverton at a distance of 300 or 400 yards off the New York shore when the Packer was 400 or 500 yards away, and who locates the Packer at that time a little on the port bow of the Wolverton. The weight of testimony is, decidedly, that the Packer had the Wolverton on her starboard bow when she first discovered her; and, indeed, this is fairly inferable from the statements in the answer of the Packer. There is no evidence in the record, worthy of consideration, to denote that the Atlanta was improperly steered, or did not follow the Wolverton as closely as she could, in view of the action of the tide.

Upon the facts, as I have found them, it being entirely plain that the Atlanta was innocent of any fault, the libellant is entitled to compensation for the loss sustained by the collision, either from the Packer or from the Wolverton, or from both. If this were a suit between the two tugs, and cases could be decided upon sentimental considerations, the sympathies of the court would be wholly with the Packer. But the Wolverton is not in court, and the only question to be determined is whether the Packer was guilty of fault which was contributory to the collision. If she was, the libellant is entitled to a decree. It is obvious that the collision might have been easily avoided if the Wolverton had yielded her strict rights, and altered her course to port when informed by the signals of the Packer that the latter proposed to pass across her bows by keeping to port. The Packer was in a very inconvenient situation, and naturally preferred keeping between the New York shore and the Wolverton, because by altering her course to starboard she would expose herself and her cumbersome tow broad-side to the full force of the tide. The Wolverton, however, wanted to get the benefit of the slack-water near the shore at the Battery, and refused to accede to the proposition of the Packer, although she could have done so with perfect safety, and without serious inconvenience to herself. But I cannot find upon the facts that the Packer could not have avoided the Atlanta as well as the Wolverton if she had taken a course to the starboard and astern of the vessels; and I agree with the learned district judge who decided this cause in the district court that she could have done so.

Inasmuch as when the vessels first saw each other, at a distance of about 500 yards away, the Packer had the Wolverton on her starboard hand, and the Wolverton had the Packer on her port bow, it was the duty of the Packer to avoid the Wolverton, and the correlative duty of Wolverton to keep her course. In that situation rule 2 of the supervising inspectors, then, as now, in force, required the Packer to fulfill her duty of avoiding the Wolverton by passing to the right of the latter, and

required the Wolverton to pass to the right of the Packer. It is unnecessary to decide whether this regulation is one which has the force of a statutory rule, or whether it is one in excess of the authority which is conferred by law upon the supervising inspectors. It suffices that the rule, at least as to the duty of the Packer under the circumstances of the present case, formulates the practice which is approved by the best nautical experience, and which has been adopted as an imperative regulation by the international marine conference. The language of the supreme court, when this cause was before it, proves that the Packer was in fault in taking a course to port:

"If it were clear that no collision would have occurred had the Wolverton kept her course, then the starboarding of the Packer was not a fault, since the point of intersection would be ahead of or astern of the Packer. But if such starboarding was likely to involve risk of collision, then, of course, it was a fault."

That the starboarding of the Packer did in this case involve risk of collision is demonstrated beyond peradventure or cavil by the fact that, before the Wolverton changed her course at all, the Packer saw that danger of collision was imminent, and that she could not pass ahead of the Wolverton, and reversed her engines.

I cannot see how the twenty-fourth rule of navigation has any application to the case. That rule authorizes a departure from the other rules when there are special circumstances rendering a departure necessary "in order to avoid immediate danger." There were no such circumstances when the vessels were 500 yards apart, and when the first fault of the Packer, if there was any, was committed. This was conceded in the opinion of the district judge. There was no immediate danger, and no condition in the situation which would have rendered it unsafe for her to have taken her course to starboard. It would have been inconvenient for the Packer to do so, but nothing more. If it was the duty of the Wolverton to alter her course to port when she heard, or ought to have heard, the first signal of the Packer, then it is clear the collision is attributable solely to her fault. That proposition has not been advanced by counsel for the Packer, and, notwithstanding some expressions in the opinion of the supreme court which may be interpreted as sanctioning it, I cannot believe that it was intended to be so declared. Unless one vessel has a right, merely at her option, and without regard to any special circumstances, to dictate to another vessel a departure from a rule which it is the right and the duty of the latter to observe, this proposition cannot be maintained.

It remains to be considered whether the collision is attributable to the conduct of the Wolverton, either because she did not reverse before the collision, or because she ported her helm. Upon this question that which seems to me the pregnant and controlling circumstance in the situation is not adverted to in the opinion of the supreme court. That circumstance is that while the Wolverton was fulfilling her duty of keeping her course, and relying upon the Packer to fulfill her duty of keeping out of the way in the manner she had selected, by passing in front

of the Wolverton, the Packer slowed and reversed her engines, and brought herself practically to a stand-still in the water. This was done when the tugs were within a distance of about 200 feet of one another. If the Packer had not thus brought herself to a stand-still when she was nearly in the path of the Wolverton, it is probable that the Wolverton would have passed astern; at least, it is possible that the Wolverton might have done so. Unless it can be found that the Wolverton could not have passed astern of the Packer had not the latter reversed, it cannot be adjudged that the collision is solely attributable to the conduct of the Wolverton in not reversing. The evidence does not warrant such a finding.

Was the Wolverton in fault for porting? It seems to have been assumed by the supreme court that she was, and that tribunal reversed the former decree of this court because of the refusal of this court to find, as the evidence before the supreme court denoted, that the course of the Wolverton was changed to starboard four or five points from her former course. In the opinion it is said "that the porting of the Wolverton must almost of necessity have brought about a collision." How this result could happen when the Packer was off the port bow of the Wolverton, and at a stand-still in the water, or nearly so, having abandoned her attempt to go forward in front of the Wolverton, I am at a loss to understand. It was for this reason, and because I deemed the finding immaterial, that I refused to find as requested. It seems to me that the more the Wolverton could have changed her course to the starboard the greater would have been the chance of safety to both vessels, because the greater the change of course the wider would have been the distance between them. If the Packer had maintained her speed, I am not satisfied that a change of course of four or five points to starboard on the part of the Wolverton would have enhanced the chances of a collision; but as it was, if it would have been safe for the Wolverton to proceed without altering her course, it certainly could not have been unsafe to alter it in a direction which would carry her a further distance away from the bows of the Packer than she would have otherwise gone. I have very great doubt whether it was possible for the Packer, in the short intervening distance between the intersecting courses of the two tugs, to change her course four or five points to starboard. Any such change is utterly inconsistent with the theory of the Packer's answer. Still, Shults, the master of the Wolverton, states that he effected such a change by porting, and, notwithstanding much in the testimony that leads me to a contrary opinion, I will find for present purposes that such a change was made. If it should be assumed that if the Wolverton had reversed, or had not ported, the collision might have been avoided, the question remains whether the Packer was not in fault for bringing the Wolverton into a situation where her master was liable to commit an error of judgment.

I understand the rule to be well established that in every case where a vessel, by her own negligence, or the breach of a statutory rule, places another in great peril, the latter will not be held guilty of negligence

because at the last moment she did something that contributed to the collision, or omitted to do something that might have avoided it. It has often been held by the supreme court that a vessel which by her own fault causes a sudden peril to another cannot impute to the other as a fault a measure taken *in extremis*, although it was a wrong step, and but for it the collision would not have occurred; and that a mistake made in the agony of the collision is regarded as an error for which the vessel causing the peril is altogether responsible. *The Nichols*, 7 Wall. 656; *The Carroll*, 8 Wall. 302; *The City of Paris*, 9 Wall. 634; *The Lucille*, 15 Wall. 676; *The Favorita*, 18 Wall. 598; *The Falcon*, 19 Wall. 75; *The Sea Gull*, 23 Wall. 165. If this is the correct rule, it would seem that if the Wolverton was in fault for not reversing, or for porting, or for not starboarding, it was a fault committed in the throes of a collision, which not only does not exonerate the Packer, but does not subject the Wolverton to liability. Whatever the conclusion may be as to fault on the part of the Wolverton, it suffices to establish the liability of the Packer to the libellant; that the Packer was guilty of fault which was contributory to the collision. She insisted upon adopting the most hazardous mode of fulfilling her duty of avoiding the Wolverton, and attempted to do it in a way which her own conduct conclusively shows was not practicable, except at risk of collision. A decree is ordered for the libellant.

THE CONQUEROR.¹

VANDERBILT v. THE CONQUEROR *et al.*

(District Court, S. D. New York. January 28, 1892.)

1. CUSTOMS DUTIES—FOREIGN BUILT YACHT—IMPORTED ARTICLE—SHIPPING LAWS.

From the foundation of the government the duties on ships and vessels have been regulated by acts independent of the custom laws, and under a different system of legislation. Nor are vessels mentioned by name in any of the schedules or paragraphs prescribing duties. Accordingly, when the foreign built yacht *Conqueror* was purchased abroad by an American citizen, and navigated to the port of New York, and was then seized by the collector of customs, on the claim that she was liable to duties as an imported article, under the general tariff act of October 1, 1890, (26 St. at Large, p. 567,) and her owner thereupon brought this suit to recover possession of her, it was held that the yacht was not an imported article, in the sense of the tariff law, and not subject to duties under the tariff act of October 1, 1890.

2. SAME—PRACTICE—COLLECTOR'S POSSESSION—SEIZURE BY MARSHAL.

Under section 984 of the Revised Statutes, where the collector's agent in possession of the *res* denies the authority of the court, the court will order the marshal to take exclusive possession of the subject of the suit.

In Admiralty. Suit by the owner to recover possession of the yacht *Conqueror*, held by the collector of customs for non-payment of duties. See 12 Sup. Ct. Rep. 295.

¹Reported by Edward G. Benedict, Esq., of the New York bar.

Elihu Root and *Samuel B. Clarke*, for libelant.

Edward Mitchell, U. S. Dist. Atty., and *Henry C. Platt*, Asst. U. S. Dist. Atty., for respondent.

BROWN, District Judge. On September 1, 1891, the libelant brought the above possessory action against J. Sloat Fassett, collector at this port, to recover possession of his yacht, the *Conqueror*, which the collector had taken and held in his custody on the claim that she was subject to customs duties. The authority of the court to proceed in the matter being denied, the marshal, under an *alias* process, and the explicit order of the court, under its general powers and section 934, Rev. St., took the yacht out of the possession of the officers of customs into his exclusive custody; and thereafter, on the 19th of October, 1891, upon the application of Fassett to the supreme court, an order was obtained, requiring this court to show cause why a writ of prohibition should not issue, forbidding this court from further entertaining the cause. On the hearing of that order, the question both of the jurisdiction of this court and whether the yacht was dutiable under the customs laws was fully argued. The supreme court denied the writ of prohibition, on the ground that this court had lawful jurisdiction both of the parties and of the subject-matter, without considering whether the yacht was liable to duty as an imported article. The proofs since taken sustain the main facts stated in the libel and the answer. The defendant claims no other right to the custody of the yacht than for the collection of customs duties. The proofs show that Mr. Vanderbilt, a native born citizen of the United States, and a member of the Royal Mersey Yacht Club of England, purchased the yacht in England on May 7, 1891, of W. S. Bailey, the registered owner of the yacht, by a bill of sale in the usual form; that, after cruising in the waters of Great Britain and Norway, the yacht was navigated by her master to Halifax, and thence to the United States, arriving at the port of New York on or about July 6, 1891; that on arrival here the yacht was entered at the custom-house, the bill of sale, previously certified by the American consul at Liverpool, being presented to the collector for record and certification; and that the collector's certificate was indorsed thereon, in accordance with articles 93 to 97 of the treasury regulations of 1884, entitling the yacht to the protection and flag of the United States, but not entitling her to engage in commerce, (Rev. St. § 2497;) that the collector claimed that the yacht was subject to customs duties as an imported article, and that, such duties not being paid, he, on the 27th of August, 1891, by his deputies, took possession of and held her for the payment of such duties, until she was arrested by the marshal, as above stated.

The libel being filed to recover possession of a vessel alleged to be wrongfully detained, it is immaterial whether at the moment of the filing of the libel, or of the issuing of the original process, the yacht was within the territorial limits of this jurisdiction, or in the waters of the adjoining district; for she presently came within the territorial jurisdiction of the court, and was there lawfully and regularly arrested

under the process. The process was not void merely because when issued the yacht was across the boundary line of this district. The supreme court, having all the facts upon the record before it, has expressly affirmed the jurisdiction of the court over both the vessel and the parties, and its authority to proceed with the cause.

The only remaining question is whether the yacht is subject to customs duties. If she is not, the seizure and possession by the collector were illegal, and it is the duty of the court to give the libellant judgment and a writ of possession.

The history of legislation in this country in reference to ships and vessels, as shown by scores of acts in the United States Statutes at Large, leaves no doubt, as it seems to me, that from the beginning ships and vessels have been treated as a subject *sui generis*, and that the acts of congress in regard to them form a complete system by itself, wholly outside of ordinary tariff legislation as respects imported goods, wares, and merchandise. Duties on vessels have always been imposed, but never in those acts, or in the same sections of acts, that deal with customs duties on goods, wares, and merchandise. They have always been imposed either by independent acts, or by independent sections in the same act, and by different methods from those applicable to merchandise, viz.: duties computed by tonnage. Protection to American industries also, and the development of American commerce and of the American marine, so sedulously studied from the first, have been provided for in ways altogether peculiar to ships and vessels alone; not merely by exacting higher duties on foreign built vessels than upon domestic ones; but higher duties also upon the cargoes brought in foreign bottoms; (still the law, except where exempted by special treaty stipulation;) and; finally, by excluding foreign vessels altogether from American registry; so that no foreign built ship can become a vessel of the United States except by a special act of congress, or take part in the coasting or internal trade of the country. Not a decade has passed since the foundation of the government during which one or more, often several, changes have not been made in the regulation of the duties to be paid by foreign and domestic vessels, and in the discriminations affecting the vessels of particular countries. These acts are much more numerous than the tariff acts, and show the constant presence of the subject in the mind of congress. In view of such a body of legislation, evidently forming a system by itself, and covering the subject of duties to be paid to the government by foreign or domestic vessels coming to this country in the usual course of navigation, and presumptively, therefore, embodying the whole intention of congress in reference thereto, the usual rule in the construction of statutes would exclude ships and vessels from the purview of ordinary tariff legislation as regards imports of goods, wares, and merchandise, in the absence of any provisions showing a clear intention to include ships and vessels, and thus to impose on them a double duty. Examination of all the tariff acts, including that of October 1, 1890, shows that in not one of them are ships or vessels named in the schedules of imports; nor is there a single phrase under which they can be classed, except by a strained and unnatural construction. By the rule

of construction above referred to, therefore, and without reference to the practice of the government for more than a century not to treat vessels coming here in the usual course of navigation as subject to tariff duties on imports, all such vessels should be held subject to such duties only as are imposed under the special acts dealing with ships and vessels, and not subject to the acts dealing only with duties on imported merchandise.

While the foregoing general view seems to me quite sufficient for the decision of the cause, the novelty of the subject makes proper, perhaps, a consideration of it more in detail. Duties upon the yacht are claimed to be due under the customs act of October 1, 1890, (26 St. at Large, p. 567.) That act declares in its first paragraph that "there shall be levied, collected, and paid upon all articles imported from foreign countries, and mentioned in the schedules herein contained, the rates of duty by the schedules prescribed." To come within the act the article must be (1) imported; (2) mentioned in the schedules; and (3) fall within the general scope and intention of this act, rather than within those other acts that provide specially for duties upon ships and vessels. Neither of these conditions seem to me to exist as regards such a vessel as the Conqueror. She is a sea-going, schooner-rigged, screw steam-ship, 182½ feet long, nearly 25 feet wide, and 13½ feet deep. Her measurement is about 372 tons gross, 219 1-5 tons net. Her crew consists of 25 men. She came to this country in the ordinary course of navigation, as a pleasure yacht, duly entered at the custom-house, and presented the bill of sale, in conformity with the treasury regulations applicable to foreign built vessels purchased by citizens of this country, as above stated. She paid no tonnage duty, because section 4216 of the Revised Statutes abolished that duty upon yachts belonging to a regularly organized yacht club of a foreign nation which extended similar privileges to yachts of this country.

1. A vessel arriving in this way is not, in my judgment, an "imported article," within the meaning of the tariff law. The word "imported" has, in general, the same meaning in the tariff laws that its etymology shows,—*in porto*, to bear; to carry. To "import" is to bear or carry into. An "imported" article is an article brought or carried into this country from abroad. This yacht was not borne or carried into this country. Vessels are the means or instruments of importation. They are not ordinarily themselves imported. The definition of a "vessel" in section 3 of the Revised Statutes is, "every description of water-craft * * * capable of being used as a means of transportation on water." A vessel arriving in the ordinary course of navigation is no more "imported," in the ordinary sense of that word, than she is "transported." Occasionally small crafts are carried from one country to another on board of larger vessels. When thus transported from one country to another, they are imported, and so far may be subject to duties as imports. The present is no such case.

2. Ships and vessels are not "mentioned" by name in any of the schedules or paragraphs prescribing duties. The only paragraphs under which it is claimed they might be brought are paragraph 215, as "man-

manufactures of iron or steel, * * * whether partly or wholly manufactured;" paragraph 230, as "manufactures of wood;" paragraph 137, as "beams, posts, building forms, etc., together with all other structural shapes of iron or steel, whether plain or punched, or fitted for use;" paragraph 153, "anchors, or parts thereof, of iron or steel, wrought-iron for ships, forgings of iron or steel for vessels or parts thereof;" and section 4 of the act, as "articles manufactured in whole or in part, not provided for in this act." Paragraphs 137 and 153 plainly enough refer to the articles in their separate forms; not when found built into, or forming a part of, such a structure as a vessel, which must be treated as a unit. Paragraphs 215 and 230 and section 4 relate only to articles "manufactured." The first imposes a duty of 45 per cent. *ad valorem*, the second 35 per cent., and the third 20 per cent. *ad valorem*. The mere etymology of the word "manufactured,"—that is, something made by hand,—might admit of its application to a ship; and in the case of a vessel, though completed, brought into port on board of another vessel, as merchandise, and not properly falling within the provisions or the intention of the special acts imposing duties on ships and vessels, I am not prepared to say that the description of it as a "manufactured" article under some of those general clauses, though it may be difficult to say which, might not be sufficient to render it chargeable with duties as an import "mentioned" in the tariff act, as in the case of *The Madge*, Treas. Dec. 4960, (March 17, 1882.) But in the ordinary use of language a vessel is no more "manufactured" than a house or a cathedral. Ships are "built" or "constructed," and those who build them are known as "ship-builders," not as "ship-manufacturers." Considering the fact that hundreds of objects are specifically named in the tariff acts, many of them of but slight consequence in comparison with ships and vessels; and considering the prominence of ships and vessels as the chief means of all importation, that they are so often presented to the attention of congress, and that there is not a tariff act but contains some allusion to them,—it is not credible that if it had been the intent of congress to make sea-going vessels coming to this country in the usual course of navigation subject either to specific or *ad valorem* duties, they would not have been mentioned *eo nomine* in some of the tariff schedules, and not left to be covered by such remote and far-fetched clauses as "manufactures of iron or wood," or "manufactures not otherwise provided for." The absence of apt words affords a strong presumption that vessels coming here in the usual way are not included.

3. The controlling fact, however, which accounts at once for the absence of ships and vessels from the express provisions of the tariff acts, and for the lack of any apt words in those acts to include them, is the fact first above mentioned, viz., that from the foundation of the government the duties on ships and vessels have been regulated by acts independent of the customs laws, and under a different system of legislation. From the first, duties on imports and duties on ships and vessels have been always treated as separate and independent subjects. The first act of the first congress was for its own organization. The second was an

act laying a duty on "goods, wares, and merchandise imported." (1 St. at Large, c. 2, p. 24.) The very next act, passed July 20, 1789, (1 St. at Large, c. 3, p. 27,) provided for duties on ships and vessels. It enacted that "the following duties shall be and are hereby imposed on all ships or vessels entered in the United States;" imposing different rates of duty per ton, viz.: (1) On those built and owned here, six cents per ton; (2) on those built here, but belonging wholly or in part to foreigners, 30 cents per ton; and (3) on all other vessels, *i. e.*, those built abroad, 50 cents per ton. This distinction between ships and vessels dutiable at certain rates per ton, and goods, wares, and merchandise imported, and dutiable at specific or *ad valorem* rates, has continued to the present hour, and has been recognized in scores of acts. The Revised Statutes (section 4219) enact that, "upon vessels entered in the United States from any foreign port, there shall be paid duties as follows," specifying various different rates per ton. Section 4223 provided that "the tonnage duty imposed on all vessels engaged in foreign commerce shall be levied once a year. By the act of June 19, 1886, (24 St. at Large, p. 82, § 11,) "a duty of six cents per ton, not to exceed 30 cents per ton per annum," was "imposed at each entry upon all vessels entered from any foreign ports; not, however, to include vessels in distress, or not engaged in trade." In the numerous statutes which have regulated the changes in the rate of tonnage duty, and the distinctions made between domestic and foreign built vessels, these duties are sometimes spoken of simply as "duties on ships and vessels," as in the first act; sometimes as "duties on the tonnage of ships," or as "tonnage duties on ships," or as a "tonnage tax." The various expressions all signify the same thing. All are "duties," imposed as directly upon ships as the tariff duties are imposed upon merchandise. The two classes of subject are wholly distinct. The tonnage duty is the duty provided to be paid by ships; the tariff duty, by imported merchandise. Each class is governed by its own laws; and neither is designed to pay a double tax. The reason for the distinction is obvious. Vessels are destined to come and go continually; merchandise, to be consumed on shore. Merchandise, therefore, pays duty on its value but once, and once for all. If vessels were dutiable, under the same law, on their whole value at every entry into port, they would be speedily taxed out of existence, and navigation would become insupportable. Vessels, therefore, are taxable at a much lower rate, but payable at every entry, or yearly.

There is nothing in the act of 1890, so far as regards the question under consideration, that in any way distinguishes it from prior tariff acts. The words "articles imported," used in the act of 1890, have been used in several previous acts, and those words have no more extended meaning than the word "merchandise" in the earlier acts, since the word "merchandise" includes "chattels of every description capable of being imported." Rev. St. § 2766. The revenue act of July 14, 1862, (12 St. at Large, p. 543,) well illustrates the above views. That act in its first 14 sections imposed duties on imported merchandise, etc. It provided also (Id. p. 557) for duties on manufactures in substantially

the same terms as paragraph 215, and § 4, Act 1890. The next section imposed duties on ships and vessels as follows:

"Sec. 15. Be it further enacted that upon all ships, vessels, or steamers which shall be entered in any custom-house in the United States from any foreign port or place, whether ships or vessels of the United States, or belonging wholly or in part to subjects of foreign powers, there shall be paid a tax or tonnage duty of 10 cents per ton, * * * in addition to any tonnage duty now imposed by law."

Here are the two classes of subjects, viz., "imported merchandise" as one group, and "ships and vessels" as the other, brought side by side in the same act. The different duties and the different modes of imposing them on the two classes are clearly discriminated. No one would seriously contend that vessels liable to a tonnage duty under section 15 of that act could be liable as an imported article to an additional duty, under such general words in the prior sections as "manufactures of iron" or "manufactures not otherwise provided for." The manifest intent of congress to provide independently in section 15 for the duties to be paid by ships and vessels excludes the prior sections from any application to whatever is covered by the latter. Similar provisions in the act of 1890 cannot receive any different construction.

In the case of *U. S. v. A Chain Cable*, 2 Sum. 362, where a chain cable had been bought in Liverpool by the master of an American vessel to replace an old one worn out, and was landed in Boston without a permit, and claimed to have become thereby forfeited, Mr. Justice STORY held that the article, though brought in on board the ship, and so imported, was nevertheless to be treated as a part of the ship, and not as goods, wares, or merchandise, within the meaning of the general revenue laws. So in *The Gertrude*, 3 Story, 68, Mr. Justice STORY, affirming the decision of WARE, J., held that the "tackle, apparel, and furniture of a foreign vessel wrecked upon our shores did not come within the meaning of the revenue laws as imported merchandise." But for the acts of June 29, 1870, (Rev. St. § 4216,) and of June 19, 1886, (24 St. at Large, p. 82, § 11,) there can be no question that this yacht would have been required to pay tonnage duties like all other vessels coming from a foreign port. She is plainly within the special statutes relating to duties on ships and vessels, and is therefore not within the scope of the general tariff upon imported merchandise. By the acts of 1870 and 1886, above referred to, congress has exempted such yachts, not engaged in trade, from the payment of tonnage duties. The effect of this was not in any degree to extend the scope of the tariff act concerning imports, so as to make it applicable where it was not applicable before. The plain intent of congress was to relieve such yachts from the prior burden of tonnage duty; not to increase their burdens, or to add any new ones. The reasons for it, if I am rightly informed, were for the improvement of navigation, by the development of the finest models both for speed and in the various forms of naval architecture, for free intercommunication between yachtsmen of different countries, their invitation to our shores, and the advantages to our own yacht-builders likely to result therefrom.

4. It is urged, however, that, though foreign vessels entering at our ports may not in general be subject to duty as imports, the case of the Conquerer is distinguishable from them in two respects: (1) That the former are treated by international comity as a part of the territory of the country to which they belong, and, being here only temporarily, are by comity not considered as imports; (2) that the Conqueror presented her bill of sale at the custom-house, and obtained the certificate of the collector thereon, entitling her to the protection and flag of the United States, and that this act made her an import by change of domicile, and subject, therefore, to import duties.

If, however, the views previously expressed are correct, none of these suggestions have weight. They do not change the fact that the yacht was navigated to this port as a sea-going vessel, and hence liable to duty, if at all, under the shipping laws, and not under the laws applicable to imported merchandise. The circumstances stated do not widen the scope of the tariff law, nor change the class to which the yacht belongs, nor transfer her from the one system of legislation to the other. After the bill of sale was made, she was none the less governed by the shipping laws alone; and, but for the acts of 1870 and 1886, she would have remained subject to tonnage duties precisely as before, whether the bill of sale was presented and certified at once, or not till long afterwards. The certification has not the effect ascribed to it. It contributed nothing to give the yacht an American domicile, or to make her American property. She was made American property months before by the bill of sale, and her domicile followed that of her owner. The certification did not make her a "vessel of the United States," nor give her the general rights or privileges of vessels of the United States. *The Merritt*, 17 Wall. 582. She could not enter into the foreign trade, nor into the internal or coastwise trade of the country. Sections 2497, 4131, 4311. The only use of the certification was to serve as "proof of American ownership," for her convenience in navigation as a pleasure yacht, and to absolve her from the payment of light-money." Rev. St. §§ 4225, 4226; *The Miranda*, 47 Fed. Rep. 815; *Sleght v. Hartshorne*, 2 Johns. 531, 545. She had already once before entered this port under the libellant's ownership, and paid "light-money," not having certified papers. If she was not liable to import duties before the certification, when navigated by the libellant as owner, there is nothing in the tariff act, or in section 4226, that makes the payment of import duties either a condition or a consequence of such certification; and without that there can be no additional duties imposed.

As regards the other suggestion, it is not correct to say that foreign private ships are usually treated as parts of the territory of the country to which they belong. It is only public vessels that are entitled to that exemption. As to private foreign vessels, the contrary is the rule. They are subject to all the laws and regulations enacted in regard to them by the country which they enter. It is under such laws that foreign vessels are required to pay tonnage duties, pilotage fees, and light-money. That import duties are not exacted of such vessels is not because of any legal fiction or international comity, but because they are not within

the scope of the tariff laws on imports, and are dutiable according to the shipping laws alone. Had foreign vessels been within the scope of the tariff law on imports, it is certain that the government would not have foreborne for a century past to collect import duties on such vessels, either by reason of their temporary stay, or of any notions of international comity.

In my judgment, nothing in the case removes this yacht from the domain of the laws specially enacted for ships and vessels, as to the dutiable charges thereon; and as by these laws she is released from the payment of the duties ordinarily imposed on vessels, without being charged with any other duties, or made subject to the general tariff law on imported merchandise, her detention for customs duties was illegal, and the libelant is entitled to a decree for possession, with costs and damages.

CREIGHTON v. DILKS *et al.*¹

(District Court, E. D. Pennsylvania. February 2, 1892.)

1. DAMAGE—LIABILITY OF CHARTERER.

A charterer, having notice of the vessel's readiness, and being bound to deliver the cargo, is liable for demurrage for delay caused by loading and discharging a quantity of iron not intended to be shipped, which an employe of the charterer erroneously designated as part of the cargo.

2. SAME—LOADING ON SUNDAY.

A master, in the absence of agreement or consideration to the contrary, is not bound to permit the charterer's stevedores to load the vessel at night or on Sundays.

3. SAME—MEASURE OF DAMAGES.

The measure of damages for delay caused by the charterer, who had agreed to load with "customary dispatch," negligently loading, and being obliged to discharge a wrong cargo, is not demurrage for the time spent in such loading and discharging, but the time spent in getting the vessel loaded over the time it would have taken to load with "customary dispatch."

In Admiralty. Libel by James E. Creighton, master of the schooner Mary O'Neill, against George H. Dilks & Co. to recover demurrage for alleged delay in loading said vessel. Decree for libelant for \$302.50.

John F. Lewis, for libelant.

F. I. Gowen, for respondents.

BUTLER, District Judge. On September 17, 1889, the respondents chartered the schooner Mary O'Neill (of which libelant is master,) to carry a cargo of railroad iron from the Philadelphia & Reading Railroad Company's wharves at Port Richmond, Philadelphia, to Birmingham, Ga. The schooner was required to be in readiness for loading on the following Monday. "Customary dispatch" was allowed respondents for loading, and in case of further detention \$55 per day were to be paid the vessel for loss of time. The schooner was in readiness at the time appointed;

¹Reported by Mark Wilks Collet, Esq., of the Philadelphia bar.

and the loading commenced late on that day. The iron was pointed out by an employe of the railroad company, at the wharf, and loaded under the direction of Mr. Shannon, chief stevedore employed by the respondents (through Mr. Boney)—as he testifies—for this purpose. The iron turned out to be other than that which the respondents intended to ship, but the mistake was not discovered until a large quantity had been loaded. When discovered the iron was ordered off; and about seven days' time was lost by the error. The loading in consequence was not complete until the night of the 21st of September. The libelant claims compensation for the loss of time to which he was subjected. The respondents deny liability on the grounds that the mistake, as they allege, was not theirs; and that, even if it was, there would not have been any detention over the time allowed for loading, if the libelant had permitted them to work at night. Neither position can be sustained. It was the duty of the respondents to deliver the cargo to the vessel. They knew she was at the wharf, ready to receive it, the terms of the charter required them to take notice of the fact, and besides express notice to them is averred in the libel, and not denied. They depended upon others to point out and load the iron they desired to ship, and are responsible for their acts. There is no room for pretense that the error arose from any fault of the libelant.

The second position is equally untenable. The respondents had no right to call on the libelant for permission to work on the vessel at night or on Sundays. Neither the charter, nor any custom entitled them to such permission. It is unimportant what induced the libelant to refuse. It is plain, however, that loading at such a time would have subjected him to disadvantages; not only for the reason which he states, but for the additional one that it was his duty to be present when the loading was being done, and to superintend the storage of the cargo. The testimony of the respondents' witnesses respecting what he said after the mistake was discovered does not show a contract that the work should proceed at night, or on Sundays. Even if it showed an agreement that it might, he would not be bound, in the absence of a consideration for his promise; and none is suggested. I incline to believe, however, that his own testimony on this subject—which is that he offered to agree provided he was compensated for five days' time which he then supposed would be lost—is nearer an accurate statement of what occurred. He is more likely to know what he said than other witnesses are, and this statement seems more consistent with probabilities; and finds some corroboration in what the respondents' witnesses say. Although the libelant is entitled to recover for loss of time, it does not follow that the loss is to be measured by time occupied in taking on and putting off the wrong iron. The charterers were entitled to so much time as was necessary to load, employing "customary dispatch." For such detention as he was subjected to beyond this time he is entitled to compensation; but to no more. A good deal more than customary dispatch was used after the error was discovered; and a little before. How many tons should have been loaded per day with such dispatch, is not

entirely clear. The respondents' witnesses disagree respecting it. Mr. Shannon, who is probably most competent to form a just estimate, says, "100 tons could have been loaded easily." The vessel, as he says, was especially adapted to speedy loading of such cargo. Before the error was discovered the loading was at the rate of about 140 tons per day. The work continued, however, for 11 hours while the customary hours of working are but 10. It was understood that the libelant was anxious to get away, and there was something probably more than customary speed shown, aside from the gain obtained by working the extra hour. I believe it is safe to say that with the dispatch required by the charter 125 tons per day should have been loaded; and I do not think it safe to place the rate higher. At this estimate 6 days would have been required to load the 725 tons carried. To this must be added one day for the Sunday which intervened. I think half a day should also be added for the time it rained on Friday, when, according to custom, the men would not work. Mr. Shannon speaks of rain on the preceding day also, but it is manifest, I think, that he is speaking of the night of the 10th. Other parts of his testimony seem to show this, and that the day was not wet. Seven and a half days, therefore, should be allowed for loading. The vessel was detained until the night of the 21st of the month, covering a period of 13 days. Taking $7\frac{1}{2}$ from this leaves $5\frac{1}{2}$, which represents the loss of the time to which the vessel was subjected, and for which it should be paid—at the rate provided by the charter. This will give him \$302.50. A decree may be entered for this sum, with costs.

CHAMBERLAIN v. PETTIT.¹

(District Court, E. D. Pennsylvania. January 15, 1892.)

1. SHIPPING—CHARTER-PARTY.

A charter of a vessel to carry a certain named cargo, drawn in formal terms and without conditions, will not be construed as a mere memorandum, not binding on the parties, where there is nothing to warrant a belief that the ship's representative understood that he was to be affected by the charterer's failure to get the cargo named in the charter.

2. SAME—DAMAGES FOR BREACH.

A member of a firm of ship-brokers having chartered a vessel to carry a certain kind of cargo, and being unable to furnish the cargo, his firm rechartered the vessel for a cargo of a different character, paying also to the ship a sum in addition to the freight named in the second charter. *Held*, as none of these circumstances show that the master agreed that the second charter should replace the first, he was entitled to recover damages if the vessel was delayed or the freight of the second cargo of less value than the first.

In Admiralty. Libel *in personam* by Joab Chamberlain, master and part owner of the schooner Vanderhersch, against Charles A. Pettit, Frank D. Pettit, and Robert F. Smith, trading as Charles A. Pettit &

¹Reported by Mark Wilks Collet, Esq., of the Philadelphia bar

Co., to recover damages for breach of contract to furnish a certain cargo for said schooner. Order for commissioner to assess damages, if same not mutually agreed on by parties.

Alfred Driver and J. Warren Coulston, for libelant, cites, as to what constitutes a charter-party, *The Tribune*, 3 Sum. 144.

Henry R. Edmonds, for respondent.

BUTLER, District Judge. In August, 1890, Charles A. Pettit chartered the schooner Vanderhersch to carry a cargo of lumber from Charleston to Philadelphia, on the terms stated in the written charter, then signed. Soon thereafter the charterer informed the libelant that he could not furnish the cargo, and would not need the vessel. He however, as a member of the firm of Charles A. Pettit & Co., ship-brokers, (on whose account, it would seem, the charter was taken,) procured a cargo of railroad ties from other parties. After the cargo was carried, and the freight on it collected, the libelant brought suit to recover damages,—which he says he sustained from the respondent's failure to comply with his contract.

The defense is twofold: *First*, that the charter was intended as a memorandum simply and that the parties were not to be bound by it; and *second*, that the cargo of ties carried under charter with others which the respondent's firm obtained for the vessel, was substituted for the lumber, which the respondent undertook to furnish, and the respondent relieved from all responsibility under his contract.

I do not find anything whatever to support the first proposition. There is no doubt that the respondent contemplated a transfer of the charter, or of his rights under it, to parties in Wilmington, (with whom he was in correspondence;) and it is probable the libelant was aware of this; but there is nothing to warrant a belief that the libelant understood that he was to be affected by any disappointment the respondent might be subjected to in his dealings with these parties. The charter was formal in all its terms and without conditions. If it was not intended to bind the parties absolutely, it would not have been so drawn. A few lines would have expressed the conditional understanding which the respondent says the parties had arrived at; and if no more had been intended it is reasonable to suppose an informal memorandum would have been made, expressing this, and nothing else.

Nor do I find anything to support the second proposition, except in the testimony of Robert F. Smith, who was a member of the firm of Charles A. Pettit & Co. If his statement that the charter (in suit) was destroyed in his presence and with the assent of the libelant, was uncontradicted, or so corroborated that it could be accepted as true, it would sustain this branch of the defense. It seems reasonably certain, however, that the witness is mistaken. The respondent himself testifies that he, personally, destroyed the charter, (believing it to be of no further value;) he does not recollect the libelant being present, and does not suggest or pretend that he assented, or was aware of the intention to destroy it. It is plain from his testimony that he did not ask the libelant's assent; and that the libelant was unaware of his act, until told of it subsequently.

The libelant contradicts Mr. Smith flatly, by saying that he knew nothing of the destruction of the paper until told of it, when he desired to see it or have a copy. It seems plain that Mr. Smith is mistaken. There is nothing else, as before stated, which tends to support this branch of the defense. The respondent may have supposed at the time, that the second charter was to take the place of the first, as his testimony indicates; but there is nothing which tends to show that the libelant agreed that it should, or that he did not expect to hold the respondent to his contract. The circumstance that Pettit & Co. paid a small sum in addition to the amount which the second charter named as freight, to induce the libelant to take this cargo, does not seem to have any bearing on the question. The respondent was interested in procuring a cargo for the vessel and had an inducement to make the sacrifice involved in this payment,—independently of a settlement with the libelant. The carriage of this cargo necessarily reduced the damages which might result from his failure to comply with his contract; and besides, the procurement of this charter entitled his firm to commissions several times greater than the sum paid.

I will not consider the question of damages. It is possible none were sustained. If the second charter was as valuable as the first, so that the libelant made as much under it as he would have made under the first, and suffered no detention, he cannot complain. I will submit this question to a commissioner, (if the parties do not agree respecting it,) and will base the decree on his report, after it has been approved.

THE MAHARAJAH.

ENNIS *v.* THE MAHARAJAH *et al.*

(Circuit Court of Appeals, Second Circuit. December 14, 1891.

SHIPPING—LIABILITY FOR PERSONAL INJURIES.

Libelant, in the employ of a stevedore in loading a ship's cargo, was assigned to work a winch belonging to the ship. In so doing, his hand slipped from the handle of the crank-bar of the winch, and was caught and crushed in the cogs. The winch was of an old pattern, with unguarded cogs; but a person using it could protect himself from such an injury as occurred to libelant by a simple expedient, which libelant neglected. Libelant was aware of the dangers of the winch, but used it without complaint for several hours. *Held*, that he was not entitled to recover damages from the steam-ship for the injury received.

Appeal from the Circuit Court of the United States for the Southern District of New York.

In Admiralty. Libel by George Ennis against the steam-ship Maharajah for personal injuries. Libel dismissed. See 40 Fed. Rep. 784. Affirmed on appeal to the circuit court. Libelant appeals. Affirmed.

Robert D. Benedict, for appellants.

Wilhelmus Mynderse, for appellees.

Before WALLACE and LACOMBE, Circuit Judges.

WALLACE, Circuit Judge. While the libelant was driving a winch belonging to the steam-ship, his hand slipped from the handle of the crank-bar, and was caught and crushed in the cogs, whereby he sustained serious injury. He was in the employ of a stevedore who was engaged in loading the ship with cargo, and had been assigned by him to work the winch. He imputes his injuries to the negligence of the steam-ship, upon the theory that the winch was unsafe because the handle came dangerously near the cogs in operating the crank-bar, and the cogs were not covered by a guard, and also because the handle was slippery from grease and steam that escaped from defective parts of the machine. The proofs are that the winch was, in details of structure, substantially like those in general use at the time it was built, had been used on the steam-ship for a dozen years or more, and was not materially out of repair; that such winches are still in common use upon vessels, but an improved machine has been also introduced, constructed with a guard over the cogs; and that the handle was not exceptionally slippery on the day of the accident. It also appears that the libelant was familiar with winches, having operated them for 10 or 12 years, and that he had been operating this one nearly all day before the accident took place, and had not made any complaint about it. Manifestly the libelant undertook to use a machine which he knew would endanger his hand unless he exercised due care. Owing to a momentary relaxation of proper caution, he met with such an accident as he could have foreseen. His own conduct affords the best evidence that the machine was not exceptionally unsafe, inherently or casually. If it had been, he would not have used it without objection. All the elements of danger incident to its use were patent to him after he had used it a few minutes; yet he used it several hours, and, until he was hurt, without a complaint, or attempting to protect himself by the simple expedient adopted after the accident by the witness Smith. He has no just ground of complaint against the steam-ship. One who voluntarily undertakes to perform a service for another impliedly consents to assume the known risks incident to it, and cannot impute to the other any breach of duty or negligence founded solely upon the presence of such risks. The decree is affirmed. As the libelant sues *in forma pauperis*, the affirmance is without costs.

PACIFIC POSTAL TEL. CABLE CO. v. IRVINE *et al.*

(Circuit Court, S. D. California. January 19, 1892.)

1. JURISDICTION—DIVERSE CITIZENSHIP—PLEADING.

An allegation that plaintiff is a New York corporation, and that defendants are "residents" of California, does not show diverse citizenship.

2. TELEGRAPH COMPANIES—USE OF HIGHWAY.

The use of a public highway by a telegraph line erecting poles and wires thereon is an additional burden, and where the fee is in the adjacent owner cannot be taken without his consent, or by statutory proceedings, in which he is entitled to compensation.

In Equity. Motion for an injunction.

George Hayford, for complainant.

Wilson & Lamme, for defendants.

Ross, District Judge. There are two very substantial reasons why the motion for an injunction herein should not be granted:

1. Neither the original nor the amended bill shows diverse citizenship of the parties, upon which ground alone the jurisdiction of this court is invoked by the complainant. In the amended bill it is alleged that the complainant is a New York corporation, and that the defendants are residents of the state of California. But a person may be a resident of a state of which he is not a citizen. There are many residents of California who are not citizens of any state of the Union.

2. The papers submitted upon the motion show that the telegraph poles and wires in question were erected by complainant upon land, the fee of which is in the defendant James Irvine, and over which the right of way for a public road had been theretofore granted to the board of supervisors of the county in which the land is situate. It appears that the poles and wires were erected by complainant under a grant from the board of supervisors so to do, but without the consent and against the protest of the defendants. The right of way granted to the supervisors was for a public road, that is to say, a way to be used by the public for ordinary travel. Where the fee of the highway is vested in the public, there can be no valid legal objection to the grant by the public of a right to erect such poles and wires without regard to the adjacent property holders; but where, as here, the fee of the highway remains in the adjacent owner, and only its use for purposes of public travel has been granted; I think it clear that every use of the highway not in the line of such travel is an additional burden, for which the proprietor of the fee is entitled to additional compensation, and which cannot be constitutionally taken from him without his consent, except by proceedings regularly instituted and prosecuted according to law.

Motion denied.

v.49F.no.2—8

KANSAS & A. V. RY. CO. v. PAYNE *et al.*

(Circuit Court of Appeals, Eighth Circuit. January 25, 1892.)

1. RAILROAD COMPANIES—RIGHT OF WAY—COMPENSATION—INJUNCTION.

Complainants occupied a tract of land in the Indian Territory, fronting on the Arkansas river, opposite the city of Ft. Smith, and were engaged in operating a ferry at that point, under a license granted them by the Cherokee Nation. The K. & A. V. Ry. Co., in 1888, condemned a right of way through said tract of land to the river, under Act Cong. June 1, 1886, which authorized it to build a railroad through the Indian Territory, and to condemn land to be used for *railway, telegraph, and telephone purposes only*. On March 15, 1890, congress authorized the railway company to build a bridge across the Arkansas river, to be used as a *railway, passenger, and wagon bridge*. The last act recited that the building of the railway, as authorized by the act of June 1, 1886, involved the necessity of constructing the bridge. *Held:* (1) That, by the act of March 15, 1890, congress impliedly authorized the railway company to use its right of way as a road-way for ordinary travel, so far as might be found necessary to give vehicles and foot passengers access to its bridge. (2) That the grant of the right to build a bridge for the purpose of general travel did not infringe the ferry franchise. (3) That the complainants were not entitled to compensation for the loss of ferry patronage, as the building of the bridge and suitable approaches thereto for general travel had not cut off access to the ferry landing, or rendered it any less feasible than before to operate a ferry. (4) That a court of equity would not enjoin the railway company from permitting foot passengers and vehicles to travel over its right of way, to such extent as might be necessary to reach the bridge, for the reason that the damages, if any, incident to such use, might be recovered in an action at law, and were certainly very small, if not purely nominal; and, furthermore, because the railway company did not propose to intrude upon the possession of any lands occupied by the complainants.

2. SAME—RELIEF IN EQUITY.

A court of equity is not bound to grant an unconditional order of injunction when it can afford adequate relief in some other manner. Adequate relief would have been afforded in the present case by requiring the railway company to give a bond to pay such damages, if any, as might be eventually assessed against it in consequence of the alleged new use imposed on the right of way.

Appeal from the Circuit Court of the United States for the Western District of Arkansas.

Action by Gabriel L. Payne and Houston J. Payne against the Kansas & Arkansas Valley Railway Company to restrain the use of defendant's right of way for approaches to a passenger and wagon bridge. Defendant appeals from a decree for complainants. Reversed.

H. S. Priest and *Alex. G. Cochran*, for appellant.

John H. Rogers, for appellees.

Before CALDWELL, Circuit Judge, and SHIRAS and THAYER, District Judges.

THAYER, District Judge. This is an appeal from an order granting and continuing a preliminary injunction, as authorized by the seventh section of the act of March 3, 1891, creating this court. The sole question for our consideration is whether the existing injunction was properly awarded, and that is to be determined on the case made by the bill and answer, and the affidavits and exhibits filed in the lower court on the hearing of the motion. The record before us shows that the appellant is a corporation created and existing under and by virtue of the laws of the state of Arkansas, and that by an act of congress approved June 1, 1886, (24 St. p. 73,) it was authorized to locate, construct, and operate a railway, telegraph, and telephone line through the Indian Territory, be-

ginning on the eastern line of the territory, at or near the city of Ft. Smith, in the state of Arkansas, and running thence, in a north-westwardly direction, through the Territory to a designated point on its northern boundary line. To that end the railway company was empowered to take and use a right of way 100 feet in width through the Indian Territory, but it was provided, in effect, that the land taken should not be leased or sold, and that it should *only* be used in such manner and for such purpose as should be necessary for the construction and convenient operation of a *railroad, telegraph, and telephone line*. The act contained provisions requiring compensation to be made to the Indian tribes and to individual occupants for all such lands as might be taken, and it also prescribed a mode of condemnation to be pursued in certain contingencies; but, without going into detail, it will suffice to say that before said railway could be constructed through any lands held by individual occupants, "according to the laws, customs, and usages of the Indian nations or tribes through which it might be constructed," the act required that full compensation should be made to such occupants "for all property taken or damage done by reason of the construction of such railway." Under the authority so conferred, and prior to the institution of this suit, the appellant had located and constructed its railroad for a long distance through the Cherokee Nation down to a point on the north bank of the Arkansas river opposite the city of Ft. Smith. To reach the water at that point, it was compelled to condemn a right of way through a tract of land, fronting on the river, which was occupied and held by the appellees according to the laws, customs, and usages of the Cherokee Nation. Such condemnation proceeding was duly prosecuted in the mode prescribed by the act of June 1, 1886, and resulted in a final decree on January 14, 1888, granting to the railway company a right of way through the appellees' lands to the water's edge. The damages awarded in such proceeding appear to have been duly paid shortly after the final decree. By another act of congress, approved March 15, 1890, (26 St. p. 21,) the appellant was authorized to bridge the Arkansas river at or near Ft. Smith. The first section of that act is as follows:

"Be it enacted * * * that the Kansas & Arkansas Valley Railway, a corporation organized and existing under the laws of the state of Arkansas, and being empowered by act of congress approved June first, eighteen hundred and eighty-six, to construct its railway from a point on the eastern boundary line of the Indian Territory, at or near Ft. Smith, Arkansas, through said territory, in a north-west direction, to a point on the northern boundary line of said territory, with the power to build a branch as therein provided, the construction and operation of which said line of railway involves the necessity of constructing a bridge across the Arkansas river, in the Indian Territory, from a point at or near Ft. Smith, be, and the said Kansas & Arkansas Valley Railway, its successors and assigns, are hereby, authorized and empowered to construct said bridge across said river, and to maintain and operate the same as a railway, passenger, and wagon bridge."

After the approval of the act last referred to, the railway company proceeded to construct a bridge strictly in accordance with its provis-

ions. It was so located that the northern end of the structure abutted on, and lay wholly within, the limits of the right of way previously condemned through the lands of these appellees. The bridge had been about completed, and the railway company was constructing an approach thereto at the northern end, suitable for the use of wagons and foot-passengers, as well as for railway trains, when the work was arrested by the order of injunction from which this appeal was taken. The bill filed by the appellees to obtain an injunction alleged, among other things, that complainants occupied land fronting on the Arkansas river both above and below the northern terminus of the bridge; that a ferry privilege was "attached to said land;" that they had a license and the exclusive right from the Cherokee Nation to run a ferry across the river from that point to Ft. Smith, and had been engaged for years in running a ferry for the accommodation of wagons, pedestrians, stock, and general travel, and had a large sum of money invested in said ferry; that the railway company had begun to construct "on its right of way," at the north end of the bridge, a wagon road and approaches for vehicles, foot-passengers, and general travel, and had also begun to construct such approaches on the complainants' land outside of the limits of its right of way. It was further averred that the construction of said road-way for footmen and general travel, on the railway company's right of way, constituted an additional burden on complainants' land which was unauthorized by law, and that the construction of said road-way for general travel over the appellant's right of way, and over the complainants' land, "would utterly destroy the value of the ferry privilege attached to said lands, and cause almost a total loss * * * of the money invested in said ferry, ferry franchises, privileges, and other ferry property."

The foregoing statement discloses the material facts on which the appellees predicated their right to injunctive relief. The case is stated more at length in the opinion of the lower court. 46 Fed. Rep. 546. It is evident that the existing injunction cannot be sustained on the ground that the railway company had begun to construct approaches to its bridge suitable for foot-passengers and vehicles, outside of the limits of its right of way, and on lands at the time occupied by the appellees. The injunction as awarded is clearly too broad to be sustained solely on that theory, for the reason that it in effect restrains the railway company from permitting wagons and foot-passengers to have access to its bridge over any part of its right of way heretofore mentioned, which is the only method of gaining access to the bridge that seems to be possible. The right to an injunction, however, is not rested exclusively or mainly on the ground last suggested. It is contended in behalf of the appellees, that the railway company has no authority to permit any part of its right of way to be traveled over by vehicles or foot-passengers for the purpose of reaching the bridge, because that would be subjecting the right of way to a new use, without compensation; and, furthermore, that a court of equity, when appealed to, must of necessity award an injunction to prevent the imposition of such additional servitude. We are of the opinion, in view

of all the circumstances of the case, that an unconditional order, such as was entered, restraining the appellant from constructing on its right of way a suitable road-way for footmen and vehicles, and restraining it as well from permitting the public to use the same, should not have been granted, and cannot be upheld, even on the last-mentioned theory. We entertain no doubt that the railway company has the right to construct an approach to the north end of its bridge, provided it keeps within the limits of its right of way, and that the appellees have no just cause to complain, even though the approach is made wide enough, and suitable for general travel, as well as for railway trains. The width and character of the approach is no concern of the appellees, if it is located wholly on land heretofore condemned and in the possession of the railway company. What they really desire to prevent by these proceedings is the use of the right of way by wagons and pedestrians when the approach to the bridge is completed; it is this right of use which evidently forms the subject of contention.

By the act of March 15, 1890, *supra*, congress, as we think, impliedly authorized the railway company to use its right of way as a road-way for ordinary travel, so far as might be found necessary to give vehicles and foot-passengers access to its bridge. The railway company, therefore, has legislative sanction for permitting the new use of which the appellees complain. The act declares that the structure thereby authorized may be used as a "railroad, passenger, and wagon bridge;" and it recites, in substance, that the grant of the right to construct a railroad through the Indian Territory, by the previous act of June 1, 1886, "involved the necessity of constructing a bridge across the Arkansas river, in the Indian Territory, * * * at or near Fort Smith." From these provisions it must be inferred that congress intended that the north end of the bridge should abut against appellant's right of way where it intersected the Arkansas river, and form a mere prolongation of the right of way across the stream. Under these circumstances, we must presume that congress intended that the railroad right of way should be used by wagons and foot-passengers to such extent as might be found necessary to enable them to reach the bridge, and that appellant should permit such use. To indulge in any other presumption would be to hold that congress has granted a right that cannot be enjoyed, as there is no mode by which general travel can reach the bridge, without passing to some extent over the railroad right of way. Furthermore, the moving papers in the cause show that the railway company only proposes to use its right of way for general travel for a short distance back from the river, where the railroad crosses a public highway, and that the opening of the bridge for the use of foot-passengers and vehicles, as well as for railroads, is a matter of such great public concern that the citizens of Ft. Smith have already donated a considerable sum towards the erection of the structure. It must also be borne in mind that the alleged new use to which the appellant proposes to devote a portion of its right of way in no wise interferes with the possession of any lands now held and occupied by the appellees; neither does it alter any of the physical aspects of the place. The new

servitude imposed on the right of way will not render it any less feasible than before to operate a ferry across the river, as it is not alleged, or even suggested, that any proposed changes made along the right of way to adapt it to general travel will obstruct access to the ferry landing, either on the land or water side, or impair any other riparian right. In short, the appellees, in their bill, have not alleged any loss or inconvenience as liable to ensue from the new use, except that the opening of the bridge for the accommodation of general travel will lessen the patronage of the ferry; and this is evidently a species of damage against which neither a court of law or equity can afford the appellees any protection. It is a damage not due to the fact that by destroying some riparian right of the appellees, or by obstructing the approaches to the ferry landing, the railway company has rendered it less feasible to operate a ferry; but it is a damage that is wholly due to the fact that a new means of crossing the river has been authorized by congress, which enters into competition with the ferry, and renders the business less profitable. It is hardly necessary to add that congress was not bound to provide compensation for a consequential injury of that character, when it authorized the construction of a bridge, as the ferry franchise was not infringed or taken, within the meaning of the constitution, by building the bridge. And the same proposition would hold good if the appellees had had a special franchise to operate a ferry for a term of years, instead of a ferry license from the Cherokee Nation, renewable annually, which is all that the present record discloses. *Parrott v. City of Lawrence*, 2 Dill. 332; *Bush v. Bridge Co.*, 3 Ind. 21; *Hartford Bridge Co. v. Union Ferry Co.*, 29 Conn. 210; *Charles River Bridge v. Warren Bridge*, 11 Pet. 420.

In view of the considerations to which we have adverted, we are satisfied that the complainants below were not, as a matter of right, entitled to injunctive relief, and that the existing injunction should not have been granted, even though we concede, for the purposes of the present decision, that the additional use to which the railway company proposed to devote its right of way was of such character as entitles the complainants to some additional compensation. It was undoubtedly a matter of much public concern to the citizens of Ft. Smith and the Indian Territory that vehicles and foot-passengers should be allowed to use the bridge as soon as possible, and that necessitated the use to a limited extent of appellant's right of way. When congress authorized the latter use (as we think it did) it was not incumbent on it to require compensation for the additional servitude to be paid in advance of its actual enjoyment by the public, even if some additional compensation is recoverable. *Cherokee Nation v. Railway Co.*, 135 U. S. 641-659, 10 Sup. Ct. Rep. 965. Furthermore, the appellees have a right of action at law to recover such additional compensation as they may be entitled to. *Railway Co. v. Twine*, 23 Kan. 591; *Railroad Co. v. Baker*, 45 Ark. 252; *Lewis, Em.* Dom. § 623, and citations. But the most important consideration bearing on the right to an injunction is the fact that, in the exercise of the authority granted to it by congress, the railway company does not propose to intrude upon the possession of any lands now occu-

pied by the appellees, or to do an act that will occasion injury to any considerable extent. The damages, if any, to which the appellees can lawfully lay claim, are certainly very small, if not purely nominal. We recognize the rule that legal rights of every description are entitled to protection, no matter how small their money value may be, but a court of equity is not bound to afford protection by an unconditional order of injunction, when adequate relief may be afforded in some other manner, whether the right involved is of great or little value. *Bassett v. Manufacturing Co.*, 47 N. H. 437; *McElroy v. Kansas City*, 21 Fed. Rep. 257; *Erie R. Co. v. Delaware, L. & W. R. Co.*, 21 N. J. Eq. 291, 292. We are of the opinion that the circuit court would have gone quite far enough in the case at bar, had it required the appellant to give a bond in a reasonable sum, not exceeding \$2,500, conditioned to pay such damages, if any, as the complainants below might thereafter be adjudged to be entitled to, by any court of competent jurisdiction, in consequence of the alleged additional servitude imposed or threatened to be imposed on its right of way. Entertaining these views, the order of injunction appealed from is hereby vacated and annulled, the existing injunction is dissolved, and the cause is remanded to the lower court, with directions to take a bond for the protection of the appellees not exceeding the amount, and with conditions as above indicated.

KANSAS & A. V. RY. CO. v. LE FLORE.

(Circuit Court of Appeals, Eighth Circuit. January 25, 1892.)

Appeal from the Circuit Court of the United States for the Western District of Arkansas.

H. S. Priest and *Alex. G. Cochran*, for appellant.

John H. Rogers, for appellee.

Before CALDWELL, Circuit Judge, and SHIRAS and THAYER, District Judges.

THAYER, District Judge. This is an appeal from an order granting and continuing a preliminary injunction. The same questions arise that have been fully considered and determined at the present session in the case of the same appellant against Gabriel L. Payne and Houston J. Payne. 49 Fed. Rep. 114. For the reasons stated in the opinion on file in the last-mentioned cause the order of injunction appealed from is vacated and annulled, the existing injunction is dissolved, and the cause is remanded to the lower court, with directions to take a bond with sufficient sureties from the appellant, in a sum not to exceed \$2,500, conditioned that the appellant will pay such damages, if any, as the appellee may hereafter be adjudged to be entitled to by any court of competent jurisdiction, in consequence of the alleged additional servitude imposed, or threatened to be imposed, on the appellant's right of way.

In re FIRST NAT. BANK OF ST. ALBANS.

(Circuit Court, D. Vermont. December 24, 1891.)

1. NATIONAL BANKS—MARRIED WOMEN AS SHAREHOLDERS—LIABILITY FOR ASSESSMENTS.

Married women, who are permitted by the laws of the state in which they reside to become shareholders in national banks; are liable to assessments thereon under the national banking laws.

2. EXECUTION—VALIDITY—JOINT DEBTORS.

Where a judgment is against a husband and wife jointly, the fact that execution is issued against the wife alone is an irregularity not within the reach of a writ of error, and, when no motion is made in the trial court to correct it, it must be considered as valid.

3. EXECUTION SALES—REDEMPTION OF LANDS—VOLUNTARY PAYMENT.

Under Laws Vt. 1884, No. 189, § 10, permitting the debtor to redeem within six months lands sold on execution, by paying to the officer the amount for which they were sold, with interest, such a payment is voluntary, and constitutes a waiver of all defects in the proceedings.

4. SURVIVAL OF ACTIONS—DEATH PENDING APPEAL.

A decree founded upon a tort will survive though the debtor die pending an appeal in which a *supersedeas* bond has been given.

In Equity. In the matter of the receivership of the First National Bank of St. Albans. Heard on petition by the receiver for leave to accept a proposal to compromise, together with a petition to sell assets in case the proposal is not approved. Proposal disapproved. For former reports, see 35 Fed. Rep. 463; 39 Fed. Rep. 403; 40 Fed. Rep. 413; 41 Fed. Rep. 752; 43 Fed. Rep. 700.

Edward A. Sowles, Henry C. Adams, and T. W. Moloney, for petition.

Albert A. Hall, H. Charles Royce, Geo. A. Ballard, Henry A. Burt, Jed P. Ladd, and Willard Farrington, opposed.

WHEELER, J. This bank has long been in the hands of a receiver appointed by the comptroller of the currency. The statute (section 5234) provides that the receiver, "upon the order of a court of record of competent jurisdiction, may sell or compound all bad or doubtful debts; and, on a like order, may sell all the real and personal property of such association, on such terms as the court shall direct." This receivership now has cash in treasury and bank about \$22,500; real estate, which came from mortgages formerly belonging to the estate of Hiram Bellows, through Edward A. Sowles, executor, worth about \$6,500; redeemable leases from the same source in the same way, worth about \$4,500; a judgment of this court against Margaret B. Sowles and Edward A. Sowles for about \$50,000, apparently satisfied to about \$30,000, on which a writ of error without *supersedeas* is now pending in the supreme court of the United States; real estate sold on execution against her on this judgment to the amount of about \$10,000; a decree of this court against Oscar A. Burton for about \$15,000, on which an appeal is now pending in the supreme court of the United States; and poor paper of one Marshall to the amount of about \$100,000, for which \$2,700 is offered. The claims amount to about \$290,000, besides one in favor of Margaret B. Sowles of about \$26,000, established by decree of this court since the payment of divi-

dends on the others. Margaret B. Sowles and Susan B. Sowles, with others, making claims upon the assets, offer, in compromise of the whole, to pay, in substance, a sum sufficient to make a further dividend of 7 per cent. to all creditors but Margaret B. Sowles (about \$20,300) for all of these assets, without claim by her for further dividend. This proposal has been submitted by the receiver, under direction of the comptroller, to this court, under that statute, with a petition for leave to sell all the assets if the proposal is not approved. Both have been fully heard on full notice to all the creditors, and appearance and expression of wishes by nearly all. These expressions are not sufficiently unanimous to be controlling.

The question is, what, in view of all the circumstances, is best for the creditors. The cash on hand would pay the 7 per cent. dividend offered to all the creditors but Mrs. Sowles; the judgment against her yet remains to meet any dividend to her; and more than \$2,000 would be left. The proposal, therefore, in reality, is that the receiver give up all the assets but the cash on hand, and pay upwards of \$2,000 for a release of the claims to that. If the judgment against Mrs. Sowles should be reversed, and final judgment in that suit be rendered in her favor, the offset would fail, and she would be entitled to a dividend of about \$6,500 from this or other money, to make her equal with the other creditors on past dividends. About \$2,200 of this money came from her to redeem real estate sold on the execution against her, and about \$2,200 more came from the bid on a farm sold on the same execution. The lien by attachment on all the real estate sold on execution is claimed to have been lost by lapse of time between the judgment and sale. The validity of that judgment, or of the claim against her for the assessment on her stock in the bank, on which the judgment is founded, and on which another may be had if this should be reversed for some technical error, is very material.

The principal question about this is whether married women are liable to such assessments. This court held that they were. *Witters v. Sowles*, 32 Fed. Rep. 130. After the verdict on which this judgment was rendered, and before the decision on the motion for a new trial, the supreme court of the United States held that they were, in equity, when by the law of the place they could become such shareholders. *Bundy v. Cocke*, 128 U. S. 185, 9 Sup. Ct. Rep. 242. They may become such shareholders in Vermont, and the motion for a new trial was overruled. *Witters v. Sowles*, 38 Fed. Rep. 700. Since then the supreme court has fully decided, in a case quite similar, that they are liable at law. *Keyser v. Hitz*, 133 U. S. 138, 10 Sup. Ct. Rep. 290. These decisions seem to settle the validity of the claim on which the judgment against her was founded, and to go far towards settling the validity of the judgment.

A suggestion is made that the suit was not ended as to Edward A. Sowles, the husband, and that the judgment against the wife was against her alone, and erroneous, but it is not well founded. The issue for the jury on the plea of both was whether she was a stockholder, and legally holden for the assessment. The verdict followed that issue, and was that she was. The judgment for the plaintiff on the verdict was on the plea

of both, and against both,—the one as much as the other. By some inadvertence, execution against her alone was taken out and levied. That was an irregularity, not within reach of the writ of error, and which might have been corrected on motion in her behalf. As it was, and was left by all to stand, it had the judgment against her, although against him also, behind it; which would probably amply support it. If that judgment should be reversed, another in the same suit would quite likely be obtained, to which the lien by attachment would, by the laws of the state, adopted by the rules of this court under the laws of the United States, be carried, and be capable of being effected by new levy in due season and proper form. The statutes adopted, regulating sales of real estate, provide that "the debtor may redeem the premises so sold by paying to the officer the amount for which the same was sold, with interest thereon," at any time within six months. Laws Vt. 1884, No. 139, § 10. Such payment on the debtor's own debt would seem to be clearly a waiver of all defects in the proceedings, voluntary, and not recoverable back on account of them. *Sowles v. Soule*, 59 Vt. 131, 7 Atl. Rep. 715. The purchaser of the farm would, doubtless, if his title should fail from defects in the proceedings, about which no opinion is now intimated, have a right to his money back; but, if that should be paid back out of the money on hand, enough would be left to pay the 7 per cent. offered.

Claims of unpaid legatees under the wills of Hiram Bellows and Susan B. Bellows upon the funds of the bank, redeemable leases, and lands which came from mortgages belonging to the estate of Hiram Bellows, are set up as incumbrances, which the funds to pay the 7 per cent. to creditors would be relieved of, and those who would take the rest of the assets would have to provide against. The assets of those estates, on which these claims would arise, were, under the laws of the state, personal assets in the hands of Edward A. Sowles, executor of both wills. After they had been converted by him, a final decree of the probate court, on notice to all, settling his accounts, decreeing payment of the legacies by him, and leaving these assets in his hands, was made, was not appealed from by any, and became binding upon all. He mortgaged and conveyed them to the bank. Susan B. Bellows was residuary legatee under the will of Hiram Bellows, and Margaret B. Sowles under the will of Susan B. Bellows. Margaret B. Sowles, as such legatee, brought suit against the receiver for this same property, and failed to make good any claim to it. *Sowles v. Witters*, 39 Fed. Rep. 403. This decision was in accordance with those of the supreme court of the state upon the same decree of the probate court. *Bellows v. Sowles*, 57 Vt. 411; *Weeks v. Sowles*, 58 Vt. 696, 6 Atl. Rep. 603. The claims of the other legatees must be similar to hers in these respects, and may also have become unfavorably affected by the lapse of time beyond the period of the statute of limitations.

The decree against Burton is founded upon his assent as director to an unlawful loan of the money of the bank to Edward A. Sowles. That this liability might not survive if he should not live till a decision upon

it by the supreme court is suggested. But the liability is now fixed by a decree. The appeal does not vacate the decree. The operation of it is suspended by the *supersedeas* founded on the bond for payment of the decree if it is affirmed. *Hovey v. McDonald*, 109 U. S. 150, 3 Sup. Ct. Rep. 136. The liability on this bond would survive, and would be enforceable against the sureties as well, if the decree should be affirmed. He has offered \$4,000 for this liability. The real estate sold on the execution against Mrs. Sowles may or may not be holden. Whether it is or not, the value of the assets appears to be much beyond the amount offered.

A fair compromise of really disputable claims, to end litigation, would doubtless be wise; but this review of the assets of the bank and of the claims made upon them leads to the conclusion that the acceptance of this proposal would not be any such fair compromise, but would be a surrender of the rights of the bank to a large and unjustifiable extent.

The petition for leave to accept the proposal is denied.

CLAPP v. CLARK *et al.*

(Circuit Court, S. D. New York. February 5, 1892.)

1. EXECUTORS AND ADMINISTRATORS—SETTING ASIDE ASSIGNMENT OF TESTATOR.

An executor may maintain a suit in equity to set aside a general assignment made, and judgment suffered, by testator, on the ground of incapacity, undue influence, and fraud against creditors, under Laws N. Y. 1880, c. 245, § 1, which provides that any executor may, for the benefit of creditors, disaffirm, treat as void, and resist all acts done, transfers and agreements made, in fraud of the rights of creditors.

2. SAME—EFFECT OF JUDGMENT SUFFERED BY TESTATOR.

The assignment having failed, and the judgment standing alone not constituting an excessive preference of creditors, the statute has no application thereto; and therefore the bill should be dismissed as to the judgment.

In Equity. Suit by John H. Clapp, executor of George F. Damon, against William Clark and others.

John H. Clapp, pro se.

Chas. B. Meyer, for defendants.

WHEELER, J. This suit was brought to set aside a mortgage and general assignment made by the testator, and a judgment against him, for incapacity, undue influence, and fraud against creditors, and to have the preferences created by the mortgage and judgment, as parts of the assignment, limited to one-third of the value of the property.

Question is made about the right of the orator, as executor, to such relief, in either aspect. If the assignment was valid the property would vest in the assignee for the benefit of the creditors, and no right to it remained in the testator to pass to the executor; and he does not appear to have any interest to have the preferences, however created, cut down. That right would seem to remain to the creditors injured by the preferences.

But chapter 314 of the Laws of 1858 of New York, as amended by chapter 245 of the Laws of 1880, § 1, provides that "any executor * * * may, for the benefit of creditors or others interested in the estate, * * * disaffirm, treat as void, and resist all acts done, transfers and agreements made, in fraud of the rights of creditors. * * *" This seems to give the orator the full right to attack the conveyances and judgment.

Much and repeated consideration of the evidence leads to the conclusion that the testator was too much broken and too weak for the transaction of such business, and was overpersuaded, while in that condition, to execute the mortgage and assignment, unfairly to the other creditors; and that these instruments are for that reason invalid. The judgment appears to have been entered in the regular course of judicial proceedings for the recovery of a valid and just debt. Under such circumstances the lack of capacity would not avoid it, especially in a collateral proceeding. If the assignment should stand, the judgment might be avoided, as a part of it, to the extent that it would create too large a preference under the statutes of New York, limiting preferences in general assignments. Laws 1887, c. 503, § 30; *Berger v. Varrelmann*, (N. Y. App.) 27 N. E. Rep. 1065. But, as the assignment fails, this statute does not apply to the judgment; and it is left to stand as at common law, wherein the collection of a just debt is lawful, although other creditors may be left. *White v. Cotzhausen*, 129 U. S. 329, 9 Sup. Ct. Rep. 309. Upon these views the mortgage and assignment should be set aside, and the bill dismissed as to the judgment. As the defendants, who are plaintiffs in the judgment, and who are the real parties in interest, prevail as to part, the costs, which are discretionary in equity, should be to some extent apportioned. Let a decree be entered, setting aside the mortgage and assignment, and dismissing the bill of complaint as to the judgment, with two-thirds of his costs to the orator.

BRUNGGER v. SMITH.

(Circuit Court, D. Massachusetts. January 6, 1892.)

1. ATTORNEYS—PRIVILEGED COMMUNICATIONS.

The doctrine of privileged communications does not apply to testimony of a solicitor of patents who is not an attorney at law.

2. SAME—SOLICITOR OF PATENTS.

A solicitor of patents, who is not an attorney at law, is not privileged from testifying under Rev. St. § 4908, which provided that a witness on the trial of an interference need not "disclose any secret invention or discovery made or owned by himself."

3. WITNESS—REFUSAL TO TESTIFY—ATTACHMENT.

In the case of the refusal to testify of a witness subpoenaed on the trial of an interference, the remedy is by petition for an attachment for contempt, and not for an order to compel the witness to answer the questions put to him.

At Law.

Petition of Herman Brungger for an order of court directing the witness, Charles F. Brown, to answer certain questions put to such witness

on the trial of the interference No. 14,195, between the applications Nos. 349,621, 349,622, and 349,623, of Herman Brungger, filed April 26, 1890, and the application No. 307,277, of Sidney Smith, filed March 7, 1889. Brown refused to answer the questions put to him on the ground that the facts and matter inquired about were privileged as communications between client and counsel. In the answer to the petition it was alleged:

"*First.* That said Brown is a solicitor of patents in good standing, and recognized as such by the commissioner of patents, and acts in a professional capacity when employed as such solicitor by claimants and applicants for patents before the United States patent-office. His relations to his client are precisely the same as those between a regular practitioner before the courts and his client, inasmuch as the nature of his employment requires professional skill, integrity, and secrecy; and he is therefore privileged from disclosing any professional matters, information, or conversations within the scope of such employment. *Second.* That said witness, acting in a professional capacity as solicitor of patents, employed by Sidney Smith, the party to this interference, as such, cannot be compelled to disclose any secret invention wherein his client is protected by Rev. St. U. S. § 4908. *Third.* That this respondent has not waived, or in any manner has he intended to waive, his privilege herein, as alleged by the counsel for Brungger. *Fourth.* This respondent denies that said questions are material in this case, or proper rebuttal, but charges and says that the examination of this witness is for the sole purpose of probing into the contents of a certain application for patent of this respondent now pending, not in this interference, and in which said witness is the solicitor, attorney, and legal adviser. *Fifth.* The very nature or character or scope of the question which the witness refused to answer is within the rule of privileged communications, though it calls for a fact."

H. T. Munson, for petitioner.

R. A. Sprague, opposed.

COLT, Circuit Judge. The doctrine of privileged communication is confined to cases of counsel, solicitor, and attorney. The witness in the present case testifies that he is not an attorney at law; and therefore, under well-settled rules, he cannot invoke this privilege. This witness is not privileged from answering under the last paragraph of section 4908, Rev. St., because he does not come within the description therein set forth.

The proper form of application to enforce obedience to a subpoena issued under section 4906, Rev. St., is a petition for an attachment for contempt. Upon the pleadings, as here presented, the court will not enter a formal order. The motion and answer in this case disclose to the court the existing facts on the examination of the witness before a commissioner of this court, and this rescript will inform the parties and the witness as to the views of the court upon the questions presented.

BLEWETT v. FRONT-STREET CABLE RY. CO.

(Circuit Court, D. Washington, N. D. December 7, 1891.)

1. BONDS—ACTIONS—MEASURE OF DAMAGES—PENALTY.

Plaintiff conveyed property to a trustee for defendant as part of a bonus to aid in the construction of a cable road of which defendant was a promoter, and took from it a bond in a penalty equal to the value of the land conveyed, conditioned for the construction of the road. The road was not constructed, and plaintiff sued on the bond. *Held*, that he was entitled to recover the whole of the penalty, as the value of the property is a proper measure of damages for the breach of the contract in consideration of which it was conveyed.

2. DEEDS—DELIVERY—ESCROWS—PAROL EVIDENCE.

Where the deed was duly delivered to such trustee, and purported to vest the title unconditionally, parol evidence is not admissible to show that it was delivered in escrow, and was not to take effect unless defendant secured an additional bonus, but was to be returned to plaintiff, and the bond thereupon to be void, if the road was not constructed on account of failure to secure such additional bonus.

3. BONDS—ACTIONS—EVIDENCE—HARMLESS ERROR.

The admission of evidence on the part of plaintiff that the land was conveyed in consideration of the bond, and for no other consideration, is without prejudice to defendant, since it in no manner varies the terms of the transaction as they appear on the face of the bond.

ON REHEARING.**4. SAME—DAMAGES—INTEREST.**

Although the damages allowed were measured by the amount of the penalty, they must be considered as unliquidated until fixed by the judgment, and hence plaintiff was not entitled to interest either from the date of the breach of the condition, or from the commencement of the action; especially as the land was unimproved and yielding no income.

At Law. Action by Edward Blewett against the Front-Street Cable Railway Company. A jury was waived, and the trial was by the court.

Burke, Shepard & Woods, for plaintiff.

J. C. Haines, for defendant.

HANFORD, District Judge. This is an action at law to recover damages upon a penal bond containing the following recital and conditions:

"The condition of the foregoing obligation is such that whereas, the said Edward Blewett has granted and conveyed to Jacob Furth, assignee [trustee] of the said Front-Street Cable Railway Company, the following described property, * * * as a part of a bonus given to secure the building of a cable road hereinafter mentioned: Now, therefore, if the North Seattle Cable Railway Company, a corporation organized and existing under the laws of the state of Washington, its successors and assigns, shall, within ten (10) months from the date of these presents, construct, ready for operation, a double-track cable railway of the same gauge as the railway of the said Front-Street Cable Railway Company, and operate cars both ways thereon, from the present terminus of the said Front-Street Cable Railway * * * to a point near the outlet of Lake Union, in the Denny & Hoyt addition to Seattle, then this obligation shall be void; otherwise to be and remain in full force and virtue."

The defendant admits the execution of the bond, and admits the breach of it. The only controversy is as to the amount of damages recoverable. Plaintiff alleges in his complaint that the property described in the bond was in fact conveyed to the trustee named by valid deeds

delivered to him, for and in consideration of the giving of said bond, and for no other consideration, and on the trial he was permitted to prove these averments. The two deeds given are in evidence, having been produced by the grantee, who testified that he received them from the plaintiff. They appear to have been legally executed and acknowledged by the plaintiff and his wife, and purport to convey the property absolutely and unconditionally. The plaintiff's evidence on this point was offered in aid of the bond, and is confirmatory, rather than contradictory, of the recital, and was intended to show a gratuitous transfer of the property induced by the giving of the bond, and the value thereof, as a basis for fixing the measure of damages. The penalty of the bond is \$18,000, and that sum is the value of the property conveyed to Mr. Furth by the plaintiff, and he contends that any less sum will not be compensation to him for his actual loss. The defendant offered to prove that the plaintiff has not sustained a loss by a transfer of property; that, instead of a complete transfer of the title, the deeds were delivered in escrow, with the verbal understanding between the parties that, if the defendant should be unable to secure a sufficient bonus or subsidy in lands or money to justify the construction and operation of the proposed line of railway referred to in said bond, said deeds should be returned to the plaintiff by Mr. Furth, and thereupon said bond should be null and void; that a sufficient bonus or subsidy was not secured, and Mr. Furth has offered to and is now willing to return said deeds, and restore said property unincumbered to the plaintiff. The allegations of these facts in the defendant's answer were, on motion, stricken out, and the evidence offered on the trial to the same effect was excluded. The contention on the part of the defendant is that, for the purpose of meeting the plaintiff's claim as to the measure of the damages, and the oral evidence which he was permitted to introduce as to the facts of the transaction, the evidence offered should have been admitted.

The position assumed, that the deeds could, under any circumstances, be shown by evidence to have been delivered to the grantee in escrow, is certainly untenable. In the conveyance of real property, the last act essential to complete a transfer is delivery of the deed to the grantee. After an intentional voluntary delivery of the deed, the grantor is completely divested of his title, and his ownership cannot be restored without the execution and delivery of a proper deed of conveyance in the same manner as if he had been theretofore an entire stranger to the title. A delivery in escrow must be to a stranger or disinterested party, with authority to hold the instrument until performance of some particular condition necessary to entitle the grantee to an absolute delivery. 6 Amer. & Eng. Enc. Law, 858; *Moss v. Riddle*, 5 Cranch, 351; *Fairbanks v. Metcalf*, 8 Mass. 230; *Cocks v. Barker*, 49 N. Y. 110; *Beers v. Beers*, 22 Mich. 42; *Johnes v. Shaw*, 67 Mo. 667; *McCann v. Atherton*, 106 Ill. 32. Unless the parties intended that the railway should be built or that the property given by plaintiff as a bonus should be paid for, there is no reason apparent for the making of this bond; and, whatever may be the real fact, it is not permissible in a court of law to say that the actual agreement in any

case was to the effect that a failure to perform the conditions of a written contract should give the party in default a right to insist upon a rescission of it, and to immunity from the consequences stipulated in the written instrument. Admission of the oral evidence introduced by the plaintiff, if an error of the court, was not prejudicial to the defendant, since it is not matter different or additional to what appears upon the face of the bond itself, nor at variance with it in any particular. In my opinion, this evidence was wholly unnecessary in the case; but no harm was done by its introduction, and it could not have the effect to open the way for the introduction of rebutting testimony going to the extent of releasing the defendant from the binding force of its obligation. It is an incontestable fact that the plaintiff conveyed \$18,000 worth of property to a trustee for the use and benefit of the defendant, to aid in the construction of a certain railway of which the defendant was the promotor, and the railway has not been constructed. What amount of benefit plaintiff might have derived from the completion and operation of the projected railway is a matter of mere conjecture. It seems fair, however, to assume that the amount of his loss by the failure to carry out the project is at least equal to the amount which he was willing to contribute as a subsidy in aid of it, and a rule making the value of property which the defendant has received by the contract the measure of damages for the breach of its conditions is not a harsh one. Findings may be prepared in accordance with this opinion, and a judgment will be awarded in favor of the plaintiff for \$18,000, and costs.

ON REHEARING.

(December 26, 1891.)

HANFORD, District Judge. In his complaint the plaintiff prays for interest on the full amount of the penalty of the bond in suit from the time of the breach of the condition, and his counsel now earnestly contends for an allowance of such interest from the date of the commencement of the action as further damages for the wrongful withholding of the money pending the litigation. But it is my opinion that \$18,000 is the limit of the damages which he can recover. There are two reasons for this: *First*. That is the sum fixed by the contract as the utmost liability of the defendant. The amount of the actual liability has not been fixed or agreed to by the parties, and could not be known until it was ascertained and adjudged by the court. Prior to judgment there is no particular sum due, which the defendant can be charged with having wrongfully withheld. *Second*. The value of the property which the plaintiff has parted with is in this case the measure of damages. I have a right to infer from facts in evidence, and because the contrary is not alleged, that the property is unimproved and yielding no income; therefore, by awarding him the full value of the property, with interest from the date of the judgment, ample justice is done to the plaintiff, for he is thereby fully compensated for his actual loss.

NORTHERN PAC. R. CO. v. SANDERS *et al.**(Circuit Court of Appeals, Ninth Circuit. January 25, 1892.)*

RAILROAD GRANTS—RESERVATIONS—LOCATION OF MINING CLAIMS.

Act July 2, 1864, granting land to the Northern Pacific Railroad Company to aid in the construction of its road, which creates a reserve of the odd-numbered sections of lands "not mineral," within the limits defined; "which are free from pre-emption or other claims or rights," from the time of filing a plat of the general route in the general land-office, does not prevent persons taking up mining claims in the reserved lands after the filing of such map, and before the definite location of the road; and it does not avail the railroad company that the lands so located under mining claims are in fact non-mineral lands. *Buttz v. Railroad Co.*, 7 Sup. Ct. Rep. 100, 119 U. S. 55, and *Denny v. Dodson*, 32 Fed. Rep. 899, distinguished. 47 Fed. Rep. 604, affirmed.

Error to the Circuit Court of the United States for the District of Montana.

At Law. Ejectment by the Northern Pacific Railroad Company against Junius G. Sanders and others. From a judgment for defendants overruling plaintiff's demurrer to the answer plaintiff brings error. Affirmed.

Fred. M. Dudley, for plaintiff in error.

Wilbur F. Sanders, for defendants in error.

Before HANFORD, HAWLEY, and MORROW, District Judges.

HANFORD, District Judge. This action was brought by the Northern Pacific Railroad Company to recover possession of section 21, township 10 N., of range 3 W., in the state of Montana. By an amended complaint the plaintiff has pleaded the grant of lands made to it by act of congress, and the facts upon which it relies to establish its title to the premises as part of said grant. To said amended complaint the defendants answered, admitting all the facts alleged by the plaintiff, but to avoid the effect of such admissions, and to controvert the legal conclusions contended for by the plaintiff, set up by affirmative allegations certain additional facts. A general demurrer to this answer was overruled; and thereupon, the plaintiff having elected to not plead further, judgment was given for the defendants. By writ of error the case has been brought to this court for review. The portions of the act of congress which must be considered in deciding this case are here quoted:

"Sec. 3. That there be, and hereby is, granted to the Northern Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores over the route of said railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of said

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road is definitely fixed; and the plat thereof filed in the office of the commissioner of the general land-office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections."

"Sec. 6. That the president of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale or entry or pre-emption before or after they are surveyed, except by said company, as provided in this act."

The material facts of the case, as stated in the pleadings, are as follows: The land in controversy is an odd-numbered section of non-mineral land within the limits of the grant. On the 21st day of February, 1872, the plaintiff filed a map of its general route in the general land-office, and on the 22d day of April, 1872, the commissioner of the general land-office, under the direction of the secretary of the interior, by a circular directed the local land-office for the Helena district, in which said land is situated, to withdraw from sale or location, pre-emption or homestead entry, all the odd-numbered sections of public lands within 40 miles on each side of the line of general route of the plaintiff's road, as fixed by the filing of said map. On the 6th day of July, 1882, the portion of the line of the plaintiff's road opposite to the land in controversy was definitely located. On different dates subsequent to receipt at the local land-office of the circular above mentioned, and prior to the definite location of the line of plaintiff's road, persons named in the answer located all of this section 21 as mining ground, and endeavored to acquire title thereto from the government under the laws relating to mineral lands of the United States. To show the nature of these supposed mining claims, and what was done in asserting and endeavoring to maintain them, we copy a portion of the answer:

"On the 2d day of August, 1880, Theodore Kleinschmidt, Edward W. Knight, Henry M. Parchen, Charles K. Wells, George P. Reeves, David H. Cuthbert, Cornelius Hedges, and Stephen E. Atkinson, each being then and there a citizen of the United States, and each having theretofore filed upon a certain separate twenty acres on the north-east quarter of said section according to the laws of the territory of Montana and the mining usages and customs then in force in the unorganized mining district in which said land was situated, and being in all respects qualified to enter mineral land under the laws of the United States, did enter into the possession of, and did enter in the United States land-office, and did file upon said quarter of said section in the land-office of the United States at Helena, Montana, in which district said land was situated, as mineral land, and did apply for a patent therefor, and did then and there, and in due form, file an application to purchase said premises as such mineral land, and did then and there make oath before the register and receiver of said land-office that they had discovered minerals thereon, and had located the said quarter section as mineral land, and claimed the same as such for the valuable mineral deposits therein, and that they had complied with chapter 6 of title 32 of the Revised Statutes of the United States, which said application was so filed in the land-office of Helena, Mon-

tana, under the oath of the said applicants, showing that they had complied with the law aforesaid, and described the same by legal subdivision; and they did then and there, prior to filing said applications, post in a conspicuous place on the claim embraced therein, a copy of said application and notice hereinafter mentioned, which said notice did then and there remain conspicuously posted on said premises during the period of publication hereinafter mentioned; and they did then and there file with the said application in said land-office an affidavit of two persons that such notice had been so duly posted, and did then and there file a copy of said notice in the land-office with the register and receiver thereof, and by said application they requested to be permitted to purchase the same as mineral land; and they then and there undertook and offered to maintain by proof that the said premises were valuable for the gold contained therein, and were mineral lands of the United States, to which they were entitled under the laws thereof; and that they had done the requisite amount of work thereon, to-wit, work of the value of five hundred dollars, and were entitled to a patent therefor; which said application and affidavit and notice were then and there entered of record in said United States land-office by the register and receiver thereof, and the said application was set for a hearing upon their said proofs to be produced, and notice of such hearing in due form of law was given by the register and receiver in the proper newspaper designated for that purpose, and was duly published therein, which said entry, application, affidavits, and notice were in all respects formal according to law, and the said application was set down for a hearing in said land-office by the register and receiver thereof at the expiration of the period of time prescribed in said notice; and, at the date at which the same was so set, the said plaintiff having theretofore filed a protest against the perfection of the said entry, as claimed by said plaintiff, that the same was not mineral land or commercially valuable for the gold or other precious metals therein contained, the said application was continued thereafter by the consent of parties or otherwise, from time to time, and was asserted and remained pending on the 6th day of July, 1882; and thereafter the said applicants, on said 6th day of July, 1882, and thereafter as theretofore, averring their ability to prove that the said land was commercially valuable for the gold therein contained, and was mineral land within the definition of that phrase contained in the act granting lands to said plaintiff mentioned in said amended complaint, and the said applicants were on the date last aforesaid claiming, affirming, and undertaking to maintain on their application for said premises in said land-office that the same was mineral land of the United States, to which they were entitled thereunder, and was not land in quality such as was described in the grant to the said plaintiff."

The answer makes similar averments as to the other three-quarters of the section, and further alleges:

"And as to the said proceedings, and each and all of them, in the office of the county clerk and recorder of said county of Lewis and Clarke, Montana, in which county said premises are situated, and in the United States land-office at Helena aforesaid, they were in the form prescribed by law for the claim and entry of placer mining claims; and thereafter, to-wit, on the 4th day of August, 1887, the said plaintiff presented to the said register and receiver a list of lands selected by it as having been granted to it by the act aforesaid, and claimed by it thereunder, to be approved to the end that the said premises in said list described might be certified to it for patent, which list included said section twenty-one; but to approve said list or to certify said land to said company the said register and receiver and the land department of the United States refused, because of the existence on the 6th day of July, 1882, of the foregoing claims to the same as mineral lands."

Subsequently to the 6th day of July, 1882, the defendants entered into the occupancy of said section 21, and at the time this action was commenced they were in possession of the same.

The case as made presents this distinct question of law: Is the land described excluded from the grant to the Northern Pacific Railroad Company because not free from claims other than pre-emption claims at the time of the definite location of the line of plaintiff's road? We do not find in the cases wherein the supreme court has construed the grant to this company any decision of this precise question; therefore, we must be guided in our decision, in so far as the case differs from cases which have been decided by the supreme court, by elementary rules. Considering the act as a whole, and its purpose and object, and giving to every word of the granting clause some force and meaning and the usual significance thereof, we conclude that congress intended to and did except and reserve out of the grant (1) lands not owned in fee by the United States; (2) lands reserved; (3) lands sold; (4) lands granted to parties other than the Northern Pacific Railroad Company; (5) lands otherwise appropriated; (6) lands subject to pre-emption claims; (7) lands subject to claims other than pre-emption claims; (8) lands subject to pre-emption rights; (9) lands subject to rights other than pre-emption rights; (10) lands containing minerals other than iron or coal. To determine whether any particular odd-numbered section within the limits of the grant was included in, or excluded from, the grant, the condition of the tract must be considered as it existed at the time the line of the road opposite thereto was definitely fixed, and the plat thereof filed in the office of the commissioner of the general land-office. The pre-emption claims and rights to which reference is made in the grant, probably, though not necessarily, are such claims and rights as may be asserted or acquired under the act of congress commonly known as the "Pre-emption Law;" but there could be no reason for making special provisions for the protection of these which would not apply as well to claims and rights of settlers under the homestead law, and to the claims and rights of prospectors and miners, founded upon the laws made expressly to reward them for the capital invested, the labor performed, and hardships endured in efforts to discover and develop the mineral resources of the country. It would therefore be unreasonable to so construe this law as to not exclude from the grant lands subject to claims and rights existing under the homestead law, and all other laws providing for the disposal of the public lands of the United States, and granting preferences to settlers, improvers, and discoverers, as well as the lands affected by the pre-emption law. The rule that general descriptive words in a statute, when connected with words of specific import, are to be understood as being qualified by the latter so as to include only things or acts of similar kind or nature to those specifically referred to, is not violated by including in the exceptions and reservations of this grant the land subject to the claims or rights of miners and prospectors under the laws providing for the acquisition of mineral lands from the government, for all such claims and rights are similar to claims and rights under the pre-emption law. The legislation by congress relating to the

acquisition by settlers upon unappropriated agricultural lands of limited portions thereof, including the improvements made by each, and the statutes providing for the disposal to discoverers and miners of limited portions of the mineral lands, has been in pursuance of the general policy of the government to bestow and distribute the public lands upon and among those citizens who will do the most to render the same productive; and there is a general similarity in all proceedings in the land-offices of the United States by which, under the general laws, claims to particular tracts of public lands are made and titles perfected, sufficient, at least, to render the above-mentioned rule of construction inapplicable in the way in which plaintiff's counsel would have it applied in this case.

The argument is made that the act must not be so construed as to include claims to mineral lands, as such, in the same category with pre-emption or other claims to agricultural land. Two reasons are alleged in support of this proposition: *First*. The lands reserved from the grant are divisible into two classes,—mineral lands, which are excluded from the grant by reason of the character of the land, regardless of the condition of the title; and lands exempted by reason of the condition of the title at the time of the definite fixing of the line of the road. It is said that, as all lands containing mineral other than coal or iron are excluded under the clause of the act referring to that description of lands, the other class of exempted lands should not include any mineral lands, else the act will be subject to the criticism of uselessly providing two distinct grounds of exemption applicable to the same lands. *Second*. Claims to mineral lands cannot be supposed to have been in contemplation of congress in the making of this law, because at the date of the act there was "no act of congress or any law under which a right or claim could be initiated to mineral lands." We regard both reasons as insufficient, and the proposition itself as unsound. The fault of the first argument is well illustrated by, and a complete answer to it found in, this very case. Whether the land is or not valuable for the mineral it contains is a question of fact which may be a subject of contention; and cannot be decided without the introduction of evidence. As to this land there was such a disputed question at the time the line of plaintiff's road opposite thereto was definitely fixed, and until the decision of that question by competent authority, after due investigation, it was not and could not be known whether the land was mineral or not. But the fact that an actual controversy existed concerning the title to this land which necessarily affected the right of the plaintiff to receive the same as part of its grant was known, and appeared by the records in the government land-offices. The question was finally decided adversely to the mineral claimants. Now, suppose that the decision was based upon false testimony, and that it is erroneous, or that the evidence had been different, and an erroneous decision had been given in favor of the claimants. In either case, if the existence of a claim and litigation does not affect it, the right of the company to the land would depend less upon the actual truth as to its character than upon the decision of a contested claim; and it follows that the plaintiff would have an interest at stake,

and therefore a right to challenge every mineral claim covering any part of an odd-numbered section within the limits of its grant, and a right to introduce evidence on its part to defeat every such claim. It requires no strain of mental vision to discover the possibility of erroneous decisions in numerous instances of valuable mines claimed by persons of insufficient means to develop the same or maintain a contest according to the rules and practice of the United States land department. The provisions of the act itself show that congress did not intend that this company should have a standing, as a contestant of any class of claims which the law recognizes, antedating the definite location of the road, for not only is there an absolute omission of words limiting the application of the phrase "or other claims or rights" to non-mineral lands, but by the provision allowing the company to select lieu lands it is manifest that congress was careful to guard against, and as far as possible prevent, disputes and contention as to the lands which the company should receive. We have also the authority of repeated decisions of the supreme court for saying that the policy of the government precludes an interpretation of such a grant, which would in effect create a powerful contestant with an interest to defeat individual claimants. *Newhall v. Sanger*, 92 U. S. 761; *Railroad Co. v. Dunmeyer*, 113 U. S. 629, 5 Sup. Ct. Rep. 566; *Railroad Co. v. Whitney*, 132 U. S. 357, 10 Sup. Ct. Rep. 112.

The second reason or argument is answered by the fact that the grant is not so worded as to imply that a claim, to have the effect of excluding land from the grant, must be founded upon an act of congress or an express provision of any law. It would be a misconstruction of the law to even modify the force of the sentence by interpolating into it the adjective "lawful," as said in the opinion of the court by Mr. Justice DAVIS in *Newhall v. Sanger*, 92 U. S. 765. "There is no authority to import a word into a statute in order to change its meaning." Much less can there be any authority or jurisdiction for construing a grant by narrowing a reservation made therein for the benefit of the people in general, by ascribing to it a meaning different from anything which its words express. Although there was no statute providing for the sale or bestowal of mineral lands at the time of the grant to plaintiff, congress had the right to and did afterwards make such a law, and under it claims could be and were lawfully initiated prior to the definite fixing of the line of plaintiff's road. We think that the reservations in the plaintiff's grant were made in contemplation of future legislation as well as the then existing laws. We also hold that claims to mineral lands could be lawfully initiated by discovery, possession, and development, according to the custom of miners and local regulations at and previous to the date of plaintiff's grant. For more than a score of years before there was a statute authorizing a conveyance from the government of title to mineral lands, the mines found chiefly in the public lands of the United States, situated in California, Colorado, Nevada, and the other states and territories west of the Rocky mountains, yielded their wealth to hundreds of thousands of individuals whose right to appropriate the precious metals extracted from their mining claims according to such customs

and regulations were never questioned by governmental authority. In the opinion of the supreme court in the case of *Forbes v. Gracey*, 94 U. S. 763, it is said that "it is very true that congress has by statutes and by tacit consent permitted individuals and corporations to dig out and convert to their own use the ores containing the precious metals which are found in the lands belonging to the government without exacting or receiving any compensation for those ores. It has gone further, and recognized the possessory rights of these miners as ascertained among themselves by the rules which have become the laws of the mining districts as regards mining claims. See Rev. St. tit. 32, c. 6, §§ 2318-2352. But in doing this it has not parted with the title to the land, except in cases where the land has been sold in accordance with the provisions of the law on that subject." Just here seems to be a good place to remark that, in the common parlance of the mining districts, the word "claim," used as a noun, has a definite and particular meaning, denoting, when coupled with the name of miner, a particular piece of ground to which that miner had a recognized vested and exclusive right of possession for the purpose of extracting precious metals therefrom, and there is reason to suppose that, in framing the reservation clause of this grant, congress selected the word "claims" for the express purpose of excluding from the grant lands held in possession of, and claimed by, miners according to local customs.

It is next insisted that the mineral claims referred to in the answer were not simply voidable, but absolutely void *ab initio*, because the land is in fact non-mineral, and in support of this it is said that as mineral lands are reserved from sale and entry, as agricultural lands, so non-mineral lands are unaffected by the mining laws, or the laws relating to entries of mineral lands, and the location and entry under mineral laws of non-mineral land is unauthorized, and a patent issued upon such an entry would be as void as a patent for mineral lands issued under a grant excluding such lands from its operation. This is very well, but we do not understand that a patent issued to a settler under the homestead or pre-emption laws would be void, or even voidable, by reason of the mere fact that the land conveyed contains valuable mines. The authorities cited certainly do not maintain that titles resting upon patents from the government can be vitiated by the discovery of minerals subsequently to the issuance thereof. In the case of *Mullan v. U. S.*, 118 U. S. 271, 6 Sup. Ct. Rep. 1041, the supreme court held that, as the entryman knew beforehand that the land contained a coal mine, he was guilty of misrepresentation and fraud in making the proofs upon which the patent was issued, and for that reason at the suit of the government it was canceled. In all the cases in which patents have been canceled, the courts have proceeded according to the familiar rules of equity, and the government has been required to allege and prove, by clear evidence, fraud, or some other sufficient equitable ground for wresting the property from the parties sued.

The last proposition affirmed by counsel for the plaintiff is this: The land, being in fact non-mineral, was by virtue of the sixth section of

plaintiff's charter, from the date of the filing of a plat of the general route of the road in the general land-office, reserved for the plaintiff's benefit, and no claim to it could be thereafter initiated whereby the plaintiff's right to it under its grant could be defeated. We yield full assent to the authorities holding that the sixth section of this charter creates a reserve of the odd-numbered sections within the limits defined from the time of the filing of a plat of the general route in the general land-office. But the reservation which this section makes is limited, and no greater effect should be given it than congress intended. This law does not purport to prohibit any person from going upon the land reserved from sale or entry or pre-emption for the purpose of hunting or fishing, nor prohibit cattle from grazing thereon, nor render unlawful a search for minerals, nor forbid the taking up of mining claims in such lands by persons supposing the same to contain the precious metals in sufficient quantities to pay for working. The country at large had an interest to be subserved by the early discovery of all the mines contained in lands liable to be claimed by the plaintiff under its grant; and it is folly to suppose that if congress had intended, contrary to the public interest, to prohibit the prospecting of a vast area of the public land through a region known to be rich in minerals, or to deprive prospectors of the right to claim and hold supposed discoveries until the truth regarding the same could be ascertained in the only practical way,—that is, by development,—requiring time, and involving labor and the outlay of money, it would not have positively said so in plain words. Of the multitude of authorities cited, the decisions of Mr. Justice FIELD and Judge DEADY in the case of *Denny v. Dodson*, 32 Fed. Rep. 899, and the case of *Buttz v. Railroad Co.*, 119 U. S. 55, 7 Sup. Ct. Rep. 100, are especially relied upon by the plaintiff's counsel. *Denny v. Dodson* was an action of ejectment by a vendee of the Northern Pacific Railroad Company. The complaint alleged that the demanded premises were portions of an odd-numbered section within the limits of the grant, fully earned by the company by a completion of that part of the road opposite thereto, and compliance on the part of the company with all requirements of the law, and that at the date of fixing the general route of the road said lands were public lands, not mineral, and not reserved, sold, granted, or occupied by homestead or other settlers, nor otherwise disposed of or located upon, and were free from pre-emption or other claims or rights, and to them the United States had full title, not appropriated otherwise than by the grant to said company. By the decision of the court a demurrer to said complaint was overruled. From the opinion of Mr. Justice FIELD, it appears that, after the fixing of the line of general route of the road, the land was settled upon, and at the time of the definite location of the line the same was occupied as a town-site; and upon the demurrer it was argued that the complaint was insufficient, for want of an allegation to the effect that at the latter date the lands were not claimed under the town-site law. The court held that, on account of the reservation by the sixth section of the plaintiff's charter, no entry of the land under the town-site act could be made after the date of the filing of a plat of

the general route in the general land-office, and therefore such an allegation in the complaint was unnecessary. In *Buttz v. Railroad Co.*, the contention was regarding part of an odd-numbered section within the limits of the grant which had been settled upon while it remained part of the Indian country, not at the time open to settlement under the laws of the United States, because the Indian title had not been extinguished. It was the settler's intention at the time of commencing to occupy the land to acquire title to it under the pre-emption law, and within three months after the township plats of the government survey had been filed in the district land-office he offered to file his declaratory statement as a pre-emptor. The land was within the limits defined by an order of the secretary of the interior previously made, withdrawing the odd-numbered sections therein from pre-emption entries under the sixth section of the plaintiff's charter, and for that reason the filing of said declaratory statement was not permitted. The supreme court held, in effect, that a claim of a mere squatter, based upon nothing but an unlawful occupancy of lands, will not be taken notice of by the government for any purpose; that the offer to file a declaratory statement under the pre-emption law was properly rejected by the officers of the land department; and that the land was not excluded from the grant to the railroad company by reason of an unrecognized claim of a squatter, nor by reason of the fact that the right of occupancy of the Indians had not been completely extinguished at the time of the definite location of the road. These cases are not like the case at bar. It is clearly distinguishable from each of them by the important fact that the land in controversy was, at the time the grant ceased to be afloat, affected by something more than a mere pretended claim existing only in the mind of an individual. It was for the time being actually segregated from the body of the public domain, by claims apparently genuine and lawful, appearing of record and recognized by the officers of the government, and as to the actual validity thereof dependent only upon issues of fact to be thereafter determined by competent authorities. By an unbroken line of decisions of the supreme court, from the case of *Wilcox v. Jackson*, 13 Pet. 498; to the case of *St. Paul & P. R. Co. v. Northern Pac. R. Co.*, 139 U. S. 1, 11 Sup. Ct. Rep. 389, the title to land so affected does not pass by a grant of "public land." For the reasons above given it is the decision of this court that the judgment of the circuit court for the district of Montana in this case be affirmed.

HILL et al. v. WOODBERRY et al.

(Circuit Court of Appeals, Eighth Circuit. January 25, 1892.)

1. ASSIGNMENT FOR BENEFIT OF CREDITORS—VALIDITY.

The provision in a deed of assignment for the benefit of creditors authorizing the assignee to "sue for" accounts, notes, etc., is in harmony with the law of Arkansas, and does not vitiate the deed.

2. REVIEW ON APPEAL.

Where the court's findings are special the circuit court of appeals cannot inquire whether the evidence supports the special findings of facts, but only whether the facts found are sufficient to support the judgment.

3. FRAUDULENT CONVEYANCES—EFFECT ON ASSIGNMENT.

A fraudulent disposition of property invalidates a subsequent assignment for the benefit of creditors only where the deed of assignment is part of a scheme to defraud, and the provisions of the deed are calculated to promote that object.

In Error to the Circuit Court of the United States, Eastern District of Arkansas.

Action by Hill, Fontaine & Co. against Woodberry & Hamilton, in which an attachment was sued out. John M. Denman, as assignee of defendants, interpleaded. Plaintiffs appeal from a judgment for the interpleader. Affirmed.

Harvey & Hill and *Atkinson, Tompkins & Greeson*, for plaintiffs in error.

C. C. Hamby and *Thos. C. McRae*, for defendant in error, J. M. Denman, interpleader.

Before CALDWELL, Circuit Judge, and SHIRAS and THAYER, District Judges.

CALDWELL, Circuit Judge. On the 12th day of March, 1891, Woodberry & Hamilton, partners in the mercantile business at Prescott, Ark., executed a deed of assignment to Denman, as assignee, for the benefit of their creditors, without preferences, of their stock of merchandise, notes, and accounts, "and also all other property, of every name, nature, and description, to them belonging." On the same day, but after the execution and delivery of the deed of assignment, the plaintiffs in error commenced an action in which they sued out a writ of attachment against Woodberry & Hamilton for the sum of \$14,900.34, and caused the marshal to levy the same on the property which the defendants had conveyed to Denman as assignee for the benefit of their creditors. The assignee intervened in the action in the court below, and filed an interplea, claiming the property attached under the deed of assignment. The issues between the plaintiffs and the assignee arising on the interplea were, by agreement of the parties, tried before the court, which made a special finding of facts, upon which judgment was rendered in favor of the interpleader; and thereupon the plaintiffs sued out this writ of error.

The deed of assignment authorizes the assignee "to demand, sue for, collect, and receipt for" the accounts, notes, and evidences of debt assigned to him by the deed. The trial court held the authority conferred on the assignee to "sue for" the collection of the choses in action did

not render the deed void; and this ruling is assigned for error. It is settled by repeated decisions of the supreme court of Arkansas, construing the statute of the state relating to assignments for the benefit of creditors, (sections 305-309, Mansf. Dig.;) that any provision in the deed which authorizes or directs the assignee to administer the trust in a different manner from that prescribed by the statute renders the deed void. *Raleigh v. Griffith*, 37 Ark. 150; *Teah v. Roth*, 39 Ark. 66; *Jaffray v. McGehee*, 107 U. S. 361, 2 Sup. Ct. Rep. 367; *Rice v. Frayser*, 24 Fed. Rep. 460; *Collier v. Davis*, 47 Ark. 373, 1 S. W. Rep. 684. But there is nothing in the statute which in terms or by implication prohibits the assignee from bringing suit to collect a debt due the estate. Under the statute as amended by the act of February 23, 1883, the assignee administers the trust under the supervision of the court of chancery. It is provided by section 306 that the "assignee shall at the first term of the court after one year from the date of the assignment, and at the corresponding term of said court every year thereafter, until the proceeds of the property assigned be disposed of for the benefit of creditors, present to the court a fair written statement or account current, in which he shall charge himself with the whole amount of the property assigned, including all debts due or to become due. * * *" Section 307 provides that "such account shall be carefully examined by the court, and upon such examination the court shall allow the assignee for all the debts with which he stands charged, which the court shall be satisfied could not be collected. * * *" These provisions clearly contemplate the collection by the assignee of the collectible debts due the estate. He is not entitled to credit for the uncollected debts with which he stands charged until he satisfies the court that they "could not be collected." Suppose an assignee should ask the court to credit him with uncollected debts, stating in his application for such credit that the debtors were solvent, and had no defense to the debts, but would not pay without suit. Would the court, upon such a showing, credit him with the amount of such debts upon the ground that they "could not be collected?" Are the debts due from solvent debtors to be treated as uncollectible, and returned as worthless, whenever the debtors neglect or refuse to pay them voluntarily? The power and authority of the assignee to collect debts is not limited to dunning the debtors. It is his duty to collect the debts due the estate; and that duty is not discharged by simply demanding payment of the debtor who will not pay voluntarily, but who can be compelled to pay by suit. The clause in the deed empowering the assignee to sue for the collection of the choses in action is a useless one; but it does not vitiate the deed, for the reason that it is in harmony with the law, and confers on the assignee no power which he would not have possessed if it had been omitted. It is not necessary in this case to decide, and we do not decide, whether, upon a consideration of all the provisions of the statute, the term "property," as used in section 309, includes the choses in action. In any event it would be the duty of the assignee to collect all the debts he could within the 120 days; and for that purpose he would have the right, and it

would be his duty, to bring suit against a debtor when necessary to collect or secure the debt. If choses in action have to be sold under section 309, the fact that suits are pending for their collection is no impediment to their sale.

The court below, among its other findings of fact, found that Woodberry, of the firm of Woodberry & Hamilton, withdrew from the firm assets "during the year 1890, and up to March 2, 1891," the sum of \$3,768.46, "and that that sum was largely in excess of the amount required for the necessary expenses of said Woodberry, and was more than the amount contributed by him to the capital stock of said firm." The plaintiffs in error contend that the withdrawal by Woodberry of the sum mentioned from the firm assets was a fraudulent act, and that the subsequent making of the deed of assignment for the remaining firm assets was the last act in a scheme to defraud the firm creditors. The conclusive answer to this contention is that the court below expressly finds "that all the improper acts of the defendant Woodberry in the use of partnership funds were prior to the execution of the assignment," and "that the assignment was and is free from any fraud, and conveys all the firm property, and was executed and delivered prior to the suing out of the order of attachment herein, and that the title to the said property passed to the assignee, and is not subject to the attachment." The express finding of the court "that the assignment was and is free from any fraud" is conclusive of that question. It is earnestly contended that the evidence did not warrant this finding of the court, but this court cannot inquire whether the evidence warranted the special finding of the court below. Where the court's findings are special, it is required to state the ultimate facts, and not the evidence; and such special finding of facts are all the facts that this court can consider. The inquiry in this court in such cases is not whether the evidence supports the special finding of facts, but only whether the facts found are sufficient to support the judgment. *Norris v. Jackson*, 9 Wall. 125; *Tyng v. Grinnell*, 92 U. S. 467.

An insolvent firm may undoubtedly make a valid assignment of the partnership property for the payment of the partnership debts. The validity of such an assignment is not affected by the fact that, before it was made, one member of the firm wrongfully or fraudulently appropriated to his own use a part of the firm assets. Such wrongful or fraudulent act of one of the partners may have compelled the firm to make an assignment for the equal protection of all their creditors. It is very well settled that a fraudulent disposition of property by a debtor does not of itself impair a subsequent general assignment for the benefit of his creditors. *Estes v. Gunter*, 122 U. S. 450, 456, 7 Sup. Ct. Rep. 1275. A fraudulent disposition of property invalidates a subsequent assignment for the benefit of creditors only where the deed of assignment is part of a scheme to defraud creditors, and the provisions of the deed are calculated to promote that object. Upon the facts found the judgment of the court below was right, and must be affirmed.

WAMsutTA MILLS v. FOX.

(*Circuit Court, D. Connecticut.* February 4, 1892.)

INJUNCTION—QUALITY OF GOODS SOLD—MISREPRESENTATIONS.

An employe of defendant retail dry-goods merchant, in charge of the men's furnishing goods department, advertised sales, at reduced prices, of men's shirts made from Wamsutta cotton, a high-grade cotton of established reputation made by plaintiff, and the clerk in charge of such sales, in positive terms, represented the shirts sold at the advertised prices as made of Wamsutta cotton, when, in fact, they were made of a much inferior cotton. *Held*, that a temporary injunction should be granted restraining defendant from advertising and selling such shirts as made from Wamsutta cotton, notwithstanding defendant denied knowledge of the untrue representation, and the sales were discontinued on service of the motion papers and notice of the misrepresentation.

In Equity. Bill in equity by the Wamsutta Mills against Moses Fox, to restrain defendant from advertising and selling articles as made from muslin manufactured by defendant, which were, in fact, made from inferior muslin. Motion for temporary injunction. Granted.

Edward D. Robbins, for plaintiff.

Charles E. Gross, for defendant.

SHIPMAN, District Judge. This is a bill in equity to restrain the defendant from advertising and selling shirts, made from inferior cotton shirtings, as made from Wamsutta cotton, upon the ground that the cotton shirting manufactured by the plaintiff, and known as, and generally called, "Wamsutta cotton," has acquired a well-known, widely extended, and high reputation, and extensive sales throughout the country; and that the sale of an inferior article under that name, and the untrue assertion by advertisements, and otherwise, that the inferior cotton shirting is Wamsutta cotton, injure the plaintiff's reputation, the good-will, and the profits of its business. The present hearing is upon a motion for temporary injunction.

The allegations of the bill in regard to the high and general reputation of the cotton shirting manufactured by the plaintiff, and generally called "Wamsutta," are not denied. It appears from the affidavits that the defendant is a large retail dry-goods merchant in Hartford, whose business is divided into departments, and that one of his employes is the head of the men's furnishing goods department. In accordance with a not unusual custom among merchants of this class, the prices of the odd lots on hand were reduced after the 1st of January, and were advertised, by an extensive advertisement, to be sold at these low prices during the week beginning January 4, 1892. Among men's furnishing goods, there were advertised, "Men's Laundered Shirts, Wamsutta cotton, 67c., value \$1.00. Men's Night-Shirts, Wamsutta cotton, 47c., value 75c." This part of the advertisement was prepared by the head of said department, without the knowledge of Fox, who did not read it. Affidavits are produced from three persons, who bought at the defendant's store, in response to this advertisement, four night-shirts and one laundered shirt, all which were expressly represented by the salesman

in attendance to be Wamsutta cotton. The clerk said he would warrant the laundered shirt to be Wamsutta cotton, and, at the request of the buyer, inserted "Wam." in the bill of the goods. These shirts were all made of greatly inferior goods, which were not the manufacture of the plaintiff. The defendant's affidavit states that he knew nothing of the untrue representations, that they were made without his orders, that his attention was first called to their existence by the motion papers in this case, when he forthwith ordered the sales to be stopped, and that his general orders to his clerks have been to exercise all possible care, and not to misrepresent the origin of any article. The head of the department says, in his affidavit, that there were laundered shirts on hand, stamped "Wamsutta muslin," which were made of Wamsutta cotton, and were marked down to 67 cents, and that the advertisement referred to these shirts, and to no others; and that, in the advertisement in regard to the night-shirts, he made a mistake, innocently, and without intention to misrepresent; that the sales of these shirts were stopped on January 16th, when the papers were served. Between the 2d and 16th of January, 25 laundered shirts were sold, some of them made of Wamsutta cotton, and 31 night-shirts were sold. The receipts from the two classes of sales were \$31.32. On January 2d the plaintiff had on hand 145 laundered shirts, and 132 night-shirts, which were respectively marked down to 67 and 47 cents. The argument of the defendant against a temporary injunction is that the sales were for a temporary purpose, that the goods on hand were a small quantity, that the representations were innocently made, and that the sales were promptly stopped when the defendant was informed of the misrepresentations. The night-shirts are so inferior that it is impossible to suppose that a person of the experience of a head of a department in dry-goods was mistaken, if he examined them. If he prepared the advertisement without knowing whether he was telling the truth or not he was exceedingly careless. The defendant had on hand some Wamsutta laundered shirts, and some of an inferior quality. They all seem to have been marked at 67 cents. The clerk who was in charge, in positive terms, misrepresented the character of the laundered shirt which he sold. I am satisfied that in the advertisement, and in the sales under it, there was an indifference to truth on the part of the subordinates in the defendant's store. The point of most importance which has been urged by the defendant is that the sales were small in amount, have been stopped, and that an injunction is to prevent a threatened wrong, rather than to punish for a past injury. "It seeks to prevent a meditated wrong, more often than to redress an injury already done." 2 Story, Eq. Jur. § 862. When a past injury has ceased, and cannot be renewed or continued, a temporary injunction will not be issued. *Potter v. Crowell*, 1 Abb. (U. S.) 89. In this case it can be renewed. It will not be consciously renewed by the defendant; but, although he has heretofore "given orders to his clerks and employes to exercise all possible care in this matter, and not to represent any article sold as made of any material of which they are not positive," the orders have not been obeyed by the persons

in charge of the men's furnishing department, and may be still disobeyed. The conduct of these persons cannot be successfully defended. The amount of sales was small, but it is apparent that the litigation is to be continued, and, for the reason which I have given, I think that an injunction *pendente lite* should be issued. The motion is granted.

ON MOTION FOR REHEARING.

(February 19, 1892.)

SHIPMAN, District Judge. This is a motion for a rehearing of the application for a temporary injunction in the above-entitled cause, upon the ground that the meaning of that portion of the defendant's affidavit upon which the court based its reason for granting an injunction was misunderstood. The defendant now makes an affidavit that the orders which he issued to his clerks, not to misrepresent any article sold as made of any material of which they were not positive, were given after the motion papers in this case were served, and that no such orders had ever been previously given, and that the need of such orders to his clerks against the misrepresentation of the character of goods offered for sale had never occurred to him, as he had assumed that such an order was necessarily implied, on account of what he knew to be his reputation among the people of Hartford for fair and honest dealing, to which he attributes his success as a merchant.

The meaning of the original affidavit was misunderstood; for I supposed that it referred to directions which the defendant had previously been in the habit of giving, or which he had previously given. It appears that no express directions were given, and the need of such orders had never occurred to him, upon the assumption that they were implied. It will be observed that the distinction between the facts as now explained and as formerly understood consists in the distinction between an express order and the defendant's assumption that there was an implied order; but it is not necessary to dwell upon that point, because I think that, although the particular reason upon which the order for an injunction was based did not exist, the facts which, as appears from all the affidavits, did exist constitute a sufficient reason for a temporary injunction. The motion is denied.

PALMER v. SANDERS *et al.*

(Circuit Court, S. D. New York. January 25, 1892.)

LEASE—PAROL EVIDENCE TO VARY.

Parol evidence of consent by the lessor to cut trees on the leased premises and on adjoining premises is not inadmissible as varying the written lease, which provides that trees should not be cut on the premises without consent of the lessor.

At Law. Action by John E. Palmer against Elizabeth B. Sanders and Charles W. Sanders, for malicious prosecution. Verdict for plaintiff. Motion by defendants to set the same aside, and for a new trial. Denied.

Palmer & Boothby, for plaintiff.

T. C. Sanders, for defendants.

WHEELER, J. The plaintiff took a lease for five years of a farm in New Jersey belonging to the husband of the defendant Elizabeth, father of the defendant Charles, of which they had charge, some of the fences on which were gone; agreeing in the lease to make all necessary repairs to the fences and buildings, and to expend \$600 in improvements on it within two years, and not to cut any living trees without the consent of the lessor. He carried some fence-posts away from this farm to another, of which he had the use, near by. They went together to look the posts up, and, on the complaint of defendant Charles, he was prosecuted for stealing the posts, imprisoned, tried, and acquitted. This suit is brought for starting that prosecution maliciously.

The defendants claimed that the posts were on the farm, piled, before the plaintiff took the lease; he claimed that he cut part of them on the leased premises, and the rest on land adjoining, belonging to the lessor, with the consent of defendant Elizabeth, acting for the lessor, for rebuilding the fences.

The defendants insist that the parol evidence of this consent was inadmissible, because it would vary or add to the terms of the written lease. But consent to cut trees on the leased premises was expressly provided for in the lease, and not required to be in writing, and consent to cut on the other premises was wholly without the terms of the lease. Besides this, the parol proof must have been admissible to account for the posts which he carried away, and shows that they were not there before he went there. His right, or claim of right, to the posts on account of having cut them with this consent was the turning point on the question of want of probable cause. It was submitted to the jury on all the evidence, and found for the plaintiff. This finding is argued to have been against the weight of the evidence, and reasons in support of that view are brought forward. They were, however, well presented to the jury on the trial, and must have been considered. That there was no evidence to support the finding is not claimed. Under those circumstances, it cannot be disturbed without trenching upon the province of the jury.

In stating the question whether the defendant Elizabeth so took part in the prosecution as to be liable for it, the court appears to have said that the defendants returned to New York together after the making of the complaint, when in fact they came separately. This is relied upon in favor of a new trial. But as they came after the prosecution was started, whether they came together or separately was wholly immaterial. If not, the attention of the court should have been called to the mistake, that it might be corrected. Some other points of the same sort are made, but are similarly and no better founded.

No valid reason for setting aside the verdict is made to appear, and the motion for that purpose must be overruled. Motion denied. Stay continued 30 days, for settling exceptions.

LEM HING DUN v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. January 7, 1892.)

APPEAL—DISMISSAL—RECORDS AND BRIEFS.

In the circuit court of appeals dismissals are provided for if no counsel appears or no brief is filed for appellant or plaintiff in error "when the case is called for trial," (Rule 23, 47 Fed. Rep. x.) and also if the record has not been printed "when the case is reached in the regular call of the docket," (Rule 23.) Held, that the time meant in each rule is not the time of going through the docket to arrange the business of the court, but the time of actual call for trial, and no motion to dismiss on the grounds mentioned can be entertained before that time.

Appeal from the District Court of the United States for the Northern District of California.

Application for writ of *habeas corpus* to release Lem Hing Dun from restraint on board the steamer City of Peking, and to permit him to land in the United States. The court below found that the prisoner was not entitled to land under the exclusion act, and remanded him to the custody of the master, to be transported to China. The prisoner appeals.

Z. T. Cason, for appellant.

W. G. Witter, Asst. U. S. Atty.

Before HANFORD, HAWLEY, and MORROW, District Judges.

HANFORD, District Judge. A motion to dismiss the appeal in this case has been made for the reasons that the appellant has failed to have the record printed, and copies thereof furnished to the adverse party, as required by rule 23 of this court, and that the attorney for the appellant is not yet prepared to argue the case, although it was docketed in this court prior to the beginning of the present term in October last.

We have acted upon and granted similar motions at this session. In doing so, we were influenced by representations made in open court that counsel for the appellant in each case had declared an intention to abandon the appeal, and by the fact that the motions were not opposed by

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any attorney appearing generally in behalf of the appellants. But we wish to have it understood that we have not intended to establish a precedent, or to give a construction to the rules authorizing motions to dismiss prior to the actual calling of the cases for argument. This court has but one term in each year, and rule 17 does not warrant the dismissal of a case until it shall have been called for hearing at two terms successively. If upon such call at the second term neither party is ready to argue it, a case will be then dismissed by the court upon its own motion; the object of the rule being to prevent the slumbering of cases after both parties have lost interest therein. Rule 22 provides that where no counsel appears and no brief has been filed for the plaintiff in error or appellant when the case is called for trial, the defendant may have the plaintiff called, and the writ of error or appeal dismissed. It is certainly plain that under this rule a motion to dismiss, made before the case is regularly reached and called for trial, is premature. Rule 23 provides for printing of the record and service of copies to be made at least six days before the trial, and that, if the record shall not have been printed when the case is reached in the regular call of the docket, the case may be dismissed. The time when a motion to dismiss for failure to observe the requirements of this rule may be made is the same as under rule 22. The regular call of the docket is the call that is made of the cases thereon for trial, and not a going through the entire docket at any one time for the purpose of informing the court and counsel as to the condition of pending cases, or to arrange the business of the court. The rules are intended to conform the practice in this court to the practice in the supreme court as nearly as it may be, and we think that if a case is docketed in time, any subsequent neglect should not authorize the respondent to move for a dismissal prior to the actual call of the case for trial.

This case has not been reached in the call of the docket, and in our opinion we cannot at this time entertain a motion to dismiss on such grounds as are alleged in this motion.

GEE FOOK SING v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. January 25, 1892.)

1. CHINESE—EXCLUSION OF IMMIGRANTS.

Under the fourteenth amendment to the constitution, the laws excluding immigrants who are Chinese laborers are inapplicable to a person born in the United States, and subject to its jurisdiction, even though his parents were not citizens, and, being Chinese, were not entitled to become citizens under the naturalization laws.

2. SAME—HABEAS CORPUS.

Any person alleging himself to be a citizen of the United States, desiring to return to his country from a foreign land, and prevented from doing so without due process of law, and applying on that ground to the United States court for a writ of *habeas corpus*, is entitled to a hearing and judicial determination of the facts so alleged; and no act of congress can be understood or construed to be a bar to such hearing and judicial determination.

3. SAME—EVIDENCE OF PLACE OF BIRTH.

A person of Chinese parentage testified, on a hearing in *habeas corpus* proceedings to determine his right to come into the United States, that he was born in San Francisco in 1877, that he was taken to China by his parents when under three years of age, and remained there continuously until October, 1890. On the question of his birth he was corroborated only by the hearsay testimony of other Chinese persons, who had seen him but a few times. *Held*, that a finding against him should not be disturbed on appeal.

Appeal from the District Court of the United States for the Northern District of California.

Petition for writ of *habeas corpus* to determine the right of petitioner to come into the United States. Petitioner appeals from a judgment remanding him. Affirmed.

H. B. M. Miller, for appellant.

W. G. Witter, Asst. U. S. Atty.

Before DEADY, HANFORD, and HAWLEY, District Judges.

HANFORD, District Judge. From the record it appears that on October 16, 1890, one Gee Joong Ding filed a petition for a writ of *habeas corpus* on behalf of the appellant in the district court for the northern district of California, alleging, in substance, that the appellant was then illegally restrained of his liberty and imprisoned on board the steam-ship Belgic, at the port of San Francisco, by the master of said vessel; that the cause of said restraint and imprisonment was that said master claimed that the appellant was a passenger on said vessel, and a Chinese person, of the class prohibited by law from landing in the United States; that the appellant had applied to the collector of customs for the port of San Francisco to be permitted to land from said vessel, and his application had been denied by the collector; and that the appellant was not a person prohibited from entering or remaining in the United States, he having been born in the city of San Francisco, in the United States, and being a citizen thereof. Upon said petition a writ was issued, and about a year afterwards the evidence in the case was taken before a commissioner, to whom the case was referred to take proofs and report findings, according to the established practice of the district court in such cases. In his report the commissioner negatives the allegations of the petitioner in the important matter as to the citizenship of the appellant by findings that he is a subject of the emperor of China, and that he has not by sufficient evidence established his right to enter or remain in the United States. The case was heard by the district court upon the evidence so taken, and the report of the commissioner, with the result that the findings of the commissioner were affirmed, and a judgment given remanding the appellant.

The case has been submitted in this court upon the record without argument. We have considered all the questions of law and fact which we find involved, and our conclusions are that, inasmuch as the fourteenth article of the amendments to the constitution of the United States declares that all persons born in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the state

wherein they reside, the laws excluding immigrants who are Chinese laborers are inapplicable to a person born in this country, and subject to the jurisdiction of its government, even though his parents were not citizens, nor entitled to become citizens, under the laws providing for the naturalization of aliens; that any person alleging himself to be a citizen of the United States, and desiring to return to his country from a foreign land, and that he is prevented from doing so without due process of law, and who on that ground applies to any United States court for a writ of *habeas corpus*, is entitled to have a hearing and a judicial determination of the facts so alleged; and that no act of congress can be understood or construed as a bar to such hearing and judicial determination. The evidence in the case shows that it is an admitted fact that the appellant is of Chinese parentage. His appearance and language proves that he is in all respects, save, possibly, in the one matter of his legal citizenship, a Chinaman, and not an American. He testifies that he was born in San Francisco in 1877, that he was taken to China by his parents when he was under three years of age, and that he remained there continuously until October, 1890. Under the circumstances stated by him, but little, if any, credence should be given to his own evidence as to the place of his birth, and he is corroborated on this vital point only by the testimony of other Chinese persons, who confessedly have seen him but a few times, and can give only hearsay evidence. There certainly is not disclosed in this record anything to justify this court in reversing the judgment of the district court on the ground of error in its findings of fact.

The judgment appealed from is affirmed, and the cause remanded for such further proceedings as may be necessary.

LEM HING DUN v. UNITED STATES. LEE FOO v. SAME. LUM SUEY
CHEONG v. SAME. TOY QUONG TEUNG v. SAME.

(Circuit Court of Appeals, Ninth Circuit. January 25, 1892.)

Appeals from the District Court of the United States for the Northern District of California.

Petition for writs of *habeas corpus*. Petitioners appeal from judgments remanding them. Affirmed.

Charles L. Weller, for appellants.

W. G. Witter, Asst. U. S. Atty.

Before DEADY, HANFORD, and HAWLEY, District Judges.

HANFORD, District Judge. The opinion of this court in the case of *Gee Fook Sing v. U. S.*, 49 Fed. Rep. 146, (just filed,) disposes of all the questions of law in these cases. The evidence is not sufficient to make a case in favor of the appellant so clear as to warrant this court in reversing the judgment of the district court upon the facts. As to each of the cases we consider that the evidence, as a whole, does not make as good a case for the appellant

as it might be reasonably expected a man would make out in his native city, after time for ample preparation; and the case is such as any impostor could easily make.

We hold that when, upon a candid consideration of all the evidence in a case, there appears to be room for a difference of opinion as to the material facts in issue, this court ought not to reverse the judgment on a question of fact alone.

Judgments affirmed and causes remanded.

UNITED STATES v. EBBS.

(District Court, W. D. North Carolina. November Term, 1881.)

1. UNITED STATES MARSHALS—FEES FOR ARRESTS.

A United States marshal who reads a warrant of arrest to a person charged with crime, but afterwards permits him to go free upon his verbal promise to appear before the commissioner for examination, is not entitled to a fee for the arrest.

2. SAME—APPEARANCE BOND.

The acceptance by a United States commissioner of an appearance bond, tendered by the friends of an absent offender, supersedes a warrant of arrest theretofore issued, and the marshal is not entitled to a fee for a subsequent arrest upon the same warrant, under the verbal direction of the commissioner.

3. SAME—DUTY TO ARREST PROMPTLY.

A deputy United States marshal who has a warrant of arrest is bound to be prepared at all times to execute the same, and if he comes into the presence of the accused, but does not arrest him, because the warrant was left at home, he is not entitled to fees for time subsequently spent in making the arrest.

4. SAME—GUARDING PRISONER.

When a United States commissioner holds an accused person to trial before the court, and verbally commits him to the custody of the marshal until bail is obtained, the latter is entitled to fees for guarding him, as he has no authority to commit him to jail without a written *mittimus*. The marshal is sole judge as to whether a guard is necessary while the prisoner is before the commissioner.

At Law. Prosecution on a criminal charge. On a rule for the re-taxation of costs.

V. S. *Lusk*, in support of rule.

C. M. *McLoud*, for marshal.

DICK, District Judge. The exceptions presented in the affidavit to the costs taxed before the commissioner are as follows: (1) The marshal charges for service of the warrant when there was no valid service. (2) The marshal charges expenses for 14 days in endeavoring to arrest the defendant, when the defendant might have been easily arrested, as he made no effort to evade the process of the law. (3) The marshal charges for attending the court of the commissioner, and guarding the defendant, when there was no necessity for such service, as the defendant was upon bail.

As to the first exception, it appears in evidence that the deputy-marshal, while he had the warrant in his hands, met the defendant, and read the warrant to him, and told him that he was under arrest. The defendant at once submitted to the authority of the deputy-marshal, who told him that he might depart from custody if he would promise to

attend the commissioner's court on a certain designated day. The defendant agreed to the proposition, and went off, and did not afterwards appear at the time and place designated. I am of opinion that this was not such a service of the warrant as entitled the marshal to the fee charged. The service of a commissioner's warrant in a criminal case consists of more than a mere arrest, as the marshal must keep the defendant in custody until he is carried before an examining magistrate for a preliminary hearing upon the charges in the warrant. Where an arrest is made on a commissioner's warrant, the officer making the arrest has no authority in law to take bail, and, if he voluntarily allows the defendant to depart from custody before the case has been heard by the magistrate, it is a voluntary escape. The liability of the officer is absolute, and cannot be relieved by a subsequent arrest of the defendant; but the warrant is not invalidated, and the defendant may be retaken under the same warrant, and by the same officer. The misconduct of the officer does not prevent an arrest, as the public good requires that the defendant should be brought to justice. 1 Chit. Crim. Law, 61. The rule of law is somewhat different in mesne process in civil cases, as the officer becomes special bail if he allows a defendant to depart out of custody without giving a bail-bond. Upon final process of execution, if there is a voluntary escape, the liability of the officer is absolute. If there is a negligent escape, the officer may retake the prisoner on fresh pursuit, and hold him, so as to relieve his liability. *Adams v. Turrentine*, 8 Ired. 147. The action of the deputy-marshal in this case, and the submission of the defendant to the control of the officer, constituted a valid arrest. Whether acts constitute an arrest depends upon the intent of the parties at the time. An arrest may be made without touching the person of the defendant at the time, if he voluntarily submits to the process of the law in the hands of the officer. *Jones v. Jones*, 13 Ired. 448.

Although there was a valid arrest in this case, there was not a due service of process, and the marshal is not entitled to the fee charged. In his answer the marshal insists that the defendant was retaken on the warrant on a subsequent day, and carried before the commissioner for a preliminary hearing. The evidence shows that the defendant, previous to the second arrest, and while he was still lurking in the woods and evading the officer, had an appearance bond, with sureties, prepared by his brother, I. N. Ebbs, with a condition to appear before the commissioner for an examination on the 20th day of August. This bond was presented by I. N. Ebbs to the commissioner, and was by him accepted, in the absence of the defendant, and the deputy-marshal knew that said bond had been accepted. The defendant made his appearance at the time and place designated in the bond. Before the hearing of the case commenced, the commissioner, then regarding the said bond as erroneous and void, gave a verbal direction to the deputy-marshal to arrest the defendant, and hold him in custody until the case could be heard. The deputy-marshal made an arrest on the warrant, which he had long had in his hands.

I am of the opinion that when the appearance bond was accepted by the commissioner, and the deputy-marshal was advised of that fact, the warrant in his hands was virtually superseded, and did not authorize an arrest. If the bond accepted by the commissioner was irregular, or in any way insufficient, he ought to have proceeded to have the defendant arrested in the manner provided in section 1019, Rev. St. This verbal direction to arrest was without legal force and authority. An examining and committing magistrate has no power verbally to command an arrest, except for a felony or breach of the peace committed in his presence, or for contempt in open court, or so near as to disturb his official proceedings. After hearing a case, he may, by verbal order, direct an officer to take a defendant into custody until a proper *mittimus* can be prepared; but in no case can he commit a defendant to prison without a written warrant setting forth the cause of such commitment in specific terms.

The correctness of the form of the bond, as an appearance bond, and the solvency of the sureties, are not denied, but the counsel of the marshal insisted that the bond was erroneous and void, as the commissioner had no power to take such a bond in the nature of a recognizance, in the absence of the principal, and before a hearing of the matter. It is well-settled law in this state that a bond duly signed, with sureties, and with a condition for the appearance of the principal in a criminal case before a court, accepted by a person authorized to take bail, is good as a recognizance. *Edney's Case*, 2 Winst. 463; *Houston's Case*, 76 N. C. 256. In the case of a formal recognizance, the obligation is generally acknowledged by the parties in open court, and entered of record, and they need not sign their names; but in the case of a bond in the nature of a recognizance, where the parties sign their names, I can see no absolute necessity for the principal being present before the person authorized to accept such bond. During the absence of the principal, the magistrate might refuse to accept such bond; but if he is satisfied that the bond was duly signed and sealed, and the sureties are sufficient, and he accepts the bond, I am of the opinion that it is valid. At the common law, even in the case of a formal recognizance, where the defendant is an infant or in prison, and so absent, sureties were allowed to enter into recognizance of bail, and a warrant called a "liberate," was issued by the person taking bail for the enlargement of the defendant. 2 Hale, P. C. 126. If the bond in this case was as good as a recognizance, I am of opinion that it operated as a *supersedeas* of the warrant in the hands of the deputy-marshal, without any formal *supersedeas* writ. At the common law, an apprehension under a warrant could, in many cases, be prevented by a party going before a justice of the peace, and finding sufficient sureties for his appearance to answer any indictment, and obtaining the *supersedeas* of the magistrate. This could be done even after an indictment found in a court. 1 Chit. Crim. Law, 46.

If process of arrest from a court after indictment could thus be superseded by a justice of the peace, I see no reason why a commissioner, having the powers of a justice of the peace in such matters, cannot su-

persede a warrant which he has issued to bring a person before him for an examination upon a charge of crime, by accepting a bond, with sufficient sureties, to secure an appearance in a bailable case, and where the defendant is entitled to have his witnesses heard upon the investigation. I do not approve of this practice of accepting bail to prevent an apprehension upon legal process, and I will instruct the commissioners of this district not to adopt it, as I think it most proper and regular for defendants to enter into bond or recognizance in person before the magistrate, and that other proceedings should be in accordance with the usual course and practice of the courts. No justice of the peace can supersede the warrant of another without a formal and legal examination, (1 Chit. Crim. Law, 36;) but we may reasonably suppose that a justice with whom a complaint was filed, and who had issued the warrant, may supersede such warrant when the appearance of the defendant had been secured by him in taking a sufficient bond. Commissioners are invested with many of the powers and functions of justices of the peace, and they act within the scope of such powers upon their own judgment and responsibility. A district attorney has no authority to direct a marshal not to execute a warrant issued by a commissioner. *U. S. v. Scroggins*, 3 Woods, 529. He may appear before the commissioner, and attend to the presentation of the evidence, but he is only counsel for the government. He cannot direct the commissioner in his judgment, or as to what course he shall pursue, or dismiss the proceedings. *U. S. v. Schumann*, 2 Abb. (U. S.) 523.

I am inclined to doubt the power of a federal judge, by writ of prohibition or otherwise, to control the discretion of a commissioner in the hearing of a cause before his order of commitment. The decision of a commissioner may in some things be reviewed upon writs of *habeas corpus* and *certiorari*, and rules of court may be adopted regulating the practice and modes of procedure in such inferior courts. As an examining and committing magistrate, a commissioner has similar powers to those of a justice of the peace, in the state where he acts, and his proceedings must be agreeable "to the usual mode of process against offenders in such states." In this state a justice of the peace is authorized and directed to hear the witnesses of the defendant, and allow him reasonable time to employ counsel in his defense, and determine the matter after hearing evidence and argument on both sides of the case. The justice being vested with such powers and duties of investigation, he must necessarily have the incidental powers of continuing the matter to a future day, to enable parties to have a fair and full investigation, and also allowing a defendant bail in bailable cases, during such continuance of the cause. This course of procedure was adopted by the justice of the peace in *Queen's Case*, 66 N. C. 615, and the supreme court seemed to regard such course as regular and proper. As the commissioner in this case adopted a similar course in accepting the appearance bond of the defendant, he could not, by a mere verbal order, revive a superseded warrant, and legally direct an arrest of a person on bail, which had been accepted, before an examination of the merits of the case. I think that

the deputy-marshal made the charge with an honest belief that he was entitled to such fee for service of the warrant, and the commissioner is not blamable for approving the same, as required by the rules of court.

The second exception presented by the defendant is not fully sustained by the evidence. It appears that the warrant was issued on the 16th day of May, and that the defendant knew it was in the hands of the deputy-marshal, and he used all the means in his power to evade an arrest. His brother, I. N. Ebbs, wrote to the deputy-marshal that, if he would meet him at his house on the 17th day of July, an arrangement could be made for the surrender of the defendant and three other co-defendants. The deputy went to the place at the time designated, but a satisfactory arrangement was not made. The deputy, on his return, passed by a place where a number of men had met to have "a shooting match." The defendant was there, and the deputy remained some time with him, but did not make an arrest, as he did not have the warrant in his possession. On several subsequent days the deputy made active efforts to arrest the defendant, but did not succeed until the day of the first arrest mentioned in considering the first exception.

The marshal is entitled to the expenses charged for the days his deputy endeavored to make an arrest previous to the 17th of July. I disallow the expenses for the subsequent days. When a warrant of arrest is put in the hands of an officer, it is his duty, as soon as he conveniently can, to proceed with secrecy and diligence to apprehend the defendant. He must always be ready to perform the mandate of the warrant. In this instance I am disposed to hold the officer to the highest and strictest rule of duty, for when he subsequently made an arrest he voluntarily allowed the defendant to depart from custody on a promise to appear before the commissioner for trial on a future day. He had no right to show favor or trust to the promise of a criminal who had so long been evading the process of law. At the common law it was allowable for a constable, when he had made an arrest without a warrant, in a case of a petty nature, to take the defendant's word for an appearance before a magistrate if he was of good repute, and there was no probability of his absconding, (1 Chit. Crim. Law, 59;) but such indulgence was not allowable in this case.

As to the third exception, the evidence shows that the defendant had given bond to appear before the commissioner on the 20th day of August, and we have above decided that such bond was valid. While under bond, and before the case was heard, there was no necessity for guarding him, as he was in the constructive custody of the court, and his sureties were his keepers. The defendant gave a new bond for his appearance on the 27th day of August, and the custody in which he was placed by the verbal order of the magistrate was unlawful. The law fixes no time and place for the session of a commissioner's court, and the marshal and his deputies are not required to be present at such court, except where they have process to return and defendants to bring in and guard. When a defendant is admitted to bail, he is placed in the custody of his sureties, who have power to arrest him at any time they may desire;

and they must have him before the court at the time and place designated in the bond, and they are not freed from this responsibility until the defendant is discharged, admitted again to bail, or placed in the custody of an officer of the law. If the magistrate hears the case, and decides that the defendant shall give bail for his appearance in court to answer an indictment, and the defendant fails to give sufficient bail, he may be committed to prison, and, if no regular officer can conveniently be found, the *mittimus* may be directed to any person who shall have power to execute the same. Battle, Revisal, c. 33, § 97; *Dean's Case*, 3 Jones, (N. C.) 393. In such a case there is no legal requirement for the marshal or his deputy being present, but if either should be present, and the defendant is committed to the custody of such officer, then the marshal would be entitled to charge for his own attendance and the service of a guard, if such service was rendered and was necessary, and the marshal must judge of such necessity. He would be responsible if the defendant should make an escape through his negligence in not summoning a guard. The law does not require or expect an officer, without assistance, to keep the custody of a prisoner charged with crime. If he relies upon his own vigilance, strength, and courage, and the prisoner escapes, he is not excused, no matter how earnestly and faithfully he endeavored to perform the duty imposed upon him. When the marshal or his deputy arrests a person under a warrant, the law requires him to carry the alleged offender before some examining magistrate as soon as the circumstances will permit. He may lodge the prisoner in the common jail, or resort to other modes of confinement, if any necessity or serious emergency should require such a course,—he must keep the prisoner. Nothing, however, but obvious necessity will authorize an officer to lodge a prisoner in jail before an examination and regular written commitment by a magistrate. This course may be adopted if the arrest is made in or near night, whereby he cannot attend the magistrate, or if there be danger of a rescue, or the party be too ill to appear before the magistrate, etc. 1 Chit. Crim. Law, 59; *State v. James*, 78 N. C. 455. When a prisoner is brought before the magistrate, he is still in the custody of the officer, who must keep him securely until he is disposed of in due course of law. As this high and strict responsibility is imposed by law upon the marshal, he is authorized to summon the necessary assistance, and he can keep such assistance as long as the responsibility continues, and he is entitled to the fees allowed by law for such important and responsible service. The rule of this court, which requires the commissioner to determine the question whether a guard is necessary for the marshal when a prisoner is before the court under arrest, must be set aside, as it is contrary to law. The marshal alone can determine this question, and say how far he is willing to subject himself to the chances and responsibilities of an escape. The marshal cannot be relieved by any action of the commissioner, as he has no power to commit a prisoner brought before him for examination until a cause of commitment judicially appears. When any commitment is ordered, a written *mittimus*, setting forth the cause, must be directed to

the marshal or his deputy, commanding him to deliver the prisoner to the keeper of the common jail; and when the mandate of the warrant is obeyed, then the marshal is relieved from the responsibility of custody. *Randolph v. Donaldson*, 9 Cranch, 78.

The marshal is clearly entitled to the fees charged for attending court and guarding the defendant on the 27th of August, as the defendant was put in his custody by order of the commissioner until sufficient bail was given for an appearance at court to answer an indictment. After hearing a case, and determining to hold a defendant to bail, the commissioner can by verbal order put the defendant in custody of an officer until the bail required is given; but the officer cannot commit to jail without a written *mittimus* from the commissioner.

It is ordered that the clerk of this court relax the costs in this case in conformity with this opinion.

UNITED STATES v. INGRAHAM.

(Circuit Court, D. Rhode Island. February 4, 1892.)

1. CLAIMS AGAINST UNITED STATES—FRAUD—INDICTMENT.

An indictment for the offense of presenting to any officer "in the civil, military, or naval service of the United States" a false claim (Rev. St. § 5438) is sufficiently certain in alleging that such claim was presented to the "third auditor of the treasury department of the United States." It need not allege that he is an officer in the civil service of the United States.

2. SAME.

An indictment alleging the presentation of a false affidavit need not aver that the officer before whom it was taken was authorized to administer oaths. The word "affidavit," as used in the statute, relates to the form of the false paper, and not its legal character.

At Law. Indictment of Royal Ingraham under Rev. St. § 5438.
Motion in arrest of judgment.

Rathbone Gardner, Dist. Atty., for the United States.
Franklin P. Owen, for defendant.

CARPENTEE, District Judge. This is a motion in arrest of judgment after verdict on an indictment under section 5438 of the Revised Statutes, which is as follows:

"Section 5438. Every person who makes or causes to be made, or presents or causes to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, or who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, * * * shall be imprisoned," etc.

The language of the indictment, so far as it is pertinent to the questions raised by this motion, is as follows: In the first count—

"That Royal Ingraham * * * did knowingly, willfully, and unlawfully make and present, and cause to be made and presented, for payment and approval, to the third auditor of the treasury department of the United States of America, a certain claim against the government of the United States."

—And in the second count—

"That said Royal Ingraham, * * * for the purpose of obtaining and aiding to obtain the payment and approval of a certain claim against the government of the United States, to-wit," etc., " * * * did knowingly, willfully, and unlawfully use and cause to be used a certain false affidavit, to-wit, the affidavit of one Perry Ingraham and one Mary E. Ingraham, * * * subscribed and sworn to on the ninth day of December, in the year of our Lord one thousand eight hundred and ninety, before Daniel H. Remington, a justice of the peace, he, the said Royal Ingraham, then and there well knowing the said affidavit to contain a fraudulent and fictitious statement, to-wit," etc.

The motion in arrest of judgment is based upon the following grounds: (1) That the first count is uncertain and charges no offense, in that it does not set forth that the third auditor of the treasury department of the United States of America was a person and officer in the civil, military, or naval service of the United States. (2) That the second count is uncertain and charges no offense, in that it does not set forth that the claim against the government of the United States had been or was to be presented to a person or officer in the civil, military, or naval service of the United States, and also in that it does not set forth that said Daniel H. Remington, a justice of the peace, was authorized to administer oaths, and in what jurisdiction said Remington was justice of the peace, and that said affidavit was sworn to in his jurisdiction. I am of opinion that in both the above particulars the offense is sufficiently stated under the statute.

As to the first objection, it is to be observed that the purpose of the indictment is to make it clear beyond a peradventure that the claim in question was presented to a person such as is described in the statute. The grand jury, the court, and the prisoner, being conclusively presumed to know the law, are therefore conclusively presumed to know that the third auditor is a person and officer in the civil service. The language, therefore, makes certain the meaning of the grand jury, and sufficiently informs the prisoner of the charge against him. The person to whom the claim was presented is described in terms, which show him to be one of the general class of persons intended by the statute, and it is not necessary explicitly to state that he belongs to that class. It can be no more necessary to allege that the auditor is a person in the civil service than it would be to allege that Royal Ingraham is a person.

As to the second objection, I observe that the substance of the crime consists in the presentation of a "false * * * affidavit, * * * knowing the same to contain any fraudulent or fictitious statement." Clearly, the affidavit so alleged to have been presented must be so fully

described that the prisoner may be able to identify the particular affidavit intended by the grand jury, and it is not necessary that it be described further. In this indictment it is described by date of jurat, and name of the person taking the same, and also by a recital of the alleged false statement contained in the affidavit. The allegation that Remington was authorized to administer the oath could not add to this certainty of description. Still further, it seems to me to be clear that it is not necessary that Remington should have been authorized to administer oaths in order that the offense here charged shall be complete. The word "affidavit" relates to the form of the false paper which is presented, and not to its legal character. If Remington were not a justice of the peace, or if he did not administer the oath, and his signature to the jurat were forged, I think the paper would still be a "false affidavit," within the meaning of the statute.

The motion must, therefore, be denied and dismissed.

NATIONAL SURFACE GUARD CO. v. MERRILL.

(Circuit Court of Appeals, Sixth Circuit. October 6, 1891.)

1. PATENTS FOR INVENTIONS—ANTICIPATION—CATTLE-GUARDS.

Letters patent No. 373,359, issued November 15, 1887, upon the application of John T. Gilbert, to James T. Hall, as assignee for a cattle-guard consisting of strips of perforated metal placed on edge, and fastened together by transverse rods passing through the perforations, and through sleeves placed between the strips, were anticipated by the Akin patent, (No. 183,099, October 10, 1876,) which shows parallel bars of wood, secured by notches in transverse timbers; and the Kline patent, (No. 141,566, issued August 5, 1873,) showing parallel wooden bars set at an incline, and presenting sharp angles at the upper edge, and secured in substantially the same manner as the metal bars of the Gilbert patent.

2. SAME—PIT AND SURFACE GUARDS.

The patent cannot be sustained on the ground that the device is a surface guard, as distinguished from a pit guard, since no claim is made for this feature, and since such a claim would be invalid for anticipation by both the Kline and Akin patents, and the Dillon and Gartner patent, (No. 275,333, issued April 3, 1883,) which is declared by the specification to be an improvement, "whereby the use of the customary pits, as now constructed by railroads, may be dispensed with."

3. SAME—VIBRATING BARS.

Letters patent No. 403,582, issued May 21, 1889, to James T. Hall, for an improvement in the guard by fastening the bars only at the ends, thus leaving them free to vibrate laterally when trod upon by animals, involves no patentable invention, and is, besides, substantially shown in the Akin and Kline patents.

4. SAME.

Letters patent No. 418,014, issued December 24, 1889, to James T. Hall, for an improvement consisting in using bars with the ends turned down so as to raise the body thereof, and allow the use of a cross-bar so low as not to be caught by anything dragging under the train, and also presenting an angle at the upper side of the bar, contain no patentable invention.

5. SAME—GUARD-SHIELDS.

Letters patent No. 421,938, issued February 25, 1890, to the same inventor, for inverted V-shaped shields, set upon the rods, and presenting a surface inclined in both directions, and extending from the top of the guard-rail to the tie, to avoid danger from any beam or chain hanging from a passing train, is a mere mechanical device.

Appeal from the Circuit Court of the United States for the Eastern District of Michigan.

Suit by the National Surface Guard Company against Parker Merrill for infringement of patents. Decree below dismissing the bill. Complainant appeals. Affirmed.

Parker & Burton and George Lothrop, for appellant.

Irish & Knappen, for appellee.

Before BROWN, Circuit Justice; JACKSON, Circuit Judge; and SAGE, District Judge.

SAGE, District Judge. The suit is for the infringement of four patents for railway cattle-guards. The first, No. 373,359, was issued November 15, 1887, upon the application of John T. Gilbert, assignor, by mesne assignments, to James T. Hall; the second, No. 403,532, May 21, 1889, to James T. Hall; the third, No. 418,014, December 24, 1889, to James T. Hall; and the fourth, No. 421,928, February 25, 1890, to James T. Hall. The appellant is the owner of all these patents.

The Gilbert patent is for a cattle-guard consisting of thin strips of perforated metal, placed on edge, and tied together by rods fastened through the strips and through sleeves interposed between the strips. There are two claims, each for a specific construction of that character; the first reciting the strips, bolts, and sleeves in more general terms, and the second in more specific terms. The drawings show strips serrated on their upper edges, and the specification states that they may be serrated or not, at will.

The Hall patent No. 403,532 is composed of flexible bars set upon edge lengthwise of the track in the form of a grating, and free to vibrate laterally. It is supported by raised ties under the ends, and combined with sloping side fences.

In the Hall patent No. 418,014 the novel feature set up is the form of the bar, which is longitudinal, and turned down at each end, whereby the body of the bar is raised; and a cross-bar, so low as not to be caught by anything dragging under the train, can be used.

The invention claimed in the Hall patent No. 421,928 consists in the peculiar construction of inclined, inverted, V-shaped metal shields, set upon the connecting rods between the bars, and serving the double purpose of shields and of spacing blocks. As shields they present a surface inclined in both directions from the top of the guard-rail to the tie, to avoid danger from any beam or chain hanging or dragging from a passing train, and as spacing blocks they prevent lateral movement of the bars upon the connecting rods.

The argument upon the hearing was devoted exclusively to the validity of the patent to Gilbert, No. 373,359, and to the question of its infringement by the defendant. The contention of counsel for the complainant was that that was the pioneer patent, and, as such, entitled to a broad and liberal construction. The other two patents were referred to as subordinate or structural patents, the principles of which, it is

claimed in the brief, are embodied in the structure which the defendant has been making and selling. It is, however, practically conceded that the case turns upon the validity and the infringement of the Gilbert patent. We do not concur in the proposition that it should be recognized as a pioneer patent. The Akin patent, No. 183,099, October 10, 1876, shows parallel bars of wood, placed on edge, at stated distances, and secured by notches or gains in transverse timbers or sills. The moment, therefore, that complainant undertakes to sustain the charge of infringement by showing that the defendant uses a mechanical equivalent, although he does not use the precise method described and claimed in the Gilbert patent, he encounters an anticipation in the Akin patent. The specification of material in that patent is nothing more than a matter of selection, for it is stated that it is preferably, though not necessarily, wood. Moreover, the language of the specification in regard to the method of attaching and supporting and securing the bars is that "the parts may be attached by any of the known methods and devices equivalent to those shown."

The patent to Kline, of August 5, 1873, No. 141,566, for improvement in cattle-guards, shows parallel wooden bars, set at an incline, and presenting a sharp angle at the upper edge. These are secured substantially as the bars in the Akin patent. These two patents clearly show that the use of parallel bars set on edge so as to present a sharp angle at the upper surface, and secured at fixed distances from each other, was not new at the date of the issue of the Gilbert patent, which disclosed no new features excepting the peculiar and exact means of securing the bars, and the notched upper edges, which latter are not claimed.

But it is urged that the Gilbert guard is a surface guard, and that, although there was nothing novel in the mechanical device of fastening strips of wood or metal together by means of rods or bolts passed through perforations, or in the use of a sleeve or jacket over a rod to keep a bar from slipping up, and although (to use the expression in the testimony of the expert for complainant) there were thousands of pit guards in existence before the Gilbert patent, in which the pit was covered over in one way or another by bars or strips of wood to enable persons walking the track to pass over, and those bars were laid at intervals apart, and made to afford very small and insecure footing, so that it would be difficult for animals to pass over, and although it was common to set wooden bars or boards on edge across pits, the use of the same upon the surface, or, in other words, without the pit, was a novel feature, and unknown prior to the Gilbert patent. Upon the argument it was admitted that if the defendant's device—which consists of rods or bars, parallel with the rail, attached at equal distances to cross-beams between the rails, and formed of sheet-steel, bent nearly together in the form of an inverted U, into which the bent ends of diamond-shaped bars of steel are hooked, the bars being strained to a tension over the central cross-beam, which is higher than the others, and tied there by staples—were placed over a pit, instead of upon the surface, it would not be an infringement. The answers to this contention are: *First*. That the com-

plainant makes no claim to this feature. The claims are confined to the structure of the guard itself. *Second.* This contention brings the complainant face to face with anticipations which would make such a claim altogether invalid.

In the Kline patent the under surface of the bars is shown by the drawings to be on a level with the top of the ties, and some of them rest thereon. Referring to the specifications, we find a clear indication that it was a surface guard. The language is that the edges of the boards or bars "do not afford any foothold. The cow's foot slips down between the boards to the ground below. As soon as the cow advances to put down the next foot, she finds the other foot jammed by the change of her position," etc.

The Akin patent shows a shallow pit under two of the slats and under the sills "of sufficient depth to prevent hogs, sheep, and other animals having small feet from stepping through said slats on the ground below." With these exceptions, that guard is a surface guard. There is another patent which is a complete anticipation in this regard. It was granted April 3, 1883, to Dillon and Gartner, and is No. 275,333. It employs spike rollers, instead of the bars shown in the patents above referred to. It is declared in the specifications to be an improvement "whereby the use of the customary pits, as now constructed by railroads, may be dispensed with." It is therefore clear that the complainant can derive no benefit from this alleged feature of his patent. The defendant does not use strips of metal placed on edge, nor in any other respect does he employ the construction described in the complainant's patent; and we are of opinion that, if the patent were held valid, the defendant should not be held to be an infringer.

Our conclusion, however, is that the complainant's patent is anticipated by the patents above referred to, and that it is not valid.

With reference to the other patents involved in this suit, it is not necessary to consider them at length. No. 403,532 relates first to the matter of so constructing the guard that its rails or bars should be flexible, and free to vibrate laterally. This feature is covered by claims 1 and 2. Claims 3 and 4 relate to the combination of the guard with the fences and extended ties underneath the track. The main object sought is to secure the lateral vibration of the bars when trod upon by animals. To this end the patentee does away with the bearing of the bars upon all the ties underneath the guard, and uses only a minimum of supports under them, which he preferably accomplishes by the use of two ties, one at each end of the guard. We do not think that a patentable feature. It is shown substantially in the Akin patent and in the Kline patent. It is scarcely necessary to add that, the patent being invalid in this respect, the claims relating to the combination are also invalid.

We are of opinion that there are no patentable features in No. 418,014. Each bar is provided with turn-down ends, forming legs or supports. These raise the body of the bar, and dispense with the necessity of using a cross-bar of any considerable depth, but there was nothing new in this feature. As to the other feature, of presenting an angle at

the upper side of the bars, that is shown in the Kline patent bars. In our opinion, this patent is invalid.

The shield or guard pieces which are claimed singly and in combination in No. 421,928 are substantially the same, and amount practically to substitutes for the sleeves on the rods shown in the Gilbert patent, excepting that they present inclined surfaces to any hook or chain dragging from a passing car. We find that this was nothing more than a mechanical device, which, before the date of the patent, had been in common use in various structures, and that it shows nothing novel or patentable, either singly or in any of the combinations claimed.

The decree of the court below dismissing the bill is affirmed.

THE MARY H. BROCKWAY.¹

STARK *et al.* v. THE MARY H. BROCKWAY.

(District Court, S. D. New York. January 14, 1892.)

COSTS AND FEES—MARSHAL'S COMMISSIONS—REV. ST. § 829—POSSESSORY SUIT.

In a suit to recover possession of a vessel, where the marshal seizes and takes possession of the vessel, and, on settlement of the suit, delivers up possession of the property subject to his fees, he is entitled to his regular commissions on the value of the vessel, under Rev. St. § 829, besides keeper's fees, though the claim was not for a money demand.

In Admiralty. On appeal from taxation of costs.

James Parker, for libellant.

BROWN, District Judge. Upon a libel filed to recover possession of the schooner Mary H. Brockway from a part owner, who had been removed as master, but who refused to give up possession, the marshal arrested and took possession of the vessel under process. Thereafter the suit was settled between the parties, and the possession of the property was accordingly delivered by the marshal, subject to the payment of his fees. The vessel being of the value of \$25,000, the marshal's fees were taxed at the sum of \$127.50, under section 829 of the Revised Statutes. The libellant appeals from the taxation, on the ground that section 829 allows only \$2.50 per day for keeping the vessel; that the language of the following paragraph of that section, giving the marshal a commission "when the debt or claim in admiralty is settled by the parties without a sale of the property," is not applicable; and that, under section 857, upon the analogy of the state practice, (Code, § 3307, subd. 2,) he should only receive such reasonable compensation for his trouble as the court or judge should allow.

¹Reported by Edward G. Benedict, Esq., of the New York bar.

Section 857 of the Revised Statutes relates only to the mode of recovering fees, not to the amount of fees chargeable. These are regulated by section 829. The language of the paragraph above referred to—

"When the debt or claim in admiralty is settled by the parties without a sale of property, a commission of one per centum on the first \$500 of the claim or decree, and one-half of one per centum on the excess: provided, that if the value be less than the claim, the commission shall be allowed only on the appraised value thereof"—

is broad enough to include the present case. The claim was for the possession of the vessel. Possession has been secured through the process of the court, the attachment, and the possession and custody of the marshal, until delivered over, pursuant to the settlement. The claim was settled by the parties without a sale. The claim is, indeed, not for a money demand, so that the case is not within the very letter of the section, but it is plainly within its spirit. The claim, being for the possession of the vessel, was, in effect, a claim for the value of the vessel, not in money, but in property. Mr. Justice BLATCHFORD in the *Case of Johnston*, 8 Ben. 191, in which marshal's commissions were allowed upon the property of the bankrupts, which had been seized in proceedings in bankruptcy, and afterwards delivered over upon a settlement between the parties, says:

"The theory of this allowance is that the marshal, in an admiralty suit *in rem*, has attached the property, and holds it, and that then, with a sale of the property by the marshal, the controversy is so disposed of by the parties that the marshal is called upon to give up possession of the property, so that he loses the fees for selling it and for receiving and paying over the money. In such a case he is allowed a commission, which is intended as a compensation for his risk and responsibility; just as the poundage allowed on final process, and the percentage allowed on a sale of property in admiralty, are each of them a compensation for risk and responsibility, not merely in selling the property, but in holding possession of it under process. Personally, he can have no other compensation for keeping safely the property. For the expense of keeping it, not exceeding \$2.50 a day can be allowed, only when paid to a keeper. * * * The commission is given by section 829 for the service of the marshal in respect to the property which he relinquishes, in taking the risk and responsibility which he takes in regard to it while he holds it."

It would be unjust to the marshal that he should be required to answer for the responsibility of keeping property for the benefit of the parties to the cause, and delivering it to them pursuant to settlement, without any compensation whatever. He is entitled to nothing for that responsibility, except under this clause, since, under the preceding section "for necessary expenses," he can recover only what he pays to the keeper. The sum allowed on settlement is less than half that allowed on sale by the following clause. The observations quoted from Mr. Justice BLATCHFORD seem to me to be decisive, and the amount taxed in accordance therewith should be allowed, and the taxation affirmed.

THE ASPOTOGAN.¹

WILLIS v. THE ASPOTOGAN.

(District Court, E. D. Pennsylvania. January 5, 1892.)

SHIPPING—LIABILITY FOR PERSONAL INJURIES—SEAMEN UNLOADING CARGO.

Libelant, a seaman engaged in unloading wood from a vessel, was hurt by the fall of a tier of wood, caused by the mate's withdrawal of a cleat. The removal of the cleat was necessary in order to unload the vessel, and was effected in the ordinary and proper manner, and after repeated warnings, which were heeded by all the men at work except the libelant. *Held*, that no negligence could be imputed to the mate, as he was justified in believing that libelant would heed the warnings.

In Admiralty. Libel by George Willis, formerly a seaman on board the bark Aspotogan, against said bark, to recover damages for personal injuries sustained while unloading cargo. Libel dismissed.

John F. Lewis and Charles Gibbons, for libelant.

Alfred Driver and J. Warren Coulston, for respondent.

BUTLER, District Judge. The libelant, a seaman on board the bark Aspotogan, was injured while assisting to unload a cargo of lumber, which she carried to Rio de Janeiro, and sued for damages—charging his injury to careless and wrongful conduct of the mate, as follows:

"Libelant was working between decks, and was running the planks out of the bark through the port bow, onto lighters. A large tier of planks was piled up along the port side of the vessel as they had been loaded, and were held in position by cleats of wood which had been driven in between the planks and the beams of the vessel. The mate of the vessel was superintending the removal, and while libelant was busily engaged in counting his planks, the mate, without a word of warning, knocked away one of the cleats which so held up the said tier of planks, and in consequence of the loss of this support, the tier of planks fell down and buried the libelant under their weight, in consequence of which his left leg was broken and other serious injury sustained, * * * without any negligence on his part whatever."

The answer denies the imputed negligence and all liability for the injury. The mate was superintending and assisting; and several other were engaged in the work of removing the lumber, as the libelant was. He alone, however, was injured. The master was on board. The testimony of the libelant, upon which alone his case rests, is contradicted by that produced by the respondent. A careful examination has satisfied me that the charge of negligence is not sustained. What the mate did was proper and usual under the circumstances. It was necessary to remove the cleats and it was customary to do it as he did. The testimony seems to leave no room for doubt that he gave ample and repeated warning that he was about to do it, which the other workmen heard and obeyed. The mate was justified in believing the libelant would also heed it. Why he did not is explained by his statement immediately

¹Reported by Mark Wilks Collet, Esq., of the Philadelphia bar.

after the occurrence; he thought himself safe where he was. The testimony justifies a conclusion that his injury resulted entirely from his own want of care. It is unnecessary therefore to consider the legal question raised—that the vessel was not responsible for the mate's negligence, if he was negligent. The libel must be dismissed.

THE CAPE HORN PIGEON.

DA CROUZ *et al.* v. THE CAPE HORN PIGEON.

(District Court, N. D. California. January 27, 1888.)

1. SEAMEN—REMUNERATION OF WHALERS—SETTLEMENT.

On a question whether the valuation of whalebone, which formed the basis of a settlement between certain whalers and their men, was fair and reasonable, it appearing that there was no market therefor in San Francisco, where the settlement was made, the value must be fixed upon the basis of the selling price in New York, with proper deductions for the expense of sending it there and preparing it for sale.

2. SAME.

The settlement complained of was made at \$1.25 per pound for the men, and it appeared that, in order to pay this amount without loss, the owners must realize \$1.77 per pound in New York. The highest offer they had received was \$1.50, which they refused, and they had then offered to sell at \$2, which was not accepted. Several ship-owners and agents of experience in the business testified that the settlement was a fair one, and it was shown that many of the same men had engaged for the following season at \$1.25 per pound if the catch exceeded 200 whales, and \$1.50 per pound if it was less than that number. The catch for the season in question was 845 whales. *Held*, that the settlement should not be disturbed.

In Admiralty. Libel by J. A. Da Crouz and others against the whaling bark Cape Horn Pigeon.

Daniel T. Sullivan and *F. Van Norman*, for libellant.

Milton Andros and *Chas. Page*, for respondents.

HOFFMAN, District Judge. This is one of the several libels filed by the crews of the whaling fleet which arrived at this port at the close of last year's whaling season, to procure a revision by the court of the settlements made or offered to the men. It was stipulated by the advocates representing all the vessels libeled and all the libelants that the testimony should be confined to the inquiry, whether the valuation of the oil and bone, which formed the basis on which the men's accounts were made up and adjusted, was fair and reasonable, and, if not, the court should determine on what valuation the accounts should be restated. The testimony was quite voluminous. I have very carefully perused it. The conclusions I have reached are in accordance with the impressions I received from hearing it orally delivered.

1. With regard to the oil, I think it is conclusively shown that the price at which it was valued was fair, if not liberal.

2. As to the bone, it seems that there is no market for the bone in this city. The valuation on which the accounts must be adjusted is the

market price in New York, less the freight, shrinkage, insurance, and other charges and expenses incident to placing the bone on that market. The losses on a ton of bone shipped at this port, as taken from the ship and put on the market at New York, appear to be as follows:

Shrinkage between San Francisco and New Bedford, 10 per cent.,	200 lbs.
Shrinkage by cleaning at New Bedford, 5 per cent.,	100 lbs.
Separating cullings under $4\frac{1}{2}$ feet, 10 per cent.,	200 lbs.
	<hr/>
	500 lbs.

There will thus arrive at New York, of good culled bone, 1,500 lbs., and also of cullings, 200 lbs. The charges and expenses incurred per ton in placing this quantity of selected bone and cullings on the New York market, and effecting a sale of it, are shown to be as follows:

Cartage from ship to railroad,	\$ 50
Freight to New Bedford at $2\frac{1}{2}$ cents per lb.,	50 00
Insurance at $1\frac{1}{2}$ per cent. on a valuation of \$1.25 per lb., or \$2,500 per ton,	31 25
Cartage to warehouse at New Bedford,	50
Cleaning and culling 1,800 lbs. of bone (the quantity arriving after deducting shrinkage) at $2\frac{1}{2}$ cents per lb.,	45 00
Cartage at New Bedford for New York,	50
Freight to New York on 1,700 lbs. at $\frac{1}{2}$ cent per lb.,	8 50
Insurance to New York at 1-10 of 1 per cent. on valuation of \$1.25 per lb.,	2 50
Cartage in New York,	50
Brokerage in New York, (say)	50 00
Interest 60 days at 6 per cent. per annum on valuation of \$1.25 per lb.,	25 00
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These charges aggregate	\$ 214 25
Adding \$1.25 per lb., the valuation at San Francisco,	2,500 00
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We have thus total cost of bone, if sold in New York within 60 days after arrival at San Francisco, without including warehouse charges at New Bedford or New York, - - - \$2,714 25

We have seen that from one ton of bone shipped from San Francisco there will be put on the market at New York, culled and selected bone, 1,500 lbs.; cullings, 200 lbs. The bone on arriving at New York is there charged with cost and expenses amounting to \$2,714.25. The 200 lbs. of cullings, it is testified, are of little value, perhaps 25 cents per lb., equal to \$50. To enable the owners to settle with the men at \$1.25 per lb., without loss, the 1,500 lbs. of selected bone must be sold at New York, within 60 days, at \$1.77 per lb. The best offer received by the owners, for any considerable quantity of bone, was \$1.50 per lb. for 100,000 lbs. This was declined. But they offered to sell at \$2 per lb. This offer was also declined. The bone was to be culled and selected bone, delivered free of charges in New York.

Several of the ship-owners and agents have testified in court. They are men of great experience in the business, and some of them of unusual intelligence. They affirm very positively, and with apparent candor, that

the basis of settlement adopted by them was, in their opinion, just and fair to the men; and their opinions derive much support from the fact that the crews of a large part of the whalers have reshipped for the next season on an agreed basis, of settlement of \$1.25 per lb. for bone if the catch amounts to 200 whales or over, and \$1.50 if the catch is less than 200 whales. Twenty cents is to be allowed for oil, without reference to catch. The number of whales taken during the last season was 345. The men have been settled with on the same basis as that mutually agreed for next year, if the catch is over 200 whales.

I find no reason for disturbing the settlement made, on the ground that the men have not been fairly dealt by.

THE SARAH CULLEN.

KNICKERBOCKER STEAM TOWAGE CO. v. THE SARAH CULLEN.

(Circuit Court of Appeals, Second Circuit. November 7, 1891.)

MARITIME LIEN—TOWAGE—CREDIT OF THIRD PERSON.

Libelant rendered towage service to a vessel without express employment by her master, or agreement to pay. Libelant was afterwards informed that the R. Ice Company was to pay for the towage, and thereafter, for the above and subsequent towage services, rendered bills to such ice company, which were paid in part. No notice was given to the vessel owner that the ship was expected to pay for the towage until the failure of the ice company, six months after the first voyage. *Held*, that the service was not rendered on the credit of the vessel, but on the credit of the charterer. 45 Fed. Rep. 511, affirmed.

Appeal from the Circuit Court of the United States for the Southern District of New York.

In Admiralty. Libel for towage by the Knickerbocker Steam Towage Company against the schooner Sarah Cullen. A decree dismissing the libel was affirmed by the circuit court, and libelant appeals. Affirmed.

It appeared that the schooner was at the time under charter to the Knickerbocker Ice Company, which had agreed to pay for all towages in the Kennebec river. Previous to the rendering of the towage sued for, the libelant had rendered other towage services to the schooner, the bills for which had been paid by the Ridgewood Ice Company. No notice was given the master or owners of the vessel that they were expected to pay these towage bills until after the failure of the Ridgewood Ice Company, and the claimants contended that the services were not rendered on the credit of the vessel, but at the request and on the credit of the ice company. The district court found that the services were not rendered on the credit of the vessel, and dismissed the libel, (45 Fed. Rep. 511;) and, on appeal, a *pro forma* affirmance was rendered by the circuit court, whence libelant appealed to this court.

Wing, Shoudy & Putnam, for appellant.

Owen, Gray & Sturges, for appellee.

Before WALLACE and LACOMBE, Circuit Judges.

PER CURIAM. We are satisfied that the towage service, for the recovery of which this libel is filed, was not rendered on the credit of the schooner or her owners, but both her master and the libellant understood that the towage was to be collected of the Ridgewood Ice Company, the charterer of the vessel. The decree of the circuit court is affirmed, with costs of this court, and the cause remanded to that court, with directions to render a decree accordingly.

THE COE F. YOUNG.

IRONS *et al.* v. THE COE F. YOUNG.¹

(Circuit Court of Appeals, Second Circuit. November 14, 1891.)

1. COLLISION—STEAM AND SAIL—LOOKOUT.

A sailing vessel is entitled to assume that a steam-vessel, approaching her, is being navigated with a proper lookout, and with reasonable attention to the obligations laid upon her.

2. SAME—DUTY OF SAIL-VESSEL—BEATING OUT TACK.

A sailing vessel, beating in the vicinity of a steam-vessel, is not obliged to run out her tacks, provided her going about is not calculated to mislead or embarrass the steam-vessel.

3. SAME—STATEMENT OF CASE.

A tug was going up about the middle of the North river on a clear morning, and was gradually overtaking a sloop, which was beating up the stream. The tug had no lookout, other than her master at the wheel. The sloop went from one tack to another, when about 1,000 feet from shore, and the tug soon after struck and sank her. The tug claimed that the change of course was the cause of the collision. The court found that the tug had ample time to have avoided the sloop after her going about, and accordingly held, that the tug was solely in fault for keeping a defective lookout.

Appeal from the Circuit Court of the United States for the Southern District of New York.

In Admiralty. Libel against the steam-tug *Coe F. Young* for damage by a collision with the sloop *Mary*; by the owners of the vessel, for its loss; the master, for personal injuries; and a deck-hand, for the loss of personal effects. A decree for libelants was affirmed by the circuit court, and respondent appeals. Affirmed.

On the morning of April 19, 1890, the steam-tug *Coe F. Young* left the foot of Fulton street, New York, bound for Yonkers. The morning was clear, the tug had no tow, and went out about one-third of the distance across the river, and then took a straight up-river course, going at full speed. She had no stationed lookout forward, other than her master in the pilot-house. When somewhere in the

¹Reported by Edward G. Benedict, Esq., of the New York bar.

neighborhood of Twenty-Third street; her master discovered ahead of him the small fishing sloop *Mary*, which was beating up the river, heading somewhat on the New York shore, and which was then to the eastward of the course of the tug. The latter kept on with unabated speed, continually overtaking the sloop. When about off Twenty-Sixth or Twenty-Seventh street, and while still 1,000 feet from the New York shore, the sloop went about on her tack towards New Jersey. Shortly afterwards the tug struck the sloop, cutting off her stern, causing her to become a total wreck, and inflicting personal injuries on her master, who was at the helm. The owner of the sloop brought suit for the loss of the vessel, the master for his personal injuries, and a deck-hand for the loss of his effects, all of which suits were consolidated on motion. The district court held the tug solely in fault, (45 Fed. Rep. 505,) and on appeal a *pro forma* affirmance was given by the circuit court, whence an appeal was taken to this court.

Benedict & Benedict, for appellants.

The absence of a stationed lookout on the tug is immaterial, unless the collision was caused by such absence of lookout. *The Farragut*, 10 Wall. 334; *The Fannie*, 11 Wall. 238; *The Atlas*, 10 Blatchf. 459, 464; *The Gen. Franz Sigel*, 6 Ben. 550; *The Margaret*, 3 Fed. Rep. 870; *The Buckeye*, 9 Fed. Rep. 666; *The George Murray*, 22 Fed. Rep. 117, 122; *Law v. Baker*, 26 Fed. Rep. 164. The sailing vessel was bound to beat out her tack, and her going about as she did was the sole cause of the collision. *The Potomac*, 8 Wall. 590; *The Adriatic*, 107 U. S. 512, 2 Sup. Ct. Rep. 355; *The City of New York*, 1 Cliff. 75; *The A. W. Thompson*, 39 Fed. Rep. 115; *The W. C. Redfield*, 4 Ben. 227; *The Illinois*, 103 U. S. 298. The sloop's change of course misled and embarrassed the tug.

Hyland & Zabriskie, for appellees.

The collision was caused by the failure of the tug to keep a lookout.

Before WALLACE and LACOMBE, Circuit Judges.

PER CURIAM. The sloop was entitled to assume that the tug was navigating with a proper lookout, and with reasonable attention to the obligations laid upon her as an overtaking steam-vessel. If, under that assumption, the sloop's maneuver was not calculated to mislead or embarrass the tug, it is immaterial whether or not she ran out her port tack. The testimony shows clearly, and in fact it was conceded on the argument, that she had gone about and filled upon the starboard tack before the collision. The disputed question is whether there was abundant time and space to enable the tug, seeing her maneuver, to keep out of the way. The collision happened about opposite Twenty-Seventh or Twenty-Eighth street. Such is the testimony of the disinterested witnesses called by the claimant, who saw it from the foot of Twenty-Ninth street. Variation in their estimates of the precise distance is to be expected; but it was certainly below, not above, their own position. They testify that the sloop went about very shortly before, (though one of them fixes the time as three or four minutes,) and therefore a little further down the river. The witness Sands, who was standing on the pier

at the foot of Twenty-Fifth street, says that she went about off Twenty-Fourth street, and that the collision took place off Twenty-Sixth or Twenty-Seventh street. Any estimate of his as to distances away from him, in the same direction, is as fallible as such estimates usually are; but it seems hardly possible he could be mistaken in the statement that one of the places he indicates is above, and the other below, his own point of observation. It seems a fair conclusion from the evidence that the sloop had sailed on her new tack, at least as far as from Twenty-Fourth to Twenty-Sixth street, which gave the tug ample time to conform her own navigation to the change of the sloop's course, if she had seen the latter come about, as she should have done. The decree of the court below is affirmed, with interest and the costs of the appeal to be paid by the appellant, and the cause remanded for further proceedings to be there taken in pursuance of this opinion.

THE BOLIVIA.

ADAMS *et al.* v. THE BOLIVIA.

(Circuit Court of Appeals, Second Circuit. December 14, 1891.)

1. COLLISION—FOG SIGNALS BY SAILING VESSEL—MECHANICAL FOG-HORN.

By a collision, during a fog, between a steam-ship and a schooner, the latter received injuries from which she sank. The schooner had no mechanical fog-horn, and, though the horn which she had was sounded, it was not heard by those in charge of the steam-ship. *Held*, that the failure of the schooner to have and use an efficient fog-horn, to be sounded by mechanical means, as required by statute, was at least a contributing cause of the collision.

2. SAME—REDUCING RATE OF SPEED OF STEAM-SHIP.

A steam-ship, failing to reduce her speed, when going through a fog in one of the main lines of ocean travel between New York and Europe, to such a rate as will admit of her being brought to a stand-still within the distance at which, in the condition of the fog, she can discover another vessel, is guilty of a fault rendering her responsible for damages in case of a collision which might have been avoided if her speed had been less.

3. SAME—MUTUAL FAULT—DIVISION OF DAMAGES.

Where the loss of a schooner by collision with a steamship in a fog is caused by an improper rate of speed on the part of the steam-ship, and the want of a proper fog-horn on the part of the schooner, the damages must be divided.

48 Fed. Rep. 173, reversed.

Appeal from the Circuit Court of the United States for the Eastern District of New York.

In Admiralty. Libel by Robert B. Adams and another against the steam-ship Bolivia for the loss of a schooner by collision with the steam-ship. The libel was dismissed. Libelants appeal. Reversed.

Edward L. Owen, for appellants.

Harrington Putnam, for appellee.

Before WALLACE and LACOMBE, Circuit Judges.

WALLACE, Circuit Judge. This is a libel by the owners of the schooner *Eva I. Smith* to recover for the loss of the vessel, her cargo and freight, and the personal effects of her officers and crew, in a collision with the steamship *Bolivia*. The libel was dismissed by the district court. The libelants have appealed. The collision took place about 20 miles off Fire island, June 27, 1889, about 11:40 A. M. The schooner, at the time of the collision, was bound from Richmond, Me., to Philadelphia, laden with a cargo of ice. The *Bolivia* was proceeding from Mediterranean ports to New York. She was an iron steam-ship, built for carrying passengers and freight, and was about 400 feet long. The weather was very foggy. The wind was light, and from the south-west. The schooner was close hauled on the starboard tack, on a course S. by E., and making about 2 or 3 knots an hour. The steam-ship was on a course W. by N., and under a speed of about 7 or 8 knots an hour. The fog set in about half an hour before the collision. The steam-ship had been making about 11 knots an hour before the fog set in, and then her speed was reduced to that which she was maintaining at the time of the collision. The lookouts were doubled, the passengers forward were sent aft, and the engineers were doubled on the watch below, and ordered to stand by the engines. When going at a speed of 11 knots she would run about 4 lengths of herself before stopping, when the order to stop and reverse was executed as promptly as possible; and going between 7 and 8 knots she would run about 3 lengths. The schooner did not have any mechanical fog-horn. After the fog set in, her fog-horn was blown at proper intervals, forward. Her men heard the fog signals of the steamer several times before the steamer was visible, and on each occasion the schooner's horn was immediately sounded in the direction of the steamer. The fog-horn of the schooner was not an efficient one. If it had been, under the conditions of the wind, it would, in all probability, have been heard by some of those in charge of the steamer. As it was, none of them heard it. They discovered the schooner as soon as she was visible in the condition of the fog, and she was then 300 or 400 feet away. The schooner saw the steamer when she was twice that distance away, probably because the fog was denser on the deck of the steamer than it was lower down on the schooner's deck. As soon as the schooner was discovered by the steam-ship she ported, to go under the schooner's stern, and reversed her engines; but, although she nearly cleared the schooner, she was unable to avoid her, and struck her on the port side, abaft of her main rigging, cutting her down to the water's edge, and the schooner shortly thereafter sunk.

The schooner was plainly in fault for not complying with the statute, which, since 1885, has required sailing vessels to be provided with an efficient fog-horn, to be sounded by mechanical means. Act March 3, 1885, (23 St. p. 438, c. 354, art. 12.) By presumption of law, as she was at the time of the collision in violation of a statutory rule, intended to prevent collision, her fault was at least a contributory cause of the disaster. Under the circumstances of the present case, it seems more than probable that, if she had been provided with and had properly used such a fog-horn as the statute prescribes, the steam-ship would have

been notified of her proximity, and could have reduced her speed to the lowest rate consistent with her ability to control herself efficiently in a moment of peril.

The steam-ship must also be held in fault because she was not going at a moderate speed in the fog, under the special circumstances and conditions of the case. Act March 3, 1885, (23 St. p. 438, c. 354, art. 13.) She has given no evidence to show what speed she was required to maintain in order to keep steerage-way, and none to show that at a lower rate of speed than at 7 or 8 knots she would not have been under efficient control, and able to govern her own movements promptly and effectually. Under the existing state of the fog, and exercising the best vigilance, she could not discover another vessel more than 300 or 400 feet away, yet maintained such a speed that, after reversing, her headway through the water could not be stopped within three times that distance. The locality was one frequented by numerous vessels in the coasting trade, and lay in one of the paths of the ocean traffic between Europe and the principal commercial port of this country. The steam-ship had but just passed a sister steam-ship of her own line, bound in an opposite direction; and the schooner had seen or heard several vessels during the previous half hour of the fog. Under such circumstances, it is not enough that the steam-ship moderated her speed; she should have reduced it to that moderate speed which was safe and prudent, in view of all the circumstances and conditions of the case. The rule is firmly established in this country, and also in England, that the speed of a steam-ship is not moderate, at least in localities where there is a likelihood of meeting other vessels, if it is such that she cannot reverse her engines and be brought to a stand-still within the distance at which, in the condition of the fog, she can discover another vessel. *The Colorado*, 91 U. S. 692; *The Nacoochee*, 137 U. S. 330, 11 Sup. Ct. Rep. 122; *The Europa*, 2 Eng. Law & Eq. 557; *The Batavier*, 9 Moore, P. C. 286.

We cannot agree with the opinion of the learned district judge that the fault of the steam-ship was not contributory to the collision. The burden is upon her to show that it was not, and from the nature of the case this cannot be done. If she had been going slower, she would not have reached the place of the collision when the schooner was there. If, going at the speed she was, and seeing the schooner as she did, she was able to almost clear the schooner, it is quite obvious that going at a less speed, under equally efficient control, she would probably have been able to avoid the schooner wholly. The facts are very similar to those in *The Pennsylvania*, 19 Wall. 125, where the collision occurred in a fog about 200 miles from Sandy Hook, between a bark, going very slowly and ringing a bell as a fog signal, and a steamer, going at the rate of 7 knots. The court divided the damages, holding both vessels in fault; the steamer, because not maintaining moderate speed, and the bark for not using a fog-horn. The court in that case applied the rule that it is to be presumed against a vessel which, at the time of a collision, is in violation of a statutory rule intended to prevent collisions, that her fault was at least a contributory cause of the disaster, and that the burden rests upon

her of showing not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been.

We regret to have to apply the strict rule of the authorities in respect to moderate speed in a fog against the steam-ship in favor of a vessel that neglected to provide herself with any adequate means to enable the steam-ship to discover and avoid her, or for her own protection, or that of other vessels, in a fog; but we must conform to the law as it has been enacted and construed. The case is one for a division of the loss.

The decree below is reversed, and the cause remanded, with instructions to ascertain the damages, and render a decree for the libelants, dividing the damages, and for half the costs of the district court and the costs of this court.

THE STATE OF CALIFORNIA, (A. M. SIMPSON *et al.*, Libelants.)

THE PORTLAND, (PACIFIC COAST S. S. Co., Libelants.)

(Circuit Court of Appeals, Ninth Circuit. January 19, 1892.)

1. COLLISION—DUTY OF STEAMER ON MEETING SAIL-VESSEL.

On the morning of April 7, 1886, the steam-ship State of California was bound for San Francisco, and, when a short distance outside the heads, sighted the barkentine Portland, two points off her starboard bow, and near two miles distant, bound for the same place. No lights were observed on the barkentine, and the master of the steamer, supposing that the courses of the two vessels were nearly parallel, neither reversed his engine nor slackened his speed, but steamed on his course at the rate of 18 knots an hour. The night was dark, but clear, and the courses of the vessels were, in fact, nearly at a right angle. The barkentine was on the starboard tack, sailing close-hauled upon the wind, and continued her course until the steamer was within 800 yards of her, and apparently about to strike her amidships, when she was luffed into the wind, thus slackening her speed, and turning her bow to starboard and away from the steamer. The latter, without changing her course or abating her speed, undertook to steam across the bows of the barkentine, when they collided, the bow of the barkentine coming in contact with the steamer just abaft her beam, and both were seriously injured. The lights were burning on the barkentine, but the proof was not satisfactory that they were sufficient, and such as required by law. *Held*, that the steamer was in fault, on sighting the sail, in not reversing her engines, or slackening her speed, until the course of the barkentine could be certainly ascertained, and then it was her duty to keep out of the way; and therefore the damage occasioned by the collision ought to be divided.

2. FLARE-UP, WHEN SHOWN BY SAIL-VESSEL.

Section 4234 of the Revised Statutes, requiring a sail-vessel to show a torch on the quarter on which a steam-vessel is approaching her, is superseded by article 11 of the "International Regulations," so far as the high seas and the coast waters are concerned.

3. FINDINGS OF FACT BY THE CIRCUIT COURT.

The law limiting the supreme court, on an appeal in admiralty, to a review of the findings of the circuit court, on questions of law merely, does not apply to this court.

(Syllabus by the Court.)

Appeal from the District Court of the United States for the Northern District of California.

In Admiralty. Cross-libels between A. M. Simpson and others, owners of the barkentine Portland, and the Pacific Coast Steam-Ship Com-

pany, owners of the steam-ship *State of California*, for damages for a collision. The owners of the barkentine *Portland* appeal from a decree of the circuit court affirming a decree dismissing their libel, and awarding damages on the libel of the owners of the *State of California*. Reversed.

Mr. E. W. McGraw, for the *Portland*.

Mr. George B. Merrill, for the *State of California*.

Before DEADY, HANFORD, and HAWLEY, District Judges.

DEADY, District Judge, delivered the opinion of the court.

About 4 o'clock on the morning of April 7, 1886, a collision occurred between the steam-ship *State of California* and the barkentine *Portland*, a short distance outside the heads of the San Francisco bay.

The night was dark and clear, and the lights on Point Bonita, Point Reyes, and Fort Point were plainly visible.

Both vessels were bound in, and each was aware of her position. The wind was north-easterly. The course of the barkentine was about N. by W., and she was close-hauled on her starboard tack. The course of the steamer was about E. by N. From this it will be seen that the vessels were approaching each other at nearly a right angle. The steamer, while attempting to cross the bows of the barkentine, collided with her abaft her beam, on the starboard side. The barkentine was cut down from the bowsprit, below the water. In a few minutes after she was struck the vessel was water-logged, but, being loaded with lumber, she kept afloat, and was towed in.

The steamer had a hole stove in her side 8 or 10 feet in diameter, but by shifting the passengers and cargo, which consisted largely of wheat and flour, to port, she managed to get to her dock without injury thereto.

On July 26, 1886, A. M. Simpson and others, the owners of the barkentine, libeled the steamer on account of said collision; and on September 13, 1886, the owner of the steamer, the Pacific Coast Steam-Ship Company, libeled the barkentine for the same cause. On December 3, 1889, the libel in case of the steamer was dismissed, and the claimant had a decree for costs, and in the case of the barkentine the libellant had a decree for the damage suffered by the collision, and referring the case to a commissioner to find the amount thereof. On March 31, 1891, the commissioner reported the damage to the steamer at \$8,880.30, and on July 23, 1891, the libellant had a decree for said damages, and for demurrage \$3,076.05, with interest thereon, amounting in all to the sum of \$15,165.65, with costs.

On December 11, 1889, the libellant appealed from the decree of the district court (46 Fed. Rep. 877) dismissing the libel in the case of the steamer, and on July 20, 1891, the circuit court affirmed said decree, and dismissed the libel. The material findings of the circuit court are to the effect that the lights on the steamer were in good condition, and were seen by the men on the barkentine half an hour before the collision; that the red light of the latter was not displayed, or was burning

dimly; that the sail of the Portland was seen by the master and lookout of the steamer 4 or 5 minutes before the collision, while she was about a mile and a half distant, and "the absence of the red light led the master of the steamer to believe that the two vessels were sailing on nearly the same course, and therefore he did not reverse his engine, or slacken speed;" that the steamer was running at the rate of 13 knots an hour, was 315 feet in length, and could have been stopped in 5 times her length; that if, on first sighting the Portland, the engines of the California had been reversed, the collision would not have occurred, but she neither reversed her engines, slackened her speed, nor changed her course; that the Portland had a torch on board, but did not exhibit it, nor was it satisfactorily shown that the lights of the Portland were such as were required by the United States Statutes; and that, about 5 minutes before the collision, the Portland was, by order of the mate, luffed into the wind, "thereby arresting her headway, and throwing her more into the track of the steamer;" and concluded that the collision resulted from the neglect of the Portland to show a proper and sufficient red light."

Upon these findings the steamer must be held in serious fault, in not reversing her engines or slackening her speed when the lookout reported "a sail on the starboard bow." The master had no right to suppose that the vessel was on the same course with the steamer, and therefore there was no danger of collision. Seeing no light at all, he had no right to indulge in any supposition. It was his duty to stop at once, or slacken his speed, so as to simply hold his way until the course of the barkentine was ascertained.

The Hermann, 4 Blatchf. 441; *Steam-Ship Co. v. Calderwood*, 19 How. 245; *Louisiana v. Fisher*, 21 How. 5; *The Illinois*, 5 Blatchf. 258; *Ping-On v. Blethen*, 11 Fed. Rep. 607; *The Ancon*, 8 Sawy. 334, 17 Fed. Rep. 742.

The International Regulations are also decisive of the question. Articles 17 and 18 are as follows:

"Art. 17. If two ships, one of which is a sailing ship and the other a steam-ship, are proceeding in such direction as to involve a risk of collision, the steam-ship shall keep out of the way of the sailing ship. Art. 18. Every steam-ship, when approaching another ship so as to involve risk of collision, shall slacken her speed, or stop and reverse, if necessary." 23 St. p. 441.

The barkentine was some two points off the starboard bow of the steamer, and might well be, as she was, sailing on a course convergent to that of the steamer, in which case the risk of collision was certainly involved.

It is claimed by the appellant that, on the facts found, there should have been a division of the damages on the ground of the manifest fault of the steamer.

It is proper to state here that we do not consider the act of February 16, 1875, (Supp. Rev. St. 135,) which makes the finding of facts of the circuit court conclusive upon the supreme court, applicable to an appeal from a circuit court to this court.

The act organizing this court (section 6) gives it "appellate jurisdiction to review by appeal" all cases in admiralty,—to review them by appeal, unqualifiedly, in which the case is tried *de novo*, on the evidence, and not upon mere question of law.

The question is only material in the case of a decree given in a circuit court, on appeal from a district court, prior to March 3, 1891, the date of the act organizing this court; as since that time no appeal is allowed from the district to the circuit courts. Section 4. So the provision in section 11 of the act concerning "methods and systems of review" is prospective, and does not apply to appeals in admiralty from decrees pronounced under the old law.

It was found in the circuit court that the barkentine did not display a torch-light, as provided in section 4234 of the Revised Statutes, which requires such light to be shown by a sail-vessel on the approach of a steam-vessel, on whatever quarter it might be approaching. But this section is superseded, as to vessels on the high seas and coast waters of the United States, by article 11 of the International Regulations, which reads:

"A ship which is being overtaken by another shall show from her stern to such last-mentioned ship a white light, or a flare-up light." *The Algiers*, 38 Fed. Rep. 526; *The Excelsior*, 33 Fed. Rep. 555.

The barkentine was in the coast waters of the United States, and was not being overtaken by the steamer.

The case of the barkentine comes here direct from the district court, on the evidence, which makes a case more favorable for her than the findings in the circuit court.

For instance, the circuit court found that, 5 minutes before the collision, the barkentine was luffed up into the wind, whereby her headway was stopped, and she was thrown more into the track of the steamer.

The mate, Peterson, testifies that, about 5 minutes before the collision, he gave the order to put the vessel close to the wind.

It is possible he is mistaken about the time, and that the order was given less than 5 minutes before the collision. It was given when the steam-ship was about 300 yards distant from the barkentine, and apparently about to strike her amid-ships; but the longer before the collision the better for the case of the barkentine. The putting her more against the wind had a tendency to stop her headway, and probably did reduce her speed to 2 or 3 miles an hour. At the moment of the collision her sails were aback or fluttering. This slackening of speed gave the steamer more time to cross her bows, and reduce the force of the impact, when they came together; and so far from the luffing throwing the barkentine more into the track of the steamer, the contrary is true. Her bow swung to the starboard,—to the right,—and if she had swung half round in the same direction she would have been parallel to the steamer, and no collision would have occurred. It was the general duty of the barkentine to hold her course; but when the mate saw the steamer was crossing her bow, and likely to collide with the barkentine, it was his right and duty

to do whatever seemed most likely to avert or diminish the impending calamity. Articles 23, 24, 23 St. p. 442.

Notwithstanding, the steamer forged ahead on her course, at the rate of 13 knots an hour, when a slight deviation to port would have sent her clear of the barkentine, and prevented the collision.

As to the lights on the barkentine, the weight of the testimony is to the effect that they were in place and burning; but the testimony is not satisfactory as to their condition or quality. The libelants were practically challenged, on the hearing, to bring the red light into court for inspection. They failed to do so, and the reasonable inference is that it would have been found insufficient.

The case is one of mutual fault, and the damages must be divided, by requiring half the difference of the respective losses, if any, to be paid by the one sustaining the lesser loss to the other. *The Oregon*, 14 Sawy. 466, 42 Fed. Rep. 78, and 45 Fed. Rep. 62.

The decision of this court is that, in the case of the steamer *State of California* (A. M. Simpson and others, libelants) the decree of the circuit court is reversed, and the cause is remanded to that court for further proceedings in accordance with this opinion; and in the case of the barkentine (the Pacific Coast Steam-Ship Company, libelants) the decree of the district court is reversed, and the cause is remanded to that court, with direction to dismiss the libel, and enter a decree in favor of the claimants for costs.

MOTION FOR A MODIFICATION OF THE DECREE.

(January 25, 1892.)

DEADY, District Judge. The order for a decree is modified as follows:

The decree of this court will be that the decrees in the cases of *The Portland* and *The State of California* are both reversed, and that they both be remanded to the district court, and there consolidated and tried as one case, upon the question of the amount of damage sustained by the Portland and State of California, respectively, by reason of the collision; and that, if either is shown to have sustained more damage than the other, the lesser sum, with the costs of libelant in such case, shall be deducted from the greater sum, with costs, and the party sustaining the greater loss shall have a decree for the one-half of the remainder.

RYCROFT v. GREEN.

(Circuit Court, S. D. New York. February 6, 1892.)

REMOVAL OF CAUSES—EXTENSION OF TIME TO ANSWER.

In view of the Code rules and practice of the courts of New York, an extension of time to answer by order of court extends the time for removal.

At Law. Motion to remand.

Henry Thompson, for the motion.

George W. Wickersham, opposed.

LACOMBE, Circuit Judge. It is the law and practice of this circuit that an extension of time to answer by order of court, whether made on stipulation or not, extends the time for removal. This was settled practice here before the decisions in other circuits, which are referred to on the argument, and, in view of what an "extension of time to answer" is under the Code rules and practice of the courts of this state, seems conformable alike to the letter and the spirit of the removal act

INTERSTATE COMMERCE COMMISSION v. LEHIGH VAL. R. CO.¹*(Circuit Court, E. D. Pennsylvania. January 15, 1892.)*

1. INTERSTATE COMMERCE COMMISSION—FINDING OF FACTS.

The finding of facts in a report by the interstate commerce commission has no greater weight where the commission itself proceeds by petition under section 16, 24 St. at Large, p. 384, to enforce obedience to its orders, than where an individual aggrieved so proceeds, and is not conclusive evidence of such facts. *Kentucky, etc., Bridge Co. v. Louisville, etc., R. Co.*, 37 Fed. Rep. 567, followed.

2. SAME—DISOBEDIENCE OF ORDERS—INJUNCTION.

A preliminary injunction to restrain a carrier from disobeying an order of the interstate commerce commission will not be granted in proceedings under section 16, 24 St. at Large, p. 384, as amended, when the answer denies the facts on which the order was based.

In Equity. Motion for preliminary injunction. Petition by the interstate commerce commission to restrain the Lehigh Valley Railroad Company from exacting an alleged excessive rate for transporting coal from the mines to Elizabethport. Upon complaint by Coxe Bros., miners and shippers of anthracite coal, the interstate commerce commission had made an order, after hearing both parties, establishing rates for the carriage of coal from the mines to Elizabethport, lower than the rates previously charged, and declaring the latter excessive. The Lehigh Valley Company continued to charge its old rates, and this petition was filed to enforce obedience to the order. Motion denied, without prejudice to complainant to file replication, and proceed to proofs.

¹ Reported by Mark Wilks Collet, Esq., of the Philadelphia bar.

Simon Stern, John R. Read, and S. P. Wolverton, for complainant.

The case of *Kentucky, etc., Bridge Co. v. Louisville, etc., R. Co.*, 37 Fed. Rep. 567, was decided under the misapprehension that judicial power could not be granted when those appointed to exercise it were not appointed during good behavior. Such grants have been declared constitutional in *Insurance Co. v. Canter*, 1 Pet. 515; *McAllister v. U. S.*, 141 U. S. 174, 11 Sup. Ct. Rep. 949. When a disciplinary body, created by statute, comes to a conclusion, the courts, in enforcing its conclusion, will only inquire whether the party has had a fair trial, and the rules governing the body have been complied with, and will not try the question over again. *Loubat v. Le Roy*, 40 Hun, 546; *People v. Commissioners*, 93 N. Y. 97. The decision of a special tribunal, having authority to decide certain matters in the course of its duties, is final. *Johnson v. Towseley*, 18 Wall. 72; *Marques v. Frisbie*, 101 U. S. 473.

John G. Johnson, for respondents.

ACHESON, Circuit Judge. Upon the complaint of *Coxe Bros. & Co.* against the *Lehigh Valley Railroad Company* made to the interstate commerce commission, pursuant to the act of congress entitled "An act to regulate commerce," approved February 4, 1887, (24 St. at Large, p. 379,) and the amendatory acts of March 2, 1889, and February 10, 1891, (25 St. at Large, p. 855; 26 St. at Large, p. 743,) the said commission found and decided that the rates established by the said railroad company, and in force over and upon its lines of railroad for the transportation of anthracite coal from the Lehigh anthracite coal region, in the state of Pennsylvania, to Perth Amboy, in the state of New Jersey, were unreasonable and unjust; and the commission fixed a scale of maximum rates of freight for such transportation, and issued an order requiring the said railroad company to cease and desist, from and after a certain specified date, from making any charge in excess of the rates so determined upon by the commission. The railroad company having neglected and refused to comply with this order, the interstate commerce commission, proceeding under the sixteenth section of the law as amended, applied by petition to this court, sitting in equity, praying for a writ of injunction or other proper process, mandatory or otherwise, to restrain said railroad company from further violation of and disobedience to the said order of the commission. To this petition the railroad company filed an answer, which, besides other defenses of a legal character therein raised, denies that the rates established and charged by it for the transportation of anthracite coal, as aforesaid, were unreasonable and unjust, and alleges that the same were and are reasonable and just rates; and the answer further avers that all the findings of fact by the commission, which led it to the conclusion that the rates charged by the defendant were unreasonable and unjust, were erroneous, and were not in accordance with the evidence. The case was set down for hearing, and has been argued upon the petition and answer.

Several questions of great importance, both to the parties to this litigation and to the public, are here involved; but at this time we deem it

necessary to consider only one of these questions, namely: In this proceeding instituted by the interstate commerce commission to enforce its order against the defendant railroad company, what effect is to be given to the findings of fact by the commission embodied in its written report, and upon which its said order was based? It has been argued earnestly and ably by counsel representing the interstate commerce commission that the present proceeding is to be regarded as a controversy between the commission and the defendant company, distinct from the original case between Coxe Bros. & Co. and the defendant; that the original case is not here retriable upon its merits, however it might be were Coxe Bros. & Co. the petitioners; that while the court may look into the testimony taken by the commission to see whether there is any justification for its decision, yet, if the commission acted upon competent evidence, and within the scope of its authority, and the defendant had a fair trial before it, the findings of fact by the commission are not here open to question, but must be accepted as conclusive. But, as respects the weight to be given to the findings of fact, the statute, we think, affords no ground for making any distinction between an application to the court by the commission itself and such an application by the original complainants, at whose instance the order sought to be enforced was made. As we shall hereinafter see, the law provides that application to the court for the enforcement of any such order may be made either by the commission or by any company or person interested in the order. No sound reason exists for according greater efficacy to the findings of fact in the one case than in the other, and the statute does not recognize any such distinction. What force, then, have the findings of fact upon which the petitioner here relies? If the acts of congress had been silent as to the effect to be given to findings of fact by the interstate commerce commission, it might, perhaps, have been reasonably inferable that the legislative intention was that those findings should fall within the general rule that, where the law has confided to a special tribunal the authority to hear and determine certain matters in the course of its duties, the decision of that tribunal, within the scope of its authority, is conclusive upon all other tribunals. But any such implication is excluded by the express terms of the interstate commerce law. Section 14 of the act, as amended, after providing that whenever an investigation shall be made by the commission it shall be its duty to make a report in writing in respect, thereto, which shall include the "findings of fact" upon which the conclusions of the commission are based, declares: "And such findings, so made, shall thereafter, in all judicial proceedings, be deemed *prima facie* evidence as to each and every fact found." Now, clearly, this provision is quite irreconcilable with the idea that in an application like the present one the findings of fact by the commission operate conclusively. But, furthermore, section 16, as amended, provides as follows:

"That whenever any common carrier, as defined in and subject to the provisions of this act, shall violate or refuse or neglect to obey or perform any lawful order or requirement of the commission created by this act, not

founded upon a controversy requiring a trial by jury, as provided by the seventh amendment to the constitution of the United States, it shall be lawful for the commission, or for any company or person interested in such order or requirement, to apply in a summary way, by petition, to the circuit court of the United States, sitting in equity in the judicial district in which the common carrier complained of has its principal office, or in which the violation or disobedience of such order or requirement shall happen, alleging such violation or disobedience, as the case may be; and the said court shall have power to hear and determine the matter; * * * and said court shall proceed to hear and determine the matter speedily as a court of equity, and without the formal pleadings and proceedings applicable to ordinary suits in equity, but in such manner as to do justice in the premises; and to this end such court shall have power, if it think fit, to direct and prosecute, in such mode and by such persons as it may appoint, all such inquiries as the court may think needful to enable it to form a just judgment in the matter of such petition; and on such hearing the findings of fact in the report of said commission shall be *prima facie* evidence of the matters therein stated; and if it be made to appear to such court, on such hearing or on report of any such person or persons, that the lawful order or requirement of said commission drawn in question has been violated or disobeyed, it shall be lawful for such court to issue a writ of injunction or other proper process, mandatory or otherwise, to restrain such common carrier from further continuing such violation or disobedience of such order or requirement of said commission, and enjoining obedience to the same."

This section further provides for proceedings on the law side of the court where the matters involved are founded upon a controversy requiring a trial by jury, and enacts that "at the trial the findings of fact of said commission, as set forth in its report, shall be *prima facie* evidence of the matters therein stated." Thus has congress most carefully defined and limited the effect of the findings of fact by the interstate commerce commission in all judicial proceedings, whether at law or in equity.

But then again, upon an analysis of the above-quoted provisions of section 16, it is demonstrable that in such a case as this it is the duty of the court to investigate the merits of the whole controversy, and form an independent judgment. The court, upon a petition alleging the violation of a "lawful" order, is to proceed to "hear and determine the matter as a court of equity in such manner as to do justice in the premises;" and to this end it may prosecute in such mode and by such persons as it may appoint all "needful inquiries" to enable it to "form a just judgment" in the matter of the petition; and, finally, "on such hearing the findings of fact in the report of said commission shall be *prima facie* evidence of the matters therein stated." Nothing can be clearer than that the findings by the commission are not here decisive of the questions of fact. We have only to add that our conclusion is in harmony with that of the circuit court in the case of *Kentucky, etc., Bridge Co. v. Louisville, etc., R. Co.*, 37 Fed. Rep. 567. In view, then, of the denials and averments of the answer, the present motion must be denied, but without prejudice to the right of the petitioner to file a replication; and it is so ordered.

BUTLER, District Judge, concurs.

GANDOLFO v. HARTMAN *et al.*

(Circuit Court, S. D. California. January 25, 1892.)

COVENANTS IN DEED—PUBLIC POLICY—SPECIFIC PERFORMANCE.

A covenant in a deed not to convey or lease land to a Chinaman is void, as contrary to the public policy of the government, in contravention of its treaty with China, and in violation of the fourteenth amendment of the constitution, and is not enforceable in equity.

In Equity. Bill for an injunction. Denied.

Blackstock & Shepherd and *Bicknell & Denis*, for complainant.

J. Marion Brooks, J. Hamer, and E. S. Hall, for defendants.

Ross, District Judge. The amended bill in this case shows that on the 22d of March, 1886, one Steward, for a valuable consideration, conveyed to the complainant a portion of lot 2, block 47, fronting on East Main street in the town of San Buena Ventura, Ventura county, of this state, together with a perpetual right of way over an adjoining alley. The deed also contained the following:

"It is also understood and agreed by and between the parties hereto, their heirs and assigns, that the party of the first part shall never, without the consent of the party of the second part, his heirs or assigns, rent any of the buildings or ground owned by said party of the first part, and fronting on said East Main street, to a Chinaman or Chinamen. This agreement shall only apply to that part of lot 2, block 47, aforesaid, lying north of the alley-way hereinbefore described, and fronting on said East Main street. And said party of the second part agrees for himself and heirs that he will never rent any of the property hereby conveyed to a Chinaman or Chinamen."

The deed was duly recorded in the county in which the property is situate, and subsequently the portion of the lot retained by Steward was purchased of him by the defendant Hartman, who was thereafter about to lease it to the defendants Fong Yet and Sam Choy, who are Chinamen, when the present suit was commenced to enjoin him from so doing.

The federal courts have had frequent occasion to declare null and void hostile and discriminating state and municipal legislation aimed at Chinese residents of this country. But it is urged on behalf of the complainant that, as the present does not present a case of legislation at all, it is not reached by the decisions referred to, and that it does not come within any of the inhibitions of the fourteenth amendment to the constitution of the United States, which, among other things, declares that no state shall "deny to any person the equal protection of the laws." This inhibition upon the state, as said by Mr. Justice FIELD, in the case of *Ah Kow v. Numan*, 5 Sawy. 552—

"Applies to all the instrumentalities and agencies employed in the administration of its government: to its executive, legislative and judicial departments; and to the subordinate legislative bodies of counties and cities. And the equality of protection thus assured to every one whilst within the United States, from whatever country he may come, or of whatever race or color he

may be, implies that not only the courts of the country shall be open to him on the same terms as to all others for the security of his person or property, the prevention or redress of wrongs, and the enforcement of contracts, but that no charges or burdens shall be laid upon him which are not equally borne by others. * * *

It would be a very narrow construction of the constitutional amendment in question and of the decisions based upon it, and a very restricted application of the broad principles upon which both the amendment and the decisions proceed, to hold that, while state and municipal legislatures are forbidden to discriminate against the Chinese in their legislation, a citizen of the state may lawfully do so by contract, which the courts may enforce. Such a view is, I think, entirely inadmissible. Any result inhibited by the constitution can no more be accomplished by contract of individual citizens than by legislation, and the courts should no more enforce the one than the other. This would seem to be very clear.

Moreover, it is by the treaty between the United States and China of November 17, 1880, provided that—

"Chinese subjects, whether proceeding to the United States as teachers, students, merchants, or from curiosity, together with their body and household servants, and Chinese laborers who are now in the United States, shall be allowed to go and come of their own free will and accord, and shall be accorded all the rights, privileges, immunities, and exemptions which are accorded to the citizens and subjects of the most favored nation." Article 2, Treaty Nov., 1880, (22 U. S. St. p. 13.)

"The intercourse of this country with foreign nations and its policy in regard to them," said the supreme court, speaking through Chief Justice TANEY, in *Kennett v. Chambers*, 14 How. 49, "are placed by the constitution of the United States in the hands of the government, and its decisions upon these subjects are obligatory upon every citizen of the Union. He is bound to be at war with the nation against which the war-making power has declared war, and equally bound to commit no act of hostility against a nation with which the government is in amity and friendship. This principle is universally acknowledged by the laws of nations. It lies at the foundation of all governments, as there could be no social order or peaceful relations between the citizens of different countries without it. It is, however, more emphatically true in relation to the citizens of the United States. For, as the sovereignty resides in the people, every citizen is a portion of it, and is himself personally bound by the laws which the representatives of the sovereignty may pass, or the treaties into which they may enter, within the scope of their delegated authority. And, when that authority has pledged its faith to another nation that there shall be peace and friendship between the citizens of the two countries, every citizen of the United States is equally and personally pledged. The compact is made by the department of the government upon which he himself has agreed to confer the power. It is his own personal compact as a portion of the sovereignty in whose behalf it is made. And he can do no act nor enter into any agreement to promote or encourage revolt or hostilities against the territories of a country with which our government is pledged by treaty to be at peace, without the breach of his duty as a citizen, and the breach of the faith pledged to the foreign nation. And, if he does so, he cannot claim the aid of a court of justice to enforce it. The appellants say, in their contract, that they were induced to advance the money

by the desire to promote the cause of freedom. But our own freedom cannot be preserved without obedience to our own laws, nor social order preserved if the judicial branch of the government countenanced and sustained contracts made in violation of the duties which the law imposes, or in contravention of the known and established policy of the political department, acting within the limit of its constitutional power."

This was said in a case where it was sought to enforce a contract made in this country after Texas declared itself independent, but before its independence had been acknowledged by the United States, whereby the complainants agreed to furnish, and under which they did furnish, money to a general in the Texan army, to enable him to raise and equip troops to be employed against Mexico. But the principle governing the case is, in my opinion, equally applicable here, where it is sought to enforce an agreement made contrary to the public policy of the government, in contravention of one of its treaties, and in violation of a principle embodied in its constitution. Such a contract is absolutely void, and should not be enforced in any court,—certainly not in a court of equity of the United States.

For the reasons stated an order will be entered sustaining the demurrer, and dismissing the bill, as amended, at complainant's cost, without reference to other points made and argued by counsel.

MEGIBBEN'S ADM'RS *et al.* v. PERIN *et al.*

(Circuit Court, S. D. Ohio, W. D. January 30, 1893.)

1. GUARDIAN AND WARD—SALE OF REALTY.

Code Civil Proc. Ky. § 490, authorizes a sale by proceedings in chancery of real estate owned jointly by two or more persons when the same cannot be divided without materially impairing its value, even though some of the owners are infants or of unsound mind. *Held*, that a sale thereunder of an infant's interest on application of its statutory guardian conveys an absolute title when the court finds that the requisite facts exist. *Power v. Power*, (Ky.) 15 S. W. Rep. 523, followed.

2. JURISDICTION OF FEDERAL COURTS—DIVERSE CITIZENSHIP—ARRANGEMENT OF PARTIES.

Where a part owner of a distillery joins a number of associates in a contract to purchase the whole, and for that purpose agrees to convey his existing interest therein, and afterwards, being ready and willing to perform his contract, joins with the other vendors in a suit for specific performance, he is a proper party plaintiff, and cannot be considered a defendant for the purpose of destroying the diversity of citizenship necessary to maintain the suit in a federal court.

3. SPECIFIC PERFORMANCE—STOCK OF CORPORATION.

A clause in a contract providing for the purchase of all the stock of a distillery company may be specifically enforced against the purchasers when it appears that it was only adopted as an expedient to secure the performance of the main stipulation, which was for the transfer of the real estate and plant.

4. SAME—INCUMBRANCES.

A vendee cannot avoid a specific performance of his contract because of a mortgage on the lands when it appears that an agreement has been made for the discharge thereof immediately upon the transfer, which discharge can be provided for in the decree.

In Equity. Suit by T. J. Megibben's administrators and others against Oliver L. Perin and others for specific performance of a contract. Decree for complainants.

James O'Hara and Peck & Shaeffer, for complainants.

Ramsey, Maxwell & Ramsey, for respondents.

SAGE, District Judge. The bill is for the specific performance of the following contract:

"In consideration of the sum of twenty-five dollars in cash, the payment of which is hereby acknowledged, said payment having been made by O. L. Perin, upon behalf of himself and others, unto James K. Megibben and the heirs of Thomas J. Megibben, deceased, and of the undertakings of said Perin, for himself and others, as hereinafter set forth, it is agreed as follows:

"Said Megibben hereby agrees to sell and convey unto said Perin, for himself and others, the distilleries Excelsior and Sharpe, situated at Lair's station, Kentucky, with all grounds connected therewith, being about sixteen acres, more or less, and all flour-mills, warehouses, buildings, and outbuildings connected therewith, and all good-will, brands, trade-marks, copyrights, patents, lately held by Thomas J. Megibben, deceased, and James K. Megibben, and used by him and J. K. Megibben in connection with their business in or about said distilleries and flour-mill, or either of them, or the right to use all patents and processes used by him or them in distillation, and all appurtenances and appliances connected with said distilleries and premises.

"Said property to be conveyed by deed of general warranty, free of all incumbrances; taxes now levied to be paid by vendor. Price to be paid for said property \$42,500.00, to be paid in cash on delivery of deed, after examination and approval of title.

"Cincinnati, July 9, 1890."

"It now appearing that the above properties are owned by two corporations, the agreement is that the entire stock of said corporations shall be transferred to Perin and associates upon the above considerations, said corporations being free from all indebtedness. The boarding-house property shall be conveyed to the said Perin on same consideration.

[Signed]

"JAS. K. MEGIBBEN.

"JAMES W. MEGIBBEN.

"JAMES W. MEGIBBEN, Administrator.

"ESTATE OF T. J. MEGIBBEN.

"O. L. PERIN, for Himself and Associates."

The equities of the cause are with the complainants, unless the title to the real estate described in the contract is defective. Thomas J. Megibben died intestate, leaving minor heirs. He was seised at the time of his death of the legal title to an undivided one-half of the real estate of the Sharpe distillery, and to an undivided two-thirds of the real estate of the Excelsior distillery. These pieces of real estate were partnership property,—the first, of the Sharpe Distilling Company, a firm composed of J. K. and T. G. Megibben, of the one part, and the G. R. Sharpe Company, incorporated, of the other part; the second, of the firm of T. J. Megibben and J. K. Megibben, of the one part, and the Megibben Excelsior Company, incorporated, of the other part. On the 30th of January, 1890, James K. Megibben, as surviving partner of said company, in consideration of \$75,000, paid by the delivery to him of 750 \$100 shares of paid-up capital stock of the said G. R. Sharpe

Distilling Company, incorporated, conveyed to said company in fee the undivided one-half of the real estate of the Sharpe distillery, of which Thomas J. Megibben died seised. On the same day, in consideration of \$75,000, paid by the delivery to him of 750 \$100 shares of the paid-up capital stock of the Megibben Excelsior Company, James K. Megibben, as surviving partner of T. J. Megibben & Bro., conveyed in fee to the Megibben Excelsior Company the undivided two-thirds of the real estate of the Excelsior distillery, of which Thomas J. Megibben died seised. It is conceded that James K. Megibben, as surviving partner, would have been entitled, in a proceeding against the widow and heirs of Thomas J. Megibben, to sell said property if necessary for the payment of partnership debts, but defendants deny the validity of the sale, because it appears from the record that there were no partnership debts. It is not clear from the authorities generally that the deeds were therefore invalid. The supreme court in *Shanks v. Klein*, 104 U. S. 18, held that the right of the surviving partner to the real estate of the copartnership is an equitable right, accompanied by an equitable title. The legal title of copartnership property may be in one or more of the partners; but in every such case equity regards him or them as holding in trust, and the copartnership as the beneficial owner. Therefore, although in such case the survivor cannot by his deed pass the legal title, which descended to the heir of the deceased partner, yet as the heir holds the title in trust to pay the debts, and the survivor is charged with that duty, his deed will convey the equity to the purchaser, who may compel the heir to convey the legal title.

This was the holding in *Andrews' Heirs v. Brown's Adm'r*, 21 Ala. 437, and in *Dupuy v. Leavenworth*, 17 Cal. 262, cited with approval by the supreme court in *Shanks v. Klein*. It has been held that the buyer is not bound to see to the application of the purchase money, as such burden would greatly reduce the value. *Tillinghast v. Champlin*, 4 R. I. 173; *Griffey v. Northcutt*, 5 Heisk. 746, (decided in accordance with the statute in Tennessee.) It may be, therefore, that the purchaser was not bound to ascertain whether, as a matter of fact, there were debts of the copartnership, for the payment of which it was necessary to sell the real estate, and that the conveyance would transfer to him the equitable ownership of the partnership, even if there were no debts, notwithstanding the general rule that the grantee of an equitable title takes no greater interest than his grantor had the right to convey, and that the remedy of the heir at law would be against the surviving partner personally, unless it was shown affirmatively that the purchaser knew, or was chargeable with notice, that there were no debts.

The rule approved by the court of appeals of Kentucky is that real estate bought with partnership funds, to be used in the partnership business and for partnership purposes, is to be regarded as partnership property, impressed with the characteristics of personality for all purposes, not only as between the partners *inter se*, and the firm and its creditors, but also as to distribution between the administrator, distributees, and heirs. *Divine v. Mitchum*, 4 B. Mon. 488; *Bank v. Hall*, 8

Bush, 678; *Spalding v. Wilson*, 80 Ky. 590; and *Flanagan v. Shuck*, 82 Ky. 620. From these cases it appears that the rule in Kentucky is that real estate purchased by the partnership for the conduct of its business is to be regarded as personalty, and that the surviving partner has the power to sell, and with the aid of a court of chancery can convey the title to a purchaser. See, also, *Rammelsberg v. Mitchell*, 29 Ohio St. 53.

But it is not necessary to decide these questions, for it appears from the record that counsel for the defendant Perin and his associates objected to the title on the ground that the deed by the surviving partner was not valid. Thereupon the adult heirs of T. J. Megibben, together with James K. Megibben, conveyed to the incorporated companies all their interest in these properties, and those companies thereby acquired title to all the property excepting the interest of the minor heirs of T. J. Megibben.

It further appears from the record that by proceedings in the chancery court of Harrison county, Ky., instituted by the guardian of the minor children of Thomas J. Megibben against the G. R. Sharpe Company and others, and like proceedings against the Megibben Excelsior Company and others, the conveyances aforesaid by J. K. Megibben, as surviving partner, to said companies, were confirmed, and it was further decreed that conveyances should be made by the master commissioner of said court to said companies of all the right, title, and interest of the minor children and heirs of Thomas J. Megibben, and deeds were made accordingly. This proceeding was conducted under section 490 of the Civil Code of Practice of Kentucky, which provides that—

"A vested estate in real property, jointly owned by two or more persons, may be sold, by order of a court of equity, in an action brought by either of them, though the plaintiff or defendant be of unsound mind, or an infant, * * * if the estate be in possession, and the property cannot be divided without materially impairing its value, or the value of the plaintiff's interest therein."

The facts were found by the court to be such as, under the requirements of this provision, were necessary to authorize the sale and conveyance. The mother of the minor children joined in the suit with the minors, who appeared by their statutory guardian. The court found that the property was partnership property, that it was indivisible, and was only suitable for a distillery, and that their interest required that it should be sold to the companies aforesaid. The court of appeals of Kentucky, in the case of *Power v. Power*, (Ky.) 15 S. W. Rep. 523, (decided February 19, 1891,) held, in a case involving like questions, that the power of the court to order the sale and conveyance was unquestionable. The court said:

"The appellees and appellant own a store-house and lot in Maysville, with a front of thirty-three feet. The appellant owns three-sixths of the lot, and the appellees the other half, subject to the one-third dower interest of the widow. The widow and her co-appellees filed this petition under section 490 of the Code. It is alleged that this property cannot be sold without materially impairing its value, and that a sale would redound to the interest of all parties. The interest of the infant appellees is asked to be reinvested for

them by the chancellor. It is apparent from the record that no division of this property can be had, and we cannot perceive why it should not be sold, and the proceeds divided. The widow, who has a dower in this lot, is not proceeding in her own right to deprive by sale the remainder-men of the fee, under section 491. This is a vested interest, by parties in possession of property that cannot be divided, and the question of whether the sale will be beneficial is not involved, though alleged; and, while the chancellor will see that the interests of the infants are not sacrificed, a party jointly interested has the right, where the property cannot be divided, to demand a sale. By virtue of the provisions of section 490, the infants had the right to sue by their mother, who is their statutory guardian, and no defense is required to be made for them where they unite as plaintiffs.

"The object of the guardian is to reinvest the proceeds for the infants,—that is, to the extent of their interest,—and no bond is required, as the proceeds will be under the control of the chancellor."

This case is decisive, and leaves no room for doubt that by virtue of the deeds, and of the legal proceedings aforesaid, the entire title passed to and is vested in said companies.

Upon the hearing it was claimed for the defendants that the complainant James K. Megibben is to be treated as a purchaser in this case, and that he is therefore a necessary party defendant; and being such, and with the other complainants a resident of the state of Kentucky, the court has no jurisdiction of the case. This is ingenious, but not sound. James K. Megibben is not a party defendant, nor can he in any view be regarded as such. It is true that he is one of the associates of the defendant Perin, but he is ready and willing to perform the contract. The decree is sought against Perin and his associates, who are unwilling; and it would not be against him, but against them, to compel them to join with him in receiving and paying for the capital stock, which represents the real property involved. He is therefore properly a complainant, and as much interested in securing a decree against the defendants as are his co-complainants.

It was also claimed upon the hearing that this is not a case for the remedy of specific performance, because the contract relates to personal property; that is to say, to the entire capital stock of the two corporations owning the real estate. The purpose was to transfer the real estate and the plant connected with the distilleries. That is apparent from the contract itself, and is abundantly proven by the testimony. In *Leach v. Fobes*, 11 Gray, 510, the court decreed specific performance of the contract, holding that where the agreement for the sale of the shares forms part of a contract for the sale of real estate, and the suit is brought for the conveyance of the land, as well as the transfer of the shares, the contract may be enforced in equity. In England it is well settled that any sale of shares of stock in a private corporation may be enforced by a decree for specific performance. *Duncuft v. Albrecht*, 12 Sim. 189; *Shaw v. Fisher*, 2 De Gex & S. 11, 5 De Gex, M. & G. 596; *Wynne v. Price*, 3 De Gex & S. 310. To the same effect are the following cases in this country: *Ashe v. Johnson*, 2 Jones, Eq. 155; *White v. Schuyler*, 1 Abb. Pr. (N. S.) 300; *Johnson v. Brooks*, 93 N. Y. 337; *Treasurer v. Commercial Co.*, 23 Cal. 390. In this last case the authorities are re-

viewed, and the question fully considered. Where the contract is for the sale of securities issued by the government, specific performance will not be decreed, since they may be easily purchased in the market; but the vendee's remedy is at law for damages. *Ross v. Railway Co.*, 1 Woolw. 26, 32; *Cud v. Rutter*, 1 P. Wms. 570; *Colt v. Nettervill*, 2 P. Wms. 304; *Buxton v. Lister*, 3 Atk. 383. If stock of a private corporation contracted to be sold is easily obtainable in the market, and there are no special reasons why the vendee should have the particular stock mentioned in the contract, he is left to his action at law for damages. *Cook, Stocks*, § 338. But here the contract is for all the stock of the corporation, and that clause of the contract was evidently adopted as an expedient to secure the transfer of the real estate. The objection to the jurisdiction of the court on this ground has, however, been practically abandoned. It is without merit, and cannot be sustained.

The only remaining objection is that of the alleged incumbrances upon the real estate, or indebtedness by the corporations. The Excelsior Company is free from debts, as appears from the testimony of J. W. Megibben. The Sharpe Company has a mortgage upon its lands for about \$7,000, which it is shown is, by an arrangement with the holder, the Farmers' Bank of Cynthiana, to be paid off and canceled whenever the defendants take the property, and the payment and cancellation can be provided for by the decree, which will be for the complainants, with costs.

FARMERS' LOAN & TRUST CO. v. SAN DIEGO STREET-CAR CO.

(Circuit Court, S. D. California. February 1, 1892.)

1. RAILROAD MORTGAGE—FORECLOSURE AND SALE—PROPERTY INCLUDED.

In a suit to foreclose a mortgage given by a street-railroad company to secure payment of certain bonds, it appeared that the bonds were invalid; but, all the property covered by the mortgage being in possession of a receiver appointed pending the litigation, who had issued certificates for expenses incurred for the preservation of the property, a decree was entered, upon consent of all parties in interest, ascertaining and fixing the amounts of their respective claims, and directing a sale of all the property of the company to satisfy the same. *Held*, that rails, fish-plates, and bolts purchased by the company for use on its road, but which had not been actually used, and were stacked upon land not within the company's right of way, were within the terms of the mortgage, which included all real and personal property of every kind and description "used or intended to be used in connection with or for the purpose of said railroad," and came clearly within the decree.

2. SAME.

Certain notes, secured by mortgage, which had been executed to the company by a land association, were set out in the receiver's inventory of property taken possession of by him under order of the court, and were in his hands at the time of making the decree by consent for the sale of all the company's property. *Held*, that even though such notes and mortgage were not included in the mortgage sought to be foreclosed, as they had been brought into the custody of the court under color of its authority, and all parties in interest were parties to the suit, the court had jurisdiction to decide all conflicting rights thereto, and should not release its control of them in order that they might be subjected to process obtained by creditors of the company from a state court, nor should it award such creditors a priority of lien by reason of their proceedings in the state court.

In Equity. Bill for foreclosure of mortgage. On petition of interveners to enforce claims against property in possession of the receiver. Denied. For former report, see 45 Fed. Rep. 518.

Turner, McClure & Rolston and Myrick & Deering, for complainant.

Oscar A. Trippett, for C. J. Fox and West Coast Lumber Company.

Works, Gibson & Titus, for receiver.

Ross, District Judge. This suit was brought to foreclose a mortgage executed by the defendant company to secure the payment of 250 of its bonds of \$1,000 each, payable to the complainant as trustee or bearer. The property mortgaged was described in the mortgage as follows:

"All and singular, the following described rights, franchises, and property lying and being situate in the city of San Diego, and in the county of San Diego, state of California, viz.: Being the line of railway owned and controlled by the party of the first part in the city of San Diego, county of San Diego, and state of California, including the right of way, road-bed and superstructure, tracks, turn-tables, sidings, switches, cars, rolling-stock of any kind, machinery, fixtures, real and personal property of any and every kind and description, now owned by said party of the first part, and used or intended to be used in connection with or for the purposes of said railroad, incomes, issues, and profits arising or being received therefrom; also, all the franchises vested in said party of the first part, including its franchises to be a corporation, and also all franchises and property that may hereafter be acquired by said party of the first part for the purposes of its line of railway, all its branch lines and extensions, and all side tracks and switches that may be hereafter constructed; it being the true intent and purpose hereof to secure the payment of said hereinbefore described bonds and coupons, according to their tenor and effect, by charging with a lien for that purpose all the property of every kind and description that is now owned by said party of the first part for the purposes of its said lines of railway, and all such property as from time to time or at any time, during the existence of said bonds or the life of this mortgage, may be acquired by, or come into the possession of, said party of the first part, for use in connection with its line of railway, as herein set forth, and as authorized by its charter powers, granted to it by the state of California."

The bill containing allegations making such action proper, a receiver was duly appointed at the commencement of the suit to take possession of the property involved in it. To the bill the defendant company interposed no defense, but numerous parties,—some unsecured creditors, and some claiming to be legal holders of the bonds thus secured,—with leave of the court, intervened in the cause. Among the unsecured creditors so intervening were the present petitioners, C. J. Fox and the West Coast Lumber Company. A reference was made to the master to take the evidence in respect to the claims of the respective parties, and to report his findings of fact in the premises, with the names of the holders of the bonds, and the respective amounts thereof, together with the character and amount of all claims made against the defendant company. Upon the coming in of the master's report, and after a full hearing, the court held that none of the bonds in question ever were legally issued, or ever became valid outstanding obligations of the defendant corporation, and as a consequence that the bill was not well filed. But inas-

much as, pending the litigation, certificates had been issued by the receiver under the direction of the court to various persons for expenses necessarily incurred by him in the care, preservation, and operation of the property, and inasmuch as it appeared, both by the pleadings and the master's report, that the defendant company was wholly insolvent, and upon the request and consent of all of the parties in interest, the court determined to retain the cause for all purposes, and to direct a sale of all the property involved, and a disposition of the proceeds in accordance with the rights of the respective parties. Accordingly, it was agreed by all of the parties in interest that a final decree should be entered, confirming the report of the master, which ascertained and fixed the amounts of the respective claims, and directing a sale of the property to satisfy the same. The property so ordered to be sold was thus described in the decree:

"All the right, title, interest, and equity of the said defendant company, the San Diego Street-Car Company, in and to that certain line of railway of the said company lying and being in the city of San Diego, county of San Diego, and state of California, including the right of way, road-bed and superstructure, tracks, turn-tables, sidings, switches, cars, rolling stock of any kind, machinery, fixtures, real and personal property of any and every kind and description, owned and used or intended to be used in connection with or for the purposes of said railroad, and its franchises, branch lines and extensions, interests and properties, wherever situate, whether the same was in existence and owned or possessed by said defendant company at the time of the execution of said mortgage or deed of trust, or has been since acquired by said defendant company, or by the receivers herein appointed, or by either of them."

For several reasons, not now necessary to be stated, the court hesitated to sign the decree as prepared by counsel; and it was not only upon the consent, but only after the urgent request, of all of the parties in interest, including the present petitioners, and only after the decree was made to express such consent upon its face, that it was signed and entered of record. A sale of the property was subsequently made by the master to one A. B. Spreckles, which was, upon like consent of all of the parties in interest, confirmed by the court; but, all of the conditions of the sale not having been yet complied with, there has been no conveyance of the property to the purchaser. Subsequent to the confirmation of the sale, to-wit, on the 7th of December last, the aforesaid interveners, C. J. Fox and West Coast Lumber Company, filed in this court a verified petition setting forth that the petitioners are creditors of the defendant corporation, and that their respective demands were established as unsecured claims against the street-car company by the aforesaid final decree of this court; that on the 20th of November, 1891, the petitioner C. J. Fox reduced his demand, amounting to \$2,117.80, to judgment, in one of the superior courts of the state, after personal service upon the defendant, and that on the 14th of October, 1891, the petitioner West Coast Lumber Company likewise reduced its demand, amounting to \$6,168.20, to judgment, in the same state court, and that no part of either of said judgments has been paid; that petitioners are

informed and believe that the proceeds of the sale made by the master under the aforesaid final decree in this suit will be almost if not entirely exhausted by the application of the same to the costs of the court, the expenses of the receivership, and the preferred claims, as established by the decree, and that little or nothing of such proceeds will remain to be applied upon the unsecured claims, including those of the petitioners; that among the assets of the defendant corporation at the time of the filing of the bill of complaint herein, and at the time of the appointment of the original receiver, was certain personal property, consisting of steel street-railway rails, with fish-plates and bolts, of the value of \$10,000, or thereabouts; that said rails, plates, and bolts were taken possession of by the original receiver herein appointed upon his construction of the order appointing him, and that upon his resignation the same were turned over to his successor; that at the time of the filing of the bill herein, and at all times thereafter, the rails were stacked upon a vacant lot near H street, in the city of San Diego, and outside of any right of way of the defendant company; that none of the rails, plates, or bolts ever formed any part of the track or structures of the defendant company, and that neither the whole nor any part thereof were ever in any way appurtenant to or connected with the defendant company's road; that the rails, plates, and bolts were never embraced by the mortgage to the complainant, nor formed any part of the subject-matter of the suit for its foreclosure; that the act of the receivers in taking and holding possession thereof was without authority, and upon a mistaken construction of the orders of the court; that the jurisdiction of this court at no time attached to the rails, plates, or bolts "to any extent beyond the fact that its said receivers took the actual possession of the same, and so removed the same beyond the reach of the process of the court in which the petitioners' said judgments have been rendered;" that said rails, plates, and bolts are not embraced by the decree of sale entered herein, and did not pass to the purchaser at the master's sale, but that the purchaser claims to have acquired title thereto thereby, and with the consent and aid of the receiver "is appropriating and about to appropriate the said rails to his own use by way of annexing the same to the street railway, the title to which passed under said master's sale to him, and, unless prevented by the order of the court, said purchaser will convert, under the protection and authority of the receiver, all of said rails to his own use and benefit." The prayer of the petition is that the court direct the receiver to return the possession of the rails, plates, and bolts to the defendant company, and relinquish all control over the same, "and for permission to these petitioners to proceed, as by law they may, with final process upon their said judgments in the court of the state, to subject the said assets of the said defendant to the satisfaction of said judgments, and for such other relief as may be meet and appropriate in the premises."

Accompanying this petition was an affidavit of J. B. Winship, setting forth, among other things, that he is the manager of the intervening West Coast Lumber Company; that on the 7th of December, 1888, one

J. C. Arnold, trustee, executed to E. S. Babcock, Jr., trustee for the San Diego Street-Car Company, a mortgage upon certain lots and blocks of land, to secure the payment of certain promissory notes given to the street-car company by the College Hill Land Association of San Diego, aggregating over \$25,000, the whole of which, with interest, is still due and unpaid; that the real estate so mortgaged is worth the full amount due upon the notes; that the notes were given to the street-car company in consideration of that company building and operating that portion of its line known as the "Park Belt Motor Line;" that, as affiant is informed and believes, the notes and mortgage never came into the possession of the receiver, and were not included in the mortgage to the complainant, and were never sold by any order of this court, but are still a part of the assets of the defendant street-car company; that the notes and mortgage will become valueless as such assets "if the said rails are removed off of the Park Belt Motor Line, because the consideration thereof will then have failed." The affidavit also states substantially the same matters respecting the rails and the proceedings of the petitioners in the state court as are set forth in the petition.

On the 4th of January, 1892, the petitioners filed a supplemental petition, duly verified, in which it is stated that on the 10th and 24th days of November, 1891, respectively, petitioners caused execution to be issued upon the respective judgments they had obtained in the state court against the street-car company, and that in order to assert a prior lien upon the rails, plates, and bolts mentioned in their original petition, and in the hands of the receiver, "so far as the same have not already been delivered to A. B. Spreckles, and fixed in the track of another and different system of railway," they caused the executions to be levied as far as possible by serving them upon the receiver and upon the secretary of the defendant company, but that the sheriff holding the executions was expressly directed not to disturb the receiver's possession of the property, nor have the petitioners sought to subject the receiver to answer personally to the state court; that the sole object and purpose of those proceedings was to lay the foundation for the equitable interposition of this court, and that it might, by order, upon application to it, award the petitioners priority of lien upon said rails and material in the event it should be found that they were not embraced by the decree of this court. The supplemental petition further sets forth that among the assets of the street-car company are two certain notes, secured by mortgage, made to it by the College Hill Land Association of San Diego,—one for the sum of \$12,850, dated November 24, 1888, and due 10 months after date, and the other for the sum of \$12,800, dated November 24, 1888, and due 22 months after date; that to secure the payment of the notes, G. C. Arnold, trustee for the College Hill Land Association, executed to E. S. Babcock, Jr., as trustee for the street-car company, a mortgage upon a large number of lots and blocks in the city of San Diego; that petitioners caused writs of attachment to be issued out of the state court in their aforesaid actions against the street-car company, and to be served upon the College Hill Land Association and upon E. S. Babcock, Jr., in the manner provided

by law. The supplemental petition further states that the petitioners are informed and believe that the receiver claims to have taken possession of these notes and the mortgage by virtue of the order of this court, and that under the terms of the notice of the sale by the master, A. B. Spreckles, the purchaser at the sale, claims to have purchased said mortgage debt, by reason of all of which petitioners are prevented from enforcing final process on their judgments obtained in the state court. They allege that the notes and mortgage never constituted any portion of the subject-matter of the suit, and were never embraced by any issue tendered or made therein; that the act of the receiver in taking possession of the notes and mortgage was without authority, and was based upon a mistaken construction of the orders of this court; that the jurisdiction of this court at no time attached to the notes and mortgage to any extent "beyond the fact that its said receiver took the actual possession of the same, and so removed them beyond the final execution of the process of the court in which the petitioners' said judgments were rendered." The supplemental petition also contains the following:

"(3) Petitioners further represent that among the assets of the San Diego Street-Car Company are certain unpaid subscriptions to the capital stock of said corporation, and petitioners are not informed as to the full amount of all said unpaid subscriptions, but among said assets is the following: Petitioners allege that on January 9, 1890, a certain action was brought in the superior court of the county of San Diego, state of California, by W. E. Baines, as a judgment creditor for himself and all other creditors of the San Diego Street-Car Company, against the corporation and certain persons alleged to be stockholders therein, for the ascertainment of the amount due upon the capital stock of said corporation as unpaid subscriptions thereto, and for judgment against such stockholders for the amount due said corporation for unpaid subscriptions to said stock, with all proper relief; that such proceedings were had upon issues joined in said action; that on the 28th day of June, 1890, the said court found, among other things, that one E. S. Babcock, Jr., was indebted to said corporation in the sum of \$48,600.00, that H. L. Story was indebted to said corporation in the sum of \$21,275.00, that Josephus Collett was indebted to said corporation in the sum of \$5,350.00, all upon their several unpaid stock subscriptions, and that judgment was duly given and made upon the findings in said cause; and it was further adjudged and decreed that the said cause be retained in the said court, and that any other judgment creditor of the said defendant corporation who should make proper showing to the said court of his right thereto be allowed to become a party to said action, establish his claim, and have execution, to the extent of such unpaid subscriptions, against the said Babcock, Story, and Collett; that your petitioners are entitled to come in and be made parties, and to have execution to collect their said judgments from the unpaid subscriptions, and they have an equitable lien upon said unpaid stock subscriptions; that, as petitioners are informed and believe, it is claimed on behalf of the receiver herein that the said unpaid stock subscriptions have been drawn within the jurisdiction of this court, and are now in the constructive possession and control of said receiver, subject to the orders of this court; that petitioners fear that they will be embarrassed in proceeding upon the judgment against said stockholders and other stockholders unless this court make an order construing the extent of the powers of said receiver, and limiting his possession so that the same does not include said unpaid stock subscriptions. Wherefore petitioners pray that the said rails and material be delivered to and placed in the hands of said sheriff of

San Diego county, to be sold under the petitioners' writs of execution, in order that the proceeds of the sale of the same might be appropriated, so far as necessary, to the satisfaction of petitioners' said judgments, or, if sold under the order of this court, that the proceeds be turned over to said sheriff to be applied on said judgments, or applied by the order of this court directly thereon, and for such other aid, remedy, and relief as the nature of the case may require, and law and equity may permit. And petitioners further pray that the receiver herein be directed to deliver to and place in the hands of the said sheriff of San Diego county, to be subjected to petitioners' said writs of execution, as provided by law, the said notes and mortgage, or, if the same be sold or collected under the orders of this court, that the proceeds, so far as necessary to satisfy petitioners' said judgments, be turned over to said sheriff, to be applied on said executions and judgments, or applied by the order of this court directly thereon, and for such other aid, remedy, and relief as may be lawful and equitable in the premises; that the court declare that its orders heretofore made, appointing said receiver, and ordering the property of said defendant to be sold, do not comprehend the unpaid stock subscriptions due to said defendant as above set forth."

Annexed to and made a part of the supplemental petition is an affidavit of H. L. Story, who deposes that, at the time the defendant company purchased the rails in question, he was the president of the corporation; that the rails were purchased for the purpose of making extensions of the railway system of the street-car company; that none of them have been used for any purpose, except an extension made upon First street, and a double track on Fifth and D streets, and the crossings between Fourth and Sixth streets on H street, also on Santa Fe wharf; that they "have never been used in connection with the said San Diego Street-Car Railway."

Upon the filing of the original petition the court made an order directing cause to be shown why the petition should not be granted; and thereafter, and after the filing of the supplemental petition, the receiver filed the following as an answer to the petition, and by way of return to the order to show cause:

"The undersigned, Joseph A. Flint, the receiver appointed in this cause, for answer to the petition of C. J. Fox and the West Coast Lumber Company, creditors and interveners herein, and by way of return to the order of this court to show cause why said petition should not be granted, respectfully sheweth: (1) That the property mentioned and described in said petition was at the time the mortgage sued on in this action was executed, and continued to be until the sale thereof to A. B. Spreckels by the master in chancery appointed in this case, the property of, and owned by, the San Diego Street-Car Company. (2) That said property was purchased by said company for the purpose of repairing and extending its line of street and motor road covered by its mortgage given to the plaintiff and sued on in this action, and was included in the property described in said mortgage, and covered thereby. (3) That, immediately upon the appointment of Milton Santee as receiver herein, he caused to be made and filed in this court a full and complete inventory of the property of the said street-car company, including all of the property described in the said petition of C. J. Fox and the West Coast Lumber Company. (4) That Oscar A. Trippett, who now appears as the solicitor of said petitioners, was their solicitor from the time of their intervention or the filing of their claims in this action, and as such had full knowledge of the foregoing facts. (5) That knowing said facts, and that the bonds which were

the foundation of this suit had been held by this court to be void, and that the plaintiff herein could not recover, for that reason, the said Oscar A. Trippett, acting for said creditors, the present petitioners, joined with the other creditors, and consented to a decree being entered in favor of all of the creditors, and against said defendant street-car company, ordering and decreeing the sale of all of the property of said company for the satisfaction of the claims of all of said creditors in the order in which they were entitled to payment; and such decree was entered accordingly. (6) That said consent was given and decree entered with the full understanding of all of the said creditors that said street-car company was insolvent, and unable to pay its debts in full, and the consent to the rendition of said decree was made and given with the view and for the purpose of winding up the affairs of said company, in so far as the same could be done by this court, and of applying all of its property to the payment of its said debts with the least expense possible; and to avoid further litigation and expense in the state courts. (7) That the property covered by said mortgage was described therein as follows: 'All and singular, the following described rights, franchises, and property lying and being situate in the city of San Diego, county of San Diego, state of California, to-wit: Being the line of railway owned and controlled by the party of the first part [San Diego Street-Car Company] in the city of San Diego, county of San Diego, state of California, including the right of way, road-bed and superstructures, tracks, turn-tables, sidings, switches, cars, rolling stock of every kind, machinery, fixtures, real and personal property of every kind and description, now owned by the said party of the first part, [San Diego Street-Car Co.,] and used or intended to be used in connection with or for the purposes of said railroad, incomes and profits arising or being received therefrom; also, all the franchises vested in the said party of the first part, [San Diego Street-Car Co.,] including its franchise to be a corporation; and also all franchises and property that may hereafter be acquired by said party of the first part [San Diego Street-Car Co.] for the purposes of its line of railway, all its branch lines, extensions, and all side tracks and switches that may be hereafter constructed; it being the true intent and purpose hereof to secure the said hereinbefore described bonds and coupons, according to their tenor and effect, by charging with a lien for that purpose all the property of every kind and description that is now owned by the said party of the first part [San Diego Street-Car Company] for purposes of its said line of railway, and all such property as from time to time, during the existence of said bonds or the life of this mortgage, may be acquired by or come into the possession of the said party of the first part [San Diego Street-Car Company] for use in connection with its line of railway as herein set forth, and as authorized by its charter powers granted to it by the state of California.' (8) That the decree of this court ordering the sale of this property, the notice of such sale, and all proceedings subsequent thereto, resulting in the confirmation of said sale, described the property to be sold, and sold, as the same was described in said mortgage. (9) That notwithstanding the entry of said decree, the consent to the entry thereof, the purpose for which such consent was given, the subsequent sale thereunder, and the confirmation thereof, the petitioners, through their said solicitor, who consented to said decree, have, in violation of the terms of said decree and the rights of other creditors, as well as of the purchaser under said decree, attempted to reach said property under the process of the state courts, and to that end have, since the filing of their petition in this court and the making of the temporary order thereunder, at their instance, caused execution to issue from the state court against said street-car company, and had the same levied upon the property in controversy in this proceeding. (10) That the petitioners, as this respondent is informed and believes, during this whole litigation, had full knowledge of the existence of the property now

in controversy, but during the pendency of the suit made no objection to the mortgage as affecting the same on the grounds now set up in their petition, but stood by and allowed the decree for its sale to be made, and consented thereto, and are now, for the first time, attempting to gain an unfair advantage of the purchaser, and an unfair and unjust precedence over other creditors, by procuring the release of this property from the effect of the decree and sale, so that their execution lien may first attach."

Accompanying this answer was an affidavit of the solicitor for the complainant, setting forth, among other things, that the draft of the decree herein was prepared by him and submitted to the counsel for the respective parties in interest, and after certain amendments was engrossed, with the full knowledge and consent of said counsel, and as so engrossed was presented to the court as and for a consent decree, and as such was signed, filed, and recorded; "that A. Haines, Esq., appeared and acted in the said final settlement of this form of the decree for the clients of Oscar Trippett, Esq., [the petitioners,] and so stated in open court; that it was the intention of all parties concerned in the preparation of the said decree, in the form in which the same was presented to the court and is now entered and recorded, to embrace within its operation all the property of the defendant company, personal as well as real; and that the said decree was read in open court, A. Haines, Esq., being present, acting for Oscar Trippett, Esq., and his clients, as well as others, and stating in open court that he was authorized by Mr. Trippett to give such consent."

So far as the rails, fish-plates, and bolts are concerned, they were clearly covered by the mortgage, and constituted a part of the subject-matter of the suit embraced by the complainants' bill. The circumstance that they had not been actually used, and that they were not stacked within the defendant company's right of way, is wholly immaterial. They were purchased to be used in the extension of the company's road, and came within the express terms of the mortgage, which included all real and personal property, of every kind and description, "used or intended to be used in connection with or for the purposes of said railroad." They were rightly taken possession of by the receiver under the order of this court, and came clearly within the decree directing a sale of the property.

In respect to the notes executed to the street-car company by the College Hill Land Association, and the mortgage securing them, the same, I think, cannot be said. But none of the property of the defendant company was decreed to be sold by virtue of the mortgage. On the contrary, the court held that the bonds for which the mortgage was given as security were invalid, and as a consequence, of course, that none of the property could be sold by virtue of the mortgage. But at the time of this decision all of the property covered by the mortgage was in the hands of the receiver appointed by the court. It is now, for the first time, brought to the notice of the court that the notes executed to the defendant company by the College Hill Land Association, together with the mortgage securing them, were likewise then in the hands of the re-

ceiver, although they were set out in the inventory, returned by the receiver first appointed, of the property taken possession of by him under the order of the court. This was the condition of the property in question when all of the parties in interest, including the present petitioners, agreed upon a decree confirming the report of the master, which, as has been said, ascertained and fixed the amounts of the respective claims, and ordering the sale of all of the property of the defendant company to satisfy the same. This was undoubtedly done because all of the parties in interest were parties to the suit; all of the property of the defendant company, which was insufficient to pay the creditors in full, was supposed to be in the hands of the receiver of the court; it was necessary that the court should retain the cause for the purpose of paying the receiver's certificates issued for the protection of the property pending the litigation; and it was therefore deemed advisable by all of the parties in interest to have the whole matter disposed of in this court, thereby avoiding the unnecessary expense of again litigating their respective claims. Under such circumstances, for this court to release its control of the notes and mortgage in question in order that they may be subjected to the process obtained by the petitioners out of the state court, or for this court to award petitioners priority of lien by reason of their proceedings in the state court, would be to give them an unconscionable advantage over the other creditors of the defendant street-car company, who acted upon the petitioners' consent to the entry of the decree in this court, and who have, so far as appears, taken no action in the state courts for the protection or enforcement of their demands. The order appointing the receiver, and directing him to take possession of the property involved in the suit, evidently proceeded upon the theory that the defendant company had no other property than that covered by the mortgage. It was undoubtedly illegal in the receiver to take possession of any property not so covered; for the bill was filed to foreclose the mortgage executed to the complainant, and the order appointing the receiver, and directing him to take possession of the property of the defendant, was legally applicable only to the property embraced by the bill. But the notes and mortgage in question having been brought into the custody of this court under color of its authority, although illegally, the court has jurisdiction to decide all conflicting rights thereto; all parties in interest being parties to the suit. This conclusion is, I think, justified and sustained by the decision of the supreme court in the case of *Gumbel v. Pitkin*, 124 U. S. 131, 8 Sup. Ct. Rep. 379. There it appeared that the marshal had taken possession of a certain stock of goods of one Dreyfus on Sunday, under color of process issued the same day, at the suit in the circuit court of certain of his creditors. Gumbel, another creditor of Dreyfus, commenced suit against him in one of the state courts, and procured an attachment to be issued and placed in the hands of the sheriff, who was prevented by the marshal's possession from making an actual levy on the goods of the attachment held by him. The supreme court held that, though the taking of the goods by the marshal was illegal,—the writ under which he acted having been illegally issued

and levied,—they were taken under color of its authority, and the circuit court therefore acquired jurisdiction by virtue of the seizure to decide all questions concerning the property, and should have done complete justice between the parties by enforcing their equitable rights. So here, I think that the notes and mortgage in question, having been taken possession of by the receiver under the order of this court purporting to authorize him to take possession of all of the property of the defendant company, were taken by that officer under color of authority, and the court therefore acquired jurisdiction over it; and, all the parties interested therein being before the court as parties to the suit, it became the duty of the court to dispose of the property in accordance with their equitable rights. Those rights are fixed by the order of the court, entered by the consent of all of the parties in interest, including the petitioners, confirming the report of the master, which ascertained the amounts and order of priority of the claims of the respective parties. The notes and mortgage now in question not having been embraced by the decree of sale already made, there must be a supplemental decree directing a sale of the notes and mortgage, and a disposition of the proceeds thereof in accordance with the rights of the respective parties as fixed by the agreed order and decree. In respect to the stock subscriptions, referred to in the supplemental petition, nothing more need be said than that it is a matter over which this court never acquired any jurisdiction, and with which it is therefore in no way concerned. Petitions denied, and counsel will prepare a supplemental decree in accordance with the views above expressed.

GAIR v. TUTTLE et al.

(Circuit Court, W. D. Missouri, S. D. February 8, 1892.)

1. TRUST TO SECURE DEBTS—SURPLUS—RIGHTS OF DEBTOR.

The grantor in a deed of trust, made to secure a debt, became involved in trouble, and fled the state. The creditor secured induced the trustee to sell, and the property was purchased by defendants, bringing enough to pay the creditor and leave a surplus to the grantor. Apprehensive that they would be made to pay this surplus to grantor's other creditors, defendants, who had received a conveyance from the trustee, reconveyed the property to the trustee, procured him to resell the land, and at such sale repurchased the land for a trifle, and received a second deed from the trustee. *Held*, in an action by the grantor against defendants to recover the surplus on the first sale, that the second sale was a nullity, and that plaintiff was entitled to recover the surplus.

2. SAME—CONTEMPORANEOUS PAROL AGREEMENT.

Defendants alleged that plaintiff had directed the trustee to apply any surplus remaining after satisfaction of the debt secured to the payment of plaintiff's other indebtedness. There was no evidence to support the contention, except an admission of plaintiff occurring in an imputed conversation three years prior to the sale. *Held*, that such alleged direction to the trustee, purporting to have been made contemporaneously with the deed of trust, and giving a different direction to the fund than that therein prescribed, was not admissible in evidence.

3. SAME—DISPOSITION OF SURPLUS—DECLARATIONS OF TRUSTEE.

The deed itself having provided that any such surplus should go to plaintiff, defendants purchased with notice of such provision, and acted at their peril in rely-

ing on the representations of the trustee that such surplus should be applied to the satisfaction of certain debts of plaintiff in which defendants were interested, to the exclusion of other creditors of plaintiff.

4. SAME—RATIFICATION BY GRANTOR.

Though defendants may have been induced to buy the property by such representations of the trustee, the same being beyond the scope of his authority, plaintiff could not by receiving or suing for such surplus, without knowledge of the departure of the trustee, be held to thereby ratify the conduct of the trustee in the premises.

5. SAME—ACTION TO RECOVER SURPLUS—PARTIES.

The grantor, and not the trustee in a deed of trust, is the proper person to maintain an action for the recovery of a surplus due to the grantor after satisfaction of the debt secured.

At Law. Action by William Gair against Seth Tuttle and others to recover a surplus due to plaintiff as grantor in a deed of trust to secure debts, remaining after a sale of the trust subject, which was land.

STATEMENT BY PHILIPS, DISTRICT JUDGE.

One Davis, being the owner of the land in question, mortgaged it to the Lombard Investment Company to secure a debt of, say, about \$2,500. He gave two mortgages,—one for the principal sum, and one for the annually accruing interest. Afterwards he sold the land to the plaintiff Gair for over \$5,000. In payment therefor, Gair executed his note to Davis for, say, \$2,800, and assumed the payment of the debt of Davis to the Lombard Investment Company. To secure the payment of the note to Davis he executed to Davis a deed of trust on the land, in which trust-deed the payment of the debt to Lombard was assumed. Gair made payments to Davis until the amount remaining on his note was about \$1,800. Gair got into some trouble, and left the state, going to Texas. Thereupon Davis, who had transferred his note on Gair, persuaded the trustee, Morris, to advertise the land for sale under his deed of trust. He worked up a "syndicate," composed of the defendants, to purchase the land at this sale; who were persuaded to bid it in at the sum of \$4,350, sufficient to pay off the Gair note to Davis, and to meet the amounts owing to Lombard. At the conclusion of the sale Morris executed and delivered to the purchasers a deed, as trustee, conveying to them the land. This deed the purchasers accepted, and had recorded. On threats made by some of Gair's creditors and others to demand the surplus arising from this sale, after the satisfaction of Davis' debt, the purchasers became alarmed, and, on the advice of counsel, undertook to reconvey the property back to the trustee, and induced him to accept a quitclaim deed from them, and record it; and thereupon the trustee, at the instance of the purchasers and Davis, readvertised and resold the land. At this last sale the defendants again became the purchasers, at the sum of \$100, and received a second deed from the trustee. Gair brings this action to recover from the purchasers the surplus money remaining after the satisfaction of the Davis debt and the costs of the first foreclosure sale. The issues and other facts sufficiently appear from the opinion.

Ben U. Massey and Seebree & Tallow, for plaintiff.

T. J. De Laney and Rathborn & Son, for defendants.

PHILIPS, District Judge, (*after stating the facts.*) By the express provisions of the mortgage made by Gair to Morris, trustee, the proceeds arising from the foreclosure sale were to be applied—*First*, to the payment of the costs of the sale and expenses attending the execution of the trust; *second*, to the satisfaction of the debt from Gair to Davis; and, *third*, the surplus, if any, was to go to the mortgagor, Gair. This would have been so by operation of law. When the trustee executed and delivered to the purchasers the deed, and they accepted and put the same to record, their obligation at law was complete to immediately pay to the trustee the whole sum bid by them. In such case the purchasers were not responsible for the proper application of the purchase money. The title in them was complete, and the application of the fund devolved upon the trustee, who, had the money been paid to him, would alone have been answerable to the *cestui que trust* and the mortgagor for the proper distribution thereof. Rev. St. Mo. 1889, § 8691; *Barnard v. Duncan*, 38 Mo. 182. The sale first made by the trustee was the execution of the special power conferred upon him by the trust instrument; and, the power having been once regularly exercised and fully accomplished by the execution and delivery of the deed to the purchasers, it was exhausted. The second sale by the trustee *sua sponte* was therefore a nullity. The defendants took no title thereunder. 2 Jones, Mortg. § 1889; *Koester v. Burke*, 81 Ill. 436. The attempted reconveyance of the property by the purchasers back to the trustee was an unprecedented performance; and, in so far as the rights of the mortgagor in this action are concerned, may be wholly disregarded. The mortgagor was in no sense a party to this transaction.

It is important in the further discussion of the questions involved to observe what the real issues are in this case. There is no foundation for any claim of fraud and deceit. The answer tenders no such issue. On the contrary, it alleges authority in the trustee to make the assurances imputed to him. Therefore, having represented the truth, it would be utterly inconsistent and contradictory to claim fraud and deceit on the part of the trustee as ground of relief. The case must therefore be considered and determined upon the logic of the position assumed in the answer. *Harris v. Railroad Co.*, 37 Mo. 310; *Newham v. Kenton*, 79 Mo. 385; *Bank v. Armstrong*, 62 Mo. 65; *Wade v. Hardy*, 75 Mo. 399. If in fact the trustee did have authority from the mortgagor to sell and apply the surplus money to the payment of the prior mortgages, the plaintiff would be bound thereby, and the defense of the defendants at law would be complete. Let us examine this issue of fact. This claimed authorization rests entirely in parol, and is sought to be drawn from an alleged conversation had with plaintiff at the time of the execution of the deed of trust. The essence of the testimony respecting this issue is that, at the time of the drawing up of the trust instrument by Morris, the trustee, when the provision was read to Gair stating that the deed of trust was subject to the trust-deeds theretofore given by Davis to the Lombard Investment Company, Gair asked what use there was in that.

Morris said it was to make Davis safe, and that was the intention. Gair observed that was useless; that if he could not pay for the place he wanted, in case the sale went on, to pay both of them; that he did not want Davis to lose a cent by him. This imputed conversation was nearly three years prior to the foreclosure sale. Such testimony is, at least, calculated, under the circumstances of this case, to excite some suspicion. Davis, Morris, and these defendants seem to have been consulting together before the sale as to how the purchasers could get the land under the sale, and at the same time protect Davis against his debt to the Lombard Company, and secure the debt from Gair to him. Gair, it appears, had gotten into some sort of trouble and left the state, leaving the farm in possession of a tenant. From "the atmosphere" surrounding the transaction, it is difficult to escape the impression that these parties regarded Gair as civilly dead, and that they would administer his estate after the fashion of an administrator *de son tort*. The defendant Tuttle is the father-in-law of Davis. Davis was the moving spirit in bringing about the sale. It was at his instance that the trustee advertised. He worked up "the syndicate" to purchase the land, and the very inspiration of his activity was to secure a bid sufficient to pay off all the debts in which he was directly and indirectly concerned. As Gair had gone to Texas under a cloud, it was supposed, perhaps, that he would not return or appear to interrupt the programme. The trustee, seemingly forgetting that, in exercising his duties under the trust-deed, he is especially a trustee for the debtor, and should pursue such course as is most advantageous to the debtor, (*Chesley v. Chesley*, 49 Mo. 540-542,) evidently lent himself to the promotion of the Davis scheme, and no doubt did agree to apply the proceeds of the sale as desired by Davis. Instead of requiring the purchasers to pay over the purchase money at the time of the delivery of the deed, he permitted them to take it, and put it to record without having received all of the money. When other creditors of Gair interposed to reach the surplus fund, and recognizing the fact that, under the express terms of the trust-deed, this surplus belonged to Gair, recourse was had to the only apparent mode of escape from the dilemma by looking for authority from Gair outside of the deed itself. It was discovered, as they supposed, in the conversation resurrected after a three-years sleep. At most, the conversation relied upon was casual and incidental. It was a mere expression of what Gair expected; a mere commendation of his honest purpose to see that Davis did not lose anything by the credit given him. It was in no degree of the character of a direction to the trustee to depart from the plainly expressed provisions of the solemn power of attorney then being executed. If such was the understanding of the parties at the time of the execution of the written instrument, why was it not incorporated therein, which itself defined and qualified the powers and duties of the trustee? It is nothing more nor less than a bald attempt to ingraft by parol a clause upon the deed of trust enlarging the powers of the trustee, and giving a different direction to the fund than that prescribed by the written instrument. Such verbal statements being made contemporane-

ously with the execution of the deed appointing the trustee and defining his powers, they can neither qualify, enlarge, nor change the trustee's authority. *Walker v. Engler*, 30 Mo. 130; *Woodward v. McGaugh*, 8 Mo. 161; *Morgan v. Porter*, 103 Mo. 135, 15 S. W. Rep. 289; *Tracy v. Iron-Works Co.*, 104 Mo. 193, 16 S. W. Rep. 203. Courts cannot too rigidly adhere to the rule holding such trustees to the letter and spirit of the written power of attorney. It is certain and definite. It guards and protects the rights of the mortgagor against the treachery of human memory and the misconduct of the trustee. It is a source of reliance to the *cestui que trust*, and, above all, it is the surest protection and guaranty to the purchaser under foreclosure. They have the record before them,—the open, published, and explicit declaration, in solemn form, of the direction and consent of both debtor and creditor. For such purpose the deed is written and recorded.

The trustee, then, having neither in fact nor law authority from the mortgagor to divert the surplus fund arising from the sale to other sources than the payment thereof to the mortgagor, the final contention of defendants is that, the trustee having represented to the purchaser that he had authority to sell, and apply the surplus to the payment of antecedent mortgages, and would so apply the same, and they having bid the sum they did on that theory, the mortgagor is bound thereby in this action. The legal postulate for this proposition is the recognized rule of law applicable to principal and agent, that where a person represents himself to be the agent of another, clothed with authority to act in a given matter and in a particular way, although he may have no such agency and authority, yet if the misrepresented principal take the fruit of the assumed agent's act, or seek to avail himself of the benefits arising from the misrepresentation, he thereby ratifies the act of the imputed agent, and will be estopped from asserting the contrary; as "he who would avail himself of the advantages arising from the act of another in his behalf must also assume the responsibilities." As this raises the question of ratification, it might be a sufficient answer to say that no such issue is tendered by the answer; as, under the code of pleading in this state, a ratification must be pleaded to avail the party. *Bank v. Armstrong*, 62 Mo. 59; *Wade v. Hardy*, 75 Mo. 399. But if it be conceded that defendants are in an attitude to avail themselves of this defense, it is an interesting question as to whether the foregoing rule has any proper application to this case. It is a misconception to regard Morris in the light of one acting merely under color of an agency. In no sense did he occupy the position of a person in possession of another's property, offering it for sale on false assurances of ownership or authority to sell. Nor was his attitude that of one falsely assuming to have authority to dispose of another's property, and making false assurances respecting the same. In such case, the true owner or principal could only claim the benefit of the act on the assumption that the agent's act was his.

But the case at bar is where Morris was the express trustee appointed by deed, duly recorded, known to those dealing with him, wherein his

powers and duties were clearly defined. All those who dealt with him had, as a matter of law, notice of the nature and extent of this trusteeship. "Every such instrument in writing, certified and recorded in the manner heretofore prescribed, shall, from the time of filing the same with the recorder for record, impart notice to all persons of the contents thereof; and all subsequent purchasers and mortgagees shall be deemed, in law and equity, to purchase with notice." Section 2419, Rev. St. Mo. 1889. As said by the court in *Barnard v. Duncan*, 38 Mo. 181-183:

"The sale is not made by the original owners. It was a sale by the trustee in his fiduciary capacity only. The trustee undertakes only for the execution of the power that is given him, and he is only authorized to sell and convey the title which is vested in him by the deed. * * * The case belongs to the class of fiduciary vendors, as executors, administrators, guardians, mortgagees, assignees for the benefit of creditors, and other like trustees, who have no other interest in the property than a legal title with power to sell and convey. * * * They are mere agents to sell and convey, and trustees to execute the trusts declared. * * * The title is on record, the records are open to all, and the purchasers can examine the title for themselves. There being no warranty, the rule of *caveat emptor* must necessarily be implied in reference to the conveyance."

It is in consonance with this that the rule obtains that a purchaser under a foreclosure mortgage sale cannot be relieved from the payment of the surplus bid by him on the ground that he was of opinion, and was so advised by counsel, that the surplus fund would go to the liquidation of the prior mortgage debt. The purchaser buys only the equity of redemption, which is converted into money, and he takes the property *cum onere*. "A trustee holding the naked legal title cannot, on the sale of the property, use part of the purchase money to satisfy taxes or prior incumbrances, unless he is empowered thereto in the instrument creating the trust. In all such cases the purchaser takes the land subject to the incumbrances." *Schmidt v. Smith*, 57 Mo. 135. See, also, *Shear v. Robinson*, 18 Fla. 379; *Ledyard v. Phillips*, 32 Mich. 13.

As said by Lord HARDEWICKE in *Pullen v. Ready*, 2 Atk. 591:

"If parties are entering into an agreement, and the very will out of which the forfeiture arose is lying before them and their counsel while the drafts are preparing, the parties shall be supposed to be acquainted with the consequences of law on this point, and shall not be relieved under a pretense of being surprised with such strong circumstances attending it."

Administrators cannot bind the estate by any representation made by them while conducting a sale. *Richardson v. Palmer*, 24 Mo. App. 480. This, *inter alia*, for the reason that their duties are defined and limited by law, and "no person may profess ignorance of the extent of the power of a public agent, and individuals must take notice of the extent and authority conferred by law upon the person acting in a fiduciary capacity." *State v. Hays*, 52 Mo. 580, and citations.

As applied to the facts of this case, we hold that where the purchaser is advised, by the deed of trust itself under which the trustee is proceeding, that any surplus arising therefrom shall go to the mortgagee,

he has notice of the trustee's express authority, and the doctrine of *caveat emptor* applies. The purchaser acts at his peril in relying upon the representations of the trustee as to any modification or change in his powers, existing *in pais*. What safety has the mortgagor under any other rule? What claim of relief can any sane man have to the interposition of the court to relieve him against his own reckless negligence in blindly accepting the statement of the trustee, in direct conflict with the express direction in the very deed under which the trustee sells and the purchaser buys? The deed of trust advising the purchaser of the fact that any surplus bid by him was to go to the mortgagor, he was at once put upon inquiry as to the existence of the outside authority claimed by the trustee. I understand the rule of law to be that, when a party is thus put upon inquiry, he is affected with notice of every fact to which a reasonable prosecution of the inquiry would lead. One conscious of the means of knowledge cannot shut his eyes to "the means in his possession for the purpose of gaining further information." *Rhodes v. Outcalt*, 48 Mo. 370. As pertinently said by BAKEWELL, J., in *Lee v. Turner*, 15 Mo. App. 213:

"It is well settled that every one is conclusively presumed to know those things which he might have known if he chose to ask a question that it was his duty in ordinary prudence to ask. 'Notice' means the means of knowledge of which a person willfully neglects or refuses to take advantage. * * * The purchaser who assumes the risk of bargaining without inquiry cannot transfer to the defendant [plaintiff] a loss resulting from his own neglect and inaction." *Smith v. Tracy*, 36 N. Y. 79-87."

When these defendants knew that the trustee was asserting an authority in contradiction of the express conditions of the trust-deed, the most ordinary prudence would have prompted the inquiry, "How and when did you get such authority from Gair?" The presumption is that the trustee would have informed them, just as he testified on the trial when questioned thereof, that his claim of authority was predicated of the conversation had with Gair at the time of the execution of the deed of trust; which conversation, as we have already shown, amounted to no authority at all.

Where, then, is the foundation for the *dernier ressort* of counsel for a ratification? The rule of ratification applies "when an authorized agent, acting within the scope of his authority, perpetrates a fraud for the benefit of his principal, and the latter receive the fruits of it; he is liable as for his own wrong." *Smith v. Tracy*, *supra*, page 83. It has no application where the trustee is clothed with a special limited authority, and in making sale departs from or makes assurances outside of his apparent authority. By receiving the proceeds of the sale, or suing therefor, without knowledge of the departure of the trustee, the principal is not affirming the wrong of the trustee, but is only claiming that which, by the express terms of the power of attorney, he is entitled to. This important distinction is sharply drawn in the case last cited, where the court cites the case of *Wilson v. Tumman*, 6 Man. & G. 236, in which it was held "that, by adopting and ratifying what he had authorized,

he did not adopt and ratify the unauthorized acts of his agent." Predictable of this distinction, the principle is announced in *White v. Sanders*, 32 Me. 188:

"If one wrongfully sells the plaintiff's goods, the receipt of money from him by the plaintiff, on account of such goods, would not be a ratification of the sale, provided the plaintiff would have had a right, without notifying the sale, to receive the money."

So it is held that the receipt of a portion of money realized from property improperly sold by a sheriff will not amount to a ratification of the sale. *Harris v. Miner*, 28 Ill. 135, 136. "Without notifying the sale," the plaintiff here, had the surplus money been paid over to him, would have been entitled to it, under the express provisions of his deed authorizing the sale. There is not one word of evidence to show that when he brought this action he had knowledge of any representations the trustee is now claimed to have made. By bringing this action he ratifies nothing; he only lays claim to that which, by the plain letter of the trust-deed, he is entitled to. It is not deemed necessary to go further, and comment on the effect of defendants' accepting deed from the trustee, and afterwards ousting the plaintiff's tenant from the land, and withholding the premises to the date of this trial. It would present the question of estoppel as against the defendants. *Ledyard v. Phillips*, 32 Mich. 13. Nothing could better illustrate the improvidence and irregularity of the course pursued in this transaction than what followed the effort of the purchasers at the first foreclosure sale to escape their responsibility to Gair. The answer discloses the fact that, at the instance of Davis, who was not the holder of the note, the trustee, Morris, sold a second time. At this sale these same defendants bought in the property at \$100, which is admittedly worth \$4,300, which after they shall have paid off the Lombard debt, if they ever do, would cost them only about \$2,600, while the evidence at this trial shows that at the first sale there were bidders who were ready and willing to bid at least the amount of the Davis debt, \$1,800. So by this second maneuver of defendants they seek to obtain Gair's entire equity for \$100, and leave him indebted to the holder of the Davis note for \$1,700 and interest.

The objection that this action, if maintainable at all, can only be in the name of the trustee, is not tenable. The debt of Gair to Davis having been satisfied by the sale, the surplus money belonged to the mortgagor. He then became the real and only party in interest, and either he or the trustee might bring action for money had and received. *Reynolds v. Hennessey*, 2 Atl. Rep. 701, 15 R. I. 215; *Flanders v. Thomas*, 12 Wis. 410; *Ballinger v. Bourland*, 87 Ill. 513; *Rogers v. Gosnell*, 51 Mo. 466; *McComas v. Insurance Co.*, 56 Mo. 575; *Fitzgerald v. Barker*, 70 Mo. 687.

Again, the defect of party plaintiff, if such defect were conceded, being apparent on the face of the petition, should be raised by demurrer. If not so raised, the objection is deemed in law as waived. *State v. Sapington*, 68 Mo. 454; *Walker v. Deaver*, 79 Mo. 672; *Rogers v. Tucker*, 94 Mo. 352, 7 S. W. Rep. 414. Embarrassing, indeed, would be the situa-

tion of this plaintiff if his relief depended on the trustee, Morris, taking the initiative in this matter, when it appears that he is making common cause with the defendants to defeat the plaintiff's action. The issues are found for the plaintiff. Judgment accordingly.

ATCHISON, T. & S. F. R. Co. v. HOWARD.

(Circuit Court of Appeals, Eighth Circuit. February 8, 1892.)

1. NEW TRIAL—DISCRETION OF TRIAL COURT.

The question of a new trial rests in the sound discretion of the trial judge, and a refusal thereof is not reviewable in the circuit court of appeals.

2. INSTRUCTIONS—OPINION ON EVIDENCE.

It is not error for a federal judge to express his opinion as to the weight which ought to be given to the statement of a witness, when the jury is in fact left free to discredit the statement.

3. SAME—REVIEW—PRESUMPTIONS.

When, under such circumstances, the substance only of the court's language is given in the bill of exceptions, it must be presumed that it did not transcend the limits of judicial discretion.

4. MASTER AND SERVANT—PERSONAL INJURIES—CONTRIBUTORY NEGLIGENCE.

In an action by a locomotive fireman for personal injuries sustained by the blowing out of a boiler flue, the statement of witnesses that the accident "might" have been due in part to the manner in which the fireman cast lumps of coal into the fire-box is insufficient to justify submitting to the jury the question of contributory negligence, when there is no evidence as to his manner of putting in coal.

In Error to the Circuit Court of the United States for the District of Colorado.

Action by Frank Howard against the Atchison, Topeka & Santa Fe Railroad Company for personal injuries. Verdict and judgment for plaintiff. Defendant brings error. Affirmed.

Charles E. Gast, for plaintiff in error.

Before CALDWELL, Circuit Judge, and SHIRAS and THAYER, District Judges.

THAYER, District Judge. This is a suit for personal injuries which the defendant in error sustained in March, 1890, while in the service of the Atchison, Topeka & Santa Fe Railroad Company as a locomotive fireman. On the trial in the circuit court it appeared that a flue-pocket was blown out of the boiler of the locomotive on which the defendant in error was employed, and that he was very severely scalded by hot steam which escaped from the boiler. A "flue-pocket," so termed, is a short flue which extends into the boiler for about six or eight inches behind the flue-sheet, and is closed at the inner end. Such "blind-flues," or "flue-pockets," as they are generally called, are located near the bottom of the flue-sheet, and open into the fire-box. They are so attached to the flue-sheet that they may be taken out or withdrawn when it becomes necessary to remove sediment or incrustations that have collected on the bottom of the boiler. The usual method of attaching flue-

pockets to the flue-sheet of a boiler, so that they cannot be blown out, is to expand the flue on the inside next to the flue-sheet, thus forming a shoulder which abuts against the sheet. The locomotive on which the defendant in error was employed when injured was an old one, but it had been thoroughly repaired and put in order about a year prior to the accident.

In the course of the trial in the circuit court the defendant in error called a witness by the name of Sturdy, who was the boiler-maker who had repaired the boiler immediately after the flue-pocket in question was blown out. This witness testified, in substance, that while making such repairs he discovered that the flue-pocket had been put in originally in a faulty manner, by reason of its not having been expanded enough to give it a sufficient shoulder to prevent it from being blown out. On his cross-examination, however, he was confronted with a letter written by him to his superior officer, shortly after the date of said repairs, in which he had reported that "the right cause of the flue-pocket being blown out was unknown, unless it was due to a sudden jar against the flue-sheet and a heavy pressure of steam; that the flue-pocket was good, and had been put back in the boiler." It is stated in the bill of exceptions that "Sturdy was the only witness who assumed to know how the flue-pocket had been originally put in." It is further said in the bill that there was "some testimony * * * tending to show that the blowing out of the pocket might have been caused by throwing heavy lumps of coal into the fire-box;" and that "the engineer testified that the defendant in error had thrown some coal into the fire-box shortly before the accident, but that he did not notice in what manner it was done;" also "that several large lumps of unburned coal were found in the fire-box after the flue-pocket was blown out." The foregoing is substantially all of the testimony preserved in the record relative to the cause of the accident; but the bill of exceptions does not purport to contain all of the testimony, or to give anything more than a short summary of the charge under which the cause was submitted to the jury. The first error relied upon in this court is the refusal of the lower court to grant the plaintiff in error a new trial. Counsel for the railroad company claim to have been surprised by the testimony of the witness Sturdy, above referred to, and on that ground they asked the circuit court to award a new trial, which motion was denied. It is sufficient to say of the alleged error that we cannot notice it. The granting of a motion for a new trial is a matter resting in the sound discretion of the trial judge, and we are not authorized to review its action in that regard. *Railroad Co. v. Horst*, 93 U. S. 291-301; *Newcomb v. Wood*, 97 U. S. 581.

Exception is also taken to one paragraph of the charge, in which the trial judge is said to have "charged the jury, in substance, * * * that the only witness who assumed to know how the flue-pocket had been originally put in was the witness Sturdy, and that the jury ought to accept that as to the manner in which the flue had been put in originally, and find whether such was a safe or negligently faulty manner

of putting it in." We discover no material error in this direction,—certainly none that would warrant a reversal. The trial judge had the right, if he thought proper, to express an opinion as to the weight that ought to be attached to the statements of the witness, and it is not apparent from the record that he did more than to express an opinion. *Nudd v. Burrows*, 91 U. S. 434-439; *Railroad Co. v. Putnam*, 118 U. S. 545, 7 Sup. Ct. Rep. 1; *U. S. v. Railroad Co.*, 123 U. S. 113, 8 Sup. Ct. Rep. 77; *Lovejoy v. U. S.*, 128 U. S. 171, 9 Sup. Ct. Rep. 57; *Simmons v. U. S.*, 12 Sup. Ct. Rep. 171, (October term, 1891.) The exact language of the court is not reproduced in the record,—the substance merely is stated; and we would be compelled to presume, in aid of the judgment, that what was in fact said did not transcend the bounds of judicial discretion. But, in any event, the jurors appear to have been left at full liberty (notwithstanding what was said by the court) to discredit the statements of the witness Sturdy if they thought proper.

Complaint is also made, and an exception was saved, because the question of contributory negligence was withdrawn from the consideration of the jury. In this respect we think there was no error. Some witnesses appear to have suggested that the blowing out of the flue-pocket might have been due in part to the manner in which lumps of coal were cast into the fire-box; but, so far as the record shows, none of them went so far as to express the opinion that the accident was so occasioned. The testimony introduced on this point amounted to no more than a suggestion of a possible cause of the accident. There was no evidence offered in support of the suggestion that would have warranted the jury in finding that the defendant in error was guilty of contributory negligence. To have made out a case entitling the court to submit that issue to the jury it should have been shown that coal was thrown into the fire-box in lumps of unusual size, or with unusual and unnecessary force, and there was no such evidence or proof of circumstances from which such facts could be legitimately inferred. No other exceptions were taken to the action of the trial court, and, as we find no material error in those already considered, the judgment of the circuit court is affirmed.

KANSAS CITY, F. S. & M. R. CO. v. STONER.

(Circuit Court of Appeals, Eight Circuit. February 1, 1892.)

1. CARRIERS OF PASSENGERS—COLLISION OF TRAINS—INSTRUCTIONS.

When a passenger is injured by the collision of trains at a crossing of two railroads, each company is liable in full if its servants are negligent; and hence in an action against both it is proper to refuse an instruction requested by one, correctly defining the duty of the other with respect to the care to be exercised in approaching the crossing, and casting upon it the liability in case the jury found a breach of the duty. Both companies are bound to the same degree of care, and the instruction should be made applicable to both.

2. SAME.

In such an action one of the companies requested a charge that its employees were only bound to exercise ordinary prudence; that, in determining whether they did so, all the circumstances should be considered; and that, if they did exercise ordinary prudence, the company was not liable, "although the jury found that they performed some acts or omitted others which in the light of subsequent events * * * would have prevented the collision." *Held*, that it was not error to omit the quoted part, since it contains an independent proposition, which should have been preferred as a separate request.

3. SAME—PRESUMPTION OF NEGLIGENCE.

Where a collision occurs between the regular trains of two railroad companies at a crossing of their tracks in broad daylight, a presumption arises of negligence on the part of one or both; and, in an action for injuries to a passenger, it is proper to refuse a charge that one of the companies was not affected by such presumption.

4. SAME—INSTRUCTIONS.

In an action by a passenger for personal injuries the court charged that unless an act or omission contributed to the injury "directly or indirectly" it should not be considered. *Held*, that the use of the words "or indirectly" was harmless when there was no proof of any fact that could be considered as a secondary or remote cause.

5. SAME—DAMAGES—FUTURE EFFECTS.

It was proper to refuse a charge that plaintiff could only recover for such future consequences as were reasonably certain to ensue, and not for "merely possible or even probable future effects not now apparent," as the quoted words qualified the correct proposition expressed in the preceding clause, and were liable to mislead the jury.

In Error to the Circuit Court of the United States for the Western Division of the Eastern District of Arkansas.

Action by John H. Stoner against the Kansas City, Fort Scott & Memphis Railroad Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

C. H. Trimble, for plaintiff in error.

Joseph W. Martin, for defendant in error.

Before CALDWELL, Circuit Judge, and SHIRAS and THAYER, District Judges.

THAYER, District Judge. The defendant in error brought suit against the Little Rock & Memphis Railroad Company (hereafter called the "Little Rock Company") and the Kansas City, Fort Scott & Memphis Railroad Company (hereafter called the "Kansas City Company") for personal injuries sustained in consequence of a collision between trains of the respective companies at a crossing of the two roads in the state of Arkansas, a few miles west of Memphis, Tenn. A westward-bound passenger train of the Little Rock Company was going over the crossing
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about 6:30 p. m. on July 9, 1890, when it was run into by a southward-bound freight train of the Kansas City Company, and the defendant in error, who was a passenger on the Little Rock Company's train, sustained injuries for which a jury awarded him damages in the sum of \$3,500. No further statement of the circumstances attending the collision is deemed necessary, as it is not claimed that the case should have been withdrawn from the consideration of the jury. The trial resulted in a verdict exonerating the Little Rock Company from all liability, but holding the Kansas City Company responsible in the sum above stated. The errors assigned relate exclusively to the charge of the lower court, and its refusal to give certain requests asked by the Kansas City Company. We proceed to consider the several assignments in the order in which they have been stated by counsel.

The first error assigned is the refusal of the circuit court to give the following instruction, which was asked by the plaintiff in error:

"It was the duty of the employees operating the passenger train to come to a full stop within a reasonable distance of the crossing, and to both look and listen for any train that might be approaching it on the other road. It was also their duty, after stopping and looking and listening, to approach the crossing with caution, keeping a vigilant lookout to see or hear trains that might be on the other road. If the engineer saw a train on the Kansas City road before or at the time his engine reached the crossing, it was his duty to observe it closely, and determine whether it was in motion, and be certain that it would not collide with the train which he was pulling before he proceeded over the crossing, or drew the cars containing the passengers onto the track. If he failed in the performance of any of these duties, it was negligence for which the Little Rock & Memphis Railroad Company would be liable."

We are of the opinion that the Kansas City Company is not entitled to complain of the refusal to give the foregoing request, even though we concede that it properly describes the various precautions which the persons in charge of the passenger train should have taken. The case was submitted to the jury under directions from the court which properly defined the relation existing between the defendant in error and the Kansas City Company, as well as the degree of care that the latter company was bound to exercise when its freight train approached the crossing. Under such instructions, correctly defining the duty of the plaintiff in error, the jury have found that the collision was the result of its negligence.

It may be that the Little Rock Company was equally culpable, or that the higher degree of care it owed to the defendant in error, by reason of his being a passenger on its train, would have warranted a verdict against it as well as against the Kansas City Company, and that such verdict would have been rendered had more specific instructions been given. But this plea cannot avail the plaintiff in error, for the reason that it is liable for all the injuries the defendant in error has sustained, if its negligence directly contributed to the collision, and that it did so contribute has been established by the verdict of the jury under instructions correctly defining its duty, as to which no exception was

taken. It is to be observed that the request preferred to the lower court by the plaintiff in error related wholly to the degree of care its co-defendant should have exercised. It was not framed with a view of elucidating its own duty, but for the obvious purpose of casting as large a measure of responsibility as possible on the Little Rock Company. If the circuit court had defined the duty of the Little Rock Company in the manner requested by the Kansas City Company, it should in that event have defined the duty of the latter company in similar language. In other words, if it adopted the instruction, it should have made it applicable to both companies. Both trains were bound to take the same precautions in approaching the crossing, and the jury should have been so advised. For the reasons stated, no error was committed in refusing the request.

The plaintiff in error asked the circuit court to charge the jury in substance as follows: That its employees in charge of the freight train were only bound to exercise ordinary prudence; that in determining whether such degree of prudence was exercised, the jury should take into consideration all the circumstances of the situation; and that, if they did exercise ordinary prudence, the Kansas City Company was not liable, "*although the jury found that they performed some acts or omitted others which in the light of subsequent events * * * would have prevented the collision.*" The court gave the several directions contained in the request except the concluding clause, which is in italics. Such action is assigned as error.

We are of the opinion that the assignment is not tenable. It will be observed that the concluding paragraph has no necessary relation to the preceding propositions of law stated in the request. It neither qualifies nor explains them, but is an abstract proposition, not directed to any particular matter or fact in controversy. To speak more accurately, it was simply a general admonition to the jury that the quality of an act alleged to be negligent ought not to be determined exclusively in the light of subsequent events. That may be, and no doubt is, a very proper admonition to be given in certain cases, especially in a case where the jury might be in doubt as to whether the act of omission or commission counted upon amounts to culpable negligence. *Express Co. v. Smith*, 33 Ohio St. 519. But if an instruction of that character is sought, it should be preferred in the form of a separate and independent request; and, in any event, we conclude that the present record does not disclose a state of facts which rendered such an admonition either necessary or appropriate.

Error is also assigned because of the refusal of the circuit court to grant the following request:

"There is no presumption of negligence as against the Kansas City Company arising from the fact that the collision occurred. The plaintiff must show by a preponderance of the testimony that it was guilty of negligence which was a direct cause of the injury."

We are of the opinion that this assignment is not tenable for the following reasons: The collision occurred in broad daylight, at a level crossing, between two regular trains of the respective companies. No

explanation of the cause of the collision was attempted at the trial which would exonerate both companies from the charge of negligence, but each company sought to cast the blame upon the other. Under these circumstances, we think there was a presumption that the collision was due to the carelessness of one or the other, or both, of the defendant companies. Such being the presumption, the court below acted properly in defining the degree of care each was required to exercise, and in leaving the jury to determine, in the light of all the testimony, upon whom rested the responsibility for the collision. It was not bound to declare, nor would it have been proper to declare, in a case of this character, that the Kansas City Company was not affected by any presumption of negligence.

Complaint is further made that the lower court refused the following request:

"The plaintiff is entitled to recover only for such future consequences of the injury inflicted on him as the proof shows you are reasonably certain to ensue. Damages should not be assessed for merely possible, or even probable, future effects not now apparent."

We think this request was properly refused, because it was liable to mislead the jury. The first paragraph of the request states a correct proposition, applicable to the assessment of damages. The last clause, however, declares that "damages should not be assessed for * * * probable future effects not now apparent." This was liable to be understood as meaning that there ought to be no allowance made for the probable effects of an injury, unless the effects are so apparent at the time of the trial, or so manifest, as to be absolutely certain to occasion loss, and not merely reasonably certain. In other words, it limits and might have put a false color on the preceding proposition. As the court had already given the jury very full and fair directions as to the assessment of damages, we think it was under no obligation to give the direction last above mentioned.

Finally, it is said the circuit court erred in the following extract from its charge:

"Speaking of negligence, I will say to you, in the language of the Little Rock & Memphis Railroad Company: 'The only acts of negligence on the part of the defendants, or either of them, that will be considered by the jury, are those which in some way contributed to the injury complained of by the plaintiff. Any other acts not so contributing will not be regarded by you.' That, gentlemen of the jury, in substance should govern you in your deliberations in this case. Unless an act or omission contributed to the injury, directly or indirectly, it must not be considered by you."

Complaint is made of the words "or indirectly," in the concluding paragraph. If these words are understood to mean that the jury were at liberty to consider remote acts of negligence as distinguished from primary, and if there was proof of such remote acts, we cheerfully concede that the direction was erroneous. But we have looked through the record in vain for any evidence tending to show an act of omission or commission on the part of the Kansas City Company which it is possible to

regard as a secondary or remote cause of the collision. The use of the words "or indirectly," in the connection above stated, was not a material error.

Upon the whole, the case appears to have been tried by the circuit court with commendable accuracy and fairness, and its judgment is therefore affirmed.

CITY OF GOLDSBORO v. MOFFETT *et al.*

(Circuit Court, E. D. North Carolina. January 13, 1892.)

1. MUNICIPAL CORPORATIONS—CONTRACT—ORDINANCES.

A city passed an ordinance authorizing a certain firm to construct water-works for it upon terms fully set out. This was accepted by the firm, and a memorandum of the acceptance was attached to a copy of the ordinance, and signed in behalf of the city by the mayor and clerk thereof, under its corporate seal, and by the firm and each member thereof under their individual seals. *Held*, that this constituted a binding contract.

2. BONDS—CONSTRUCTION—BREACH.

The firm gave a bond which, after reciting that the same was required of them by the city "for the faithful performance of their contract," expressed the condition to be that they should faithfully perform their contract "during the construction of said works." *Held*, that the latter words did not restrict the scope of the bond to the period of actual construction, but, on the contrary, a failure to begin the work at all constituted a breach.

3. SAME—MEASURE OF DAMAGES.

The amount of damages was at least equal to the difference between the contract price and the compensation provided for in a new contract made in pursuance of a bid, secured by a subsequent advertisement of the same work.

At Law. Action by the city of Goldsboro against John F. Moffett, Henry C. Hodgkins, and John V. Clarke as principals, and Daniel G. Griffin as surety, upon a bond to secure the performance of a contract to build water-works. Jury waived and trial to the court. Judgment for plaintiff.

Reade, Busbee & Busbee, for plaintiff.

Theo. F. Klutz, for defendants.

SEYMOUR, District Judge. The city of Goldsboro, by its board of aldermen, in the spring of 1887, enacted a city ordinance authorizing the firm of Moffett, Hodgkins & Clarke to construct, maintain, and operate water-works in Goldsboro, upon terms fully set forth in the ordinance. The ordinance was accepted by the firm of Moffett, Hodgkins & Clarke, which consists of the defendants John F. Moffett, Henry C. Hodgkins, and John V. Clarke, and an instrument embodying a memorandum of its acceptance was on the 5th of April, 1887, annexed to a copy of the ordinance, and signed in behalf of the city by its mayor and clerk, under its corporate seal, and by the firm and each member thereof under their individual seals. Under these circumstances the court is at a loss to conceive upon what ground the position of defendants' counsel, that the city ordinance did not constitute a contract, rests. If

either the city of Goldsboro or defendants' firm are capable of entering into a contract, they have done so by the ordinance and its formal acceptance.

By their contract the firm of Moffett, Hodgkins & Clarke undertook to complete the said works to successful operation on or before October 1, 1887. This they have failed to do. On the contrary, they have entirely neglected and abandoned their contract, and the city, after waiting a reasonable time, has made a contract for the same works with another firm. That contract, as well as the one with defendants' firm, has been admitted and made a part of this case. The building of water-works being within the authority vested in the city government by its charter, and the contract having been duly executed, and having been violated by defendants' firm, the city is entitled to recover from said firm whatever damages it has sustained by the default. To secure performance of the contract, the defendants Moffett, Hodgkins & Clarke entered into a bond in the sum of \$5,000, which was on the 7th of June, 1887, duly executed by themselves as principals, and by the defendant Daniel G. Griffin as surety. The condition of the bond is in these words:

"Whereas, the city of Goldsboro did on the 29th day of March, 1887, adopt an ordinance authorizing and empowering Moffett, Hodgkins & Clarke to construct, maintain, and operate water-works to supply the city of Goldsboro, N. C., with water; and whereas, the said ordinance was duly accepted by said Moffett, Hodgkins & Clarke; and whereas, it was further required by the said city that the said Moffett, Hodgkins & Clarke give a bond in the sum of five thousand dollars for the faithful performance of their contract: Now, if the said Moffett, Hodgkins & Clarke, or their assigns, do faithfully perform the terms of their contract during the construction of said works, then this obligation to be void; otherwise," etc.

A jury having been waived, and hearing had, and the court having found the facts to be as hereinabove stated, the only question remaining, besides the amount of plaintiff's damages, is whether there has been a breach of the condition of the bond. That is purely a question of construction.

Defendants' contention is that the bond is conditioned only for faithful performance of the terms of the contract during the construction of the water-works, and that, their construction never having been begun by Moffett, Hodgkins & Clarke, there can have been no breach. Plaintiff's contention is that the failure to construct is itself within the intent and terms of the bond. Whatever may be the technical rules that sometimes embarrass endeavors to interpret wills, or even statutes, there is no difficulty in regard to the principle by which every contract should be construed; which is intention, and but one limitation, which is the words used by the parties. Unlike cases in which the meaning of wills is involved, the words of contracts admit of technical construction only when technical significations are intended by the parties. It is said in this case that both as a bond, and, as far as one defendant is concerned, as the contract of a surety, the paper in suit should be strictly construed. There are certain minor propositions laid down in the books. Among them is one that guaranties and other agreements, such as is the

one by the defendant in this action who is a surety to answer for another's obligation, should be strictly construed. On the other hand, is the rule that the words of instruments should be taken most strongly against their makers. Propositions of this description are more properly guides in reaching intent than rules of construction. They are never resorted to excepting by way of illustrations, or, as Justice REDFIELD styles them, "makeweights," if the intention of the parties can be ascertained from the words adopted by them, viewed in the light of the whole agreement and its known circumstances.

In the present case the intent is evident, and is to be found in the recitals in the condition of the bond, one of which is that the defendants have been required to give a bond for the faithful performance of their contract. The words following this recital are: "Now, if the said Moffett, Hodgkins & Clarke do faithfully perform the terms of their contract *during the construction of said works*," etc. If the words italicized should be construed to modify the obligation recited, which includes the performance of the contract, so as to limit it to faithful performance, provided the contractors should see fit to begin the work of construction, they would be made to contradict the expressed intention of the signers of the bond, and would make that instrument as to one of the purposes, if not the main purpose for which it was given, entirely nugatory. The city needed no security for the performance of the contract, in case the firm went on and supplied the works, other than the works themselves and the rental it had agreed to pay. What they demanded a bond as security against was precisely the contingency that has happened. They had rejected other bids at nearly the same rates as those offered by Moffett, Hodgkins & Clarke, and were relying upon them to supply them with water-works. It was against a failure to perform the work, damages to result from delay, and the possible increased cost of a new contract, that they demanded and obtained the security of a bond. If the words, "during the construction," etc., contradict and render impossible of attainment this purpose, they may by an equitable construction, allowable even in a court of law, be rejected, *ut res magis valeat quam pereat*.

A strict technical construction of the bond leads to a like result. Obligors by their bond undertake to pay obligee \$5,000, the obligation to be void upon their doing a thing specified in the bond. That thing is that M., H. & C. shall perform the terms of their contract during the construction by them of the water-works. If this had been done, the bond would have been discharged. It has not been done. The act agreed upon is impossible, in view of the fact that M., H. & C. have not constructed the works, and now cannot do so. Had the condition been impossible when the bond was executed, the liability would have been absolute, for it would have been the obligors' own folly to undertake an impossible condition. Had it subsequently become impossible by the act of God, the act of the law, or the act of the obligee, then the penalty would have been saved, for no prudence of the obligors could have guarded against such a contingency. 2 Bl. Comm. 341. But,

having become impossible by the act of the obligors, the bond has become single and unconditional, and plaintiff may recover the damages actually due them upon it.

The remaining question is one of damages. After failure to obtain construction of the works by defendants' firm, the city again advertised for bids for precisely the same work, received an offer from another firm at a larger price than that which they had agreed to pay Moffett, Hodgkins & Clarke, and, having accepted the offer, entered into a new contract with such firm. Plaintiff asks to be allowed as damages the difference in cost to it between the two contracts. This, at least, it is entitled to. The difference, being mere matter of computation, will be referred to a master, his report to be subject to exceptions, etc. Let such an order be entered.

In re SCHEFER et al.

(Circuit Court, S. D. New York. January 8, 1892.)

1. CUSTOMS DUTIES—ADMINISTRATIVE CUSTOMS ACT OF JUNE 10, 1890—PROTEST.

A protest against appraisements made of imported merchandise in accordance with section 2911, Rev. St. U. S., raises, within the meaning of section 15 of the administrative customs act of June 10, 1890, (26 St. p. 131,) a question as to the construction of the law and the facts respecting the classification of such merchandise, and the rate of duty imposed thereon under such classification.

2. SAME—REPEAL OF STATUTE.

Section 2911, Rev. St., was not repealed by section 10 of the administrative customs act, but is still in force.

At Law.

During September, 1890, Schefer, Schramm & Vogel imported from a foreign country into the United States at the port of New York certain merchandise consisting of cotton hosiery and skirts of similar kind, but different quality, and charged at an average price. The local appraiser at that port, in appraising the value of this merchandise, applied the principle laid down in section 2911, Rev. St. U. S., which reads as follows:

"Whenever articles composed wholly or in part of wool or cotton, of similar kind, but different quality, are found in the same package, charged at an average price, it shall be the duty of the appraisers to adopt the value of the best article contained in such package, and so charged as the average value of the whole."

Within the time specified in section 13 of the administrative customs act of June 10, 1890, (26 St. U. S. p. 131, c. 407,) the importers gave notice in writing to the collector of that port of their dissatisfaction with the appraisement made by the local appraiser, and, pursuant to the directions of the collector, a reappraisement was made by one of the United States general appraisers, who sustained the decision of the local appraiser in appraising the value as aforesaid. Thereafter the importers

duly gave notice in writing of their dissatisfaction with this reappraisement to the collector, who thereupon transmitted the invoice of the merchandise in question, and all the papers appertaining thereto, to a board of three United States general appraisers, who, after an examination of the case, decided the value appraised as aforesaid was the dutiable value according to law. Upon this value, the collector then levied and exacted duties at the rate prescribed by law on the merchandise in question. Within 10 days after the exaction of these duties, as prescribed in section 14 of the administrative customs act, the importers duly protested, as follows:

"We claim that the said merchandise is not dutiable under section 2911 of the Revised Statutes, under which section the said goods have been classified for duty, but that the same are dutiable only under those provisions of existing laws which require that all goods subject to *ad valorem* duty shall be appraised and reappraised according to the actual market value and wholesale price of the merchandise at the time of exportation to the United States in the principal markets of the country whence the same have been imported. We claim that the general appraiser who first appraised said goods, and the board of general appraisers who afterwards reappraised said goods on appeal, instead of reappraising them according to said actual market value or wholesale price in the principal markets of the country of exportation, reappraised the same according to the provisions of section 2911 of the Revised Statutes, which is now, and has long been, obsolete, it having been a portion of the tariff act of 1832, which was repealed by the later acts of 1842, and others following the same up to the present time. We claim that said reappraisers, discovering the fact that said merchandise was composed in part of cotton or wool, charged at an average price, supposed that it was their duty to adopt the value of the best article contained in each package, and so charged, as the average value of the whole, thus classifying the goods as subject to a section or provision of the Revised Statutes long since obsolete."

Alexander P. Ketchum, for importers, contended:

(1) That section 10 of the administrative customs act provided that it should be the duty of the appraisers, by all reasonable ways and means in their power, to ascertain, estimate, and appraise (any invoice or affidavit thereto or to the contrary notwithstanding) the actual market value and wholesale price, etc., of the merchandise in suit. (2) That section 19 of the same act provided that duty should be assessed upon the actual market value or wholesale price of said merchandise. (3) That the appraisement under section 2911, Rev. St., of the merchandise in suit, obtained a higher value than such market value or wholesale price, and a duty exacted on the higher value so obtained was greater than the duty would have been if exacted on such market value or wholesale price. (4) That section 2911, Rev. St., therefore, was inconsistent with said section 10, and was, under section 29 of the administrative customs act, repealed thereby.

Edward Mitchell, U. S. Atty., and *Thomas Greenwood*, Asst. U. S. Atty., for collector, contended:

(1) That section 15 of the administrative customs act, having given the court jurisdiction only as to classification of merchandise and the rate of duty imposed thereon, and there being no question raised or capable of being raised in this case as to classification or rate of duty by the protest or by the facts before the court, the court had no jurisdiction of this case, involving, as it did, only the appraisement of value heretofore determined, and by section 13

of the same act made final and conclusive. (2) That section 2911, Rev. St., which, under section 5595, Rev. St., was certainly the law of the land after the passage of the Revised Statutes until the passage of the administrative customs act, was omitted from the list of sections of the Revised Statutes specifically enumerated in section 29 thereof as repealed by that act, and was, therefore, presumably not repealed or intended to be repealed. (3) That section 10 of the administrative customs act was a re-enactment, without change of meaning, of section 2902, Rev. St. (4) That section 2911, Rev. St., evidently was, as to the kind of merchandise in suit, in the nature of an exception to section 2902, Rev. St., and these two sections, so construed, were entirely consistent. (5) That said section 10 and section 2911, Rev. St., were to be construed in the same manner as sections 2902 and 2911, Rev. St., and that section 2911, Rev. St., was not, therefore, inconsistent with said section 10, and was not repealed by it.

WHEELER, District Judge. The first point is as to whether the protest raised the question as to the effect of section 2911 of the Revised Statutes. Section 15 of the administrative customs act, as to appeals to the circuit court, provides that if the importer, consignee, or agent for the importer, or the collector, or secretary shall be dissatisfied with the decision of the board of general appraisers, as provided for in section 14 of this act, as to the construction of the law and the facts respecting the classification of such merchandise, and the rate of duty imposed under such classification, they, or either of them, may, within 30 days next after such decision, appeal to the circuit court of the United States. This question, under section 2911, Rev. St., would directly relate to the duty imposed there, and to a decision under the law and the facts respecting that; so the question would seem to be raised by this protest. The question as to whether section 2911 is still in force and can be carried out rests upon whether it is consistent with, and can be carried out with, the provisions of section 10 of the administrative customs act. I think it can be, because section 2911 merely provides what sample is to be taken for appraisal, the same as the section as to sending one parcel in ten or one case in ten to be examined. It merely provides what shall be taken for examination, instead of taking an average of the goods of the same class, of different values, mixed together. When that sample is taken, then all the other provisions of the law are to be followed as to that. I think the intention of the law was that the appraisals should not be made on an average, but should be of a definite thing, a sample, the best in the lot, to be gone by. Section 2911 and section 2902 stood in the Revised Statutes together, and could be enforced together; and there is no more difference between section 2911 and section 10 of the administrative customs act, in these respects, than there was between section 2911 and section 2902 of the Revised Statutes. They can stand together in either case, and be enforced. The decision of the board of general appraisers is therefore affirmed.

In re MADDOCK et al.

(Circuit Court, S. D. New York. January 20, 1892.)

CUSTOMS DUTIES—ACT OF MARCH 3, 1883—TABLE MIRRORS.

Table mirrors, known as "mirror plateaus" or "circles," made of plate glass, silvered, beveled, and framed, in circular form, held not to be dutiable at 45 per cent. *ad valorem*, under Schedule B, par. 143, as a "manufacture of glass, or of which glass shall be the component material of chief value," etc., but dutiable at a square-foot duty according to measurement, under paragraph 141, and at an additional duty of 30 per cent. *ad valorem* for their frames, under paragraph 142 of said schedule and act.

At Law. Appeal by importers from decision of board of United States general appraisers under section 15 of the act of June 10, 1890.

Maddock & Steel (importers) imported per steamer Cufic, on July 8, 1890, and per Runic, July 23, 1890, certain mirror plateaus or table mirrors, which were reported by the assistant appraiser to be disks of plate-glass, silvered, from 6 to 16 inches in diameter, and set into a metal base, with feet, intended to be used on dining-tables for holding fruit, and for flower-stands. The collector assessed duty thereon at 45 per cent. *ad valorem*, as "manufactures of glass," under paragraph 143 of Schedule B of the tariff act of March 3, 1883. The importers protested, claiming the same to be dutiable as "cast, polished plate-glass, silvered, or looking-glass plates," according to their measurement by the square foot, with 30 per centum *ad valorem* added for their frames, according to the provisions of paragraphs 141 and 142 of said schedule and act. The importers duly appealed to the board of United States general appraisers, under the provisions of the act of June 10, 1890. The board of general appraisers, on March 4, 1891, affirmed the decision of the collector. An appeal was thereupon taken by the importers to the United States circuit court from the decision of the board. The return of the board was filed in the United States circuit court on May 15, 1891. Additional or further evidence was taken before one of the members of said board, as an officer of the court, under an order of the court entered June 1, 1891, by which it appeared that the articles in suit were mirrors, commonly known in trade as "plateaus," "mirror plateaus," or "circles." Samples of the merchandise were also put in evidence and produced in court.

Edward Mitchell, U. S. Atty., and *Henry C. Platt*, Asst. U. S. Atty., for collector.

Edward Hartley, for importers.

WHEELER, District Judge. Paragraph 141 of the tariff act of 1883 provides for a duty on "cast, polished plate-glass, silvered, or looking-glass plates, not exceeding ten by fifteen inches square, four cents per square foot," etc., increasing the duty by the square foot, as they are made larger. Paragraph 142 provides:

"But no looking-glass plates or plate-glass, silvered, when framed, shall pay a less rate of duty than that imposed upon similar glass of like descrip-

tion not framed, but shall be liable to pay, in addition thereto, thirty per centum *ad valorem* upon such frames."

Paragraph 143 imposes a duty upon—

"Porcelain and Bohemian glass, chemical glassware, painted glassware, stained glass, and all other manufactures of glass, or of which glass shall be the component material of chief value, not specially enumerated or provided for in this act, forty-five per centum *ad valorem*."

This importation is of circular, cast, polished plate-glass plates, silvered, beveled, and framed. It has been assessed as a manufacture of glass, or of which glass is the component material of chief value, at 45 per centum *ad valorem*. The protest raises the question as to whether it comes under that paragraph or under paragraph 141. The record shows that these articles are used sometimes for table ornaments, and called "plateaus." They also may be used for looking-glasses. The case is argued as if the clause "polished plate-glass, silvered, or looking-glass plates," of paragraph 141, applies only to looking-glasses. But paragraph 140 provides a duty on "cast, polished plate-glass, unsilvered, not exceeding ten by fifteen inches square, three cents per square foot," etc. That shows that cast, polished plate-glass may or may not be made into looking-glass plates. It may be unsilvered or silvered, or it may be looking-glass plates. These are, for certain purposes, looking-glass plates, but they come within the exact description of "cast, polished plate-glass, silvered," of paragraph 141; and also they are "framed," within paragraph 142. They are, therefore, "manufactures of glass," provided for in this act, and not "manufactures of glass, or of which glass shall be the component material of chief value," not provided for. They should be assessed under paragraphs 141 and 142, and not under paragraph 143. Therefore the decision of the board of United States general appraisers is reversed.

In re VAN BLANKENSTEYN *et al.*

(Circuit Court, S. D. New York. January 11, 1892.)

CUSTOMS DUTIES—ACT OF MARCH 3, 1883—BOLTING CLOTH.

Bolting cloth, made of silk and cotton, silk chief value, used for other than milling purposes, is not dutiable at 50 per cent. *ad valorem*, as a manufacture of silk, under paragraph 383 of Schedule L of the tariff act of March 3, 1883, but is free of duty, under paragraph 657 of the free-list of said act.

At Law. Appeal by importers from decision of board of United States general appraisers, under section 15 of the act of June 10, 1890.

Blankensteyn & Hennings imported by the steamers Burgoyne, July 29, 1890, and La Normandie, August 20, 1890, certain "bolting cloth," which was returned by the appraiser upon the invoice as a manufacture of silk and cotton, silk chief value, upon which the collector assessed

duty at the rate of 50 per cent. *ad valorem* under the provisions of paragraph 383 of Schedule L of the act of March 3, 1883. The importers protested, claiming that the said bolting cloth was entitled to free entry under paragraph 657 of the free-list of said act providing for "bolting cloths." The board of United States general appraisers affirmed the decision of the collector. An appeal was duly taken under the act of June 10, 1890, by the importers from the decision of the board of appraisers to the United States circuit court. Return filed May 15, 1891. The evidence taken before the board of general appraisers showed that the said merchandise was known in trade and commerce of this country as "bolting cloth," and that it was bought and sold under that name, but the particular merchandise in suit was not used for milling purposes, but for fancy work or to be embroidered. Samples of the merchandise were produced in court.

Edward Mitchell, U. S. Atty., and *Henry C. Platt*, Asst. U. S. Atty., for the collector.

Comstock & Brown, for the importers.

WHEELER, District Judge. All the force of the evidence is that these cloths are of the kind made for "bolting cloths." They may be fitted up and used for other purposes, but they are still the same kind of cloth, and made in the same way. When congress said "bolting cloths," they did not then say that if they were used for anything else they should pay a different duty, but that when made in that way, as bolting cloths, without saying for what they were used, they should be on the free-list. I think that, although these may be used for something else,—for linings, or for ornamentation, or for something of that sort,—those that were imported under that act should come in free; and so I think that the decision of the board of general appraisers should be reversed. So ordered.

In re LORSCH et al.

(Circuit Court, S. D. New York. January 9, 1892.)

CUSTOMS DUTIES—ACT OF MARCH 3, 1883—"SHOT-CHAINS."

So-called "shot-chains" of iron or steel, consisting of iron or steel balls fastened together with swivels or links, held not to be dutiable at 45 per cent. *ad valorem*, under paragraph 216 of Schedule C of the act of March 3, 1883, as an article composed wholly or in part of iron, steel, etc.; but at 2½ cents per pound, under paragraph 171 of Schedule C of said act, under the description, "chains of all kinds, made of iron or steel," (according to their diameter.)

At Law. Appeal by importers from decision of the board of United States general appraisers under act of June 10, 1890.

Albert Lorsch & Co. imported per steamers Trave and Elbe, in August, 1890, certain so-called "shot-chains," which were returned by the

appraiser upon the invoice as manufactures or articles composed wholly or in part of iron, steel, etc., and duty thereon was accordingly assessed by the collector at the rate of 45 per cent. *ad valorem*, under the provisions of paragraph 216 of Schedule C of the tariff act of March 3, 1883. The importers duly protested, claiming that the said chains were dutiable at 2½ cents per pound only, under paragraph 171 of said schedule and act, under the phrase, "chains of all kinds, made of iron or steel." The board of United States general appraisers affirmed the decision of the collector, and an appeal was taken by the importers from the decision of said board to the United States circuit court. The merchandise consisted of small iron or steel balls fastened together with swivels or links. The board of appraisers found that said articles were not the ordinary chains of commerce. The return of the board of general appraisers was filed in the United States circuit court on May 15, 1891. Additional evidence was taken, under the provisions of the act of June 10, 1890, and pursuant to an order of the court, by which it appeared that the merchandise in suit was known to the trade and commerce as "shot-chains," and were bought and sold by that name; that they were used for key-chains, neck-chains, and the smaller size for chains for eye-glasses. Samples of the merchandise were produced in court.

Edward Mitchell, U. S. Atty., and *Henry C. Platt*, Asst. U. S. Atty., for the collector.

Comstock & Brown, for the importers.

WHEELER, District Judge. I think we shall have to call these "chains." The hollow balls are not beads, because beads are strung, while these make a link; and these little connections between them are links, and together they make a chain. The decision of the board of general appraisers is reversed.

In re OTTENHEIMER et al.

(Circuit Court, S. D. New York. January 8, 1892.)

CUSTOMS DUTIES—ACT OF OCTOBER 1, 1890—COTTON CORSETS—WEARING APPAREL.

Cotton corsets, imported on April 30, 1891, held to be dutiable under the tariff act of October 1, 1890, (26 St. at Large, p. 567,) at 50 per cent. *ad valorem*, under Schedule I, par. 349, as cotton wearing apparel, and not at 35 per cent., under Schedule I, par. 324, of the act of March 3, 1883, as corsets; nor at 40 per cent., under Schedule I, par. 355, of the said act of October 1, 1890, as "manufactures of cotton."

At Law. Appeal by the importers from a decision of the board of United States general appraisers under the act of June 10, 1890.

Ottenheimer Bros. imported certain cotton corsets per steamer Teutonic on April 30, 1891, upon which the collector of customs at the port of New York assessed duty at the rate of 50 per cent. *ad valorem* as "cotton wearing apparel," under the provisions of paragraph 349 of

the tariff act of October 1, 1890. The importers duly protested, claiming (1) that said goods were dutiable at 35 per cent. *ad valorem* only, under the provisions of Schedule I, par. 324, of the tariff act of March 3, 1883, because they were therein specifically provided for by name, and said act was not expressly repealed by the act of October 1, 1890. (2) If said goods are to be held dutiable under the act of October 1, 1890, then the same were dutiable at 40 per cent. only, as "manufactures of cotton, not otherwise provided for," in Schedule I, par. 355, of the act of October 1, 1890; and that said goods were not "wearing apparel," within the ordinary and popular meaning of said words, nor ready-made clothing. An appeal was duly taken under the provisions of the act of June 10, 1890, from the decision of the collector to the board of United States general appraisers, who affirmed the same. The board of general appraisers held that said articles are articles of dress, commonly laced closely around the waist; that they were worn by females, and are articles of wearing apparel. The importers thereupon took an appeal from the decision of the board of general appraisers to the United States circuit court. The return of the board of general appraisers was filed on December 10, 1891.

Edward Mitchell, U. S. Atty., and *Henry C. Platt*, Asst. U. S. Atty., for collector.

Curie, Smith & Mackie, for importers.

WHEELER, District Judge. In this case the question is whether the article—cotton corsets—is properly classified as "wearing apparel." In point of fact it is a waist, in which are inserted whalebones or steels for the support of the body and also for the support of the clothing. If you were to ask anybody who did not care anything about the matter in any way, but who knew, whether that is an article of wearing apparel or clothing or not, or whether it is a mechanical contrivance, I rather think they would say it is a part of the clothing; that it would help to keep the body warm; and that it answers the purpose of a waist. I think it is clothing. The decision of the board of United States general appraisers may be affirmed. So ordered.

NOTE. The tariff act of March 3, 1883, was decided to be repealed by the tariff act of October 1, 1890, in *Re Straus*, 46 Fed. Rep. 522.

In re SHERMAN et al.

(Circuit Court, S. D. New York. January 8, 1892.)

1. CUSTOMS DUTIES—ADMINISTRATIVE CUSTOMS ACT OF JUNE 10, 1892—AMENDMENT OF PROTEST.

A protest, made within the 10 days specified by section 14 of the administrative customs act of June 10, 1890, (chapter 407, 26 St. p. 131,) cannot, after the expiration of that time, be amended.

2. SAME—PROTEST—DECISION UNDER.

In a case arising under this act, in which neither the classification for duty by a collector of customs of imported merchandise under a provision contained in a paragraph of the tariff act of October 1, 1890, (chapter 1244, 26 St. p. 567,) nor the classification thereof, claimed under another provision, contained in another paragraph by the importer's protest, is the correct and legal classification, a decision of a board of United States general appraisers classifying this merchandise under a third provision, contained in a third paragraph, will be reversed, and the decision of the collector affirmed, by a United States circuit court, reviewing such decision of such board, even though the rate of duty prescribed by such third paragraph be the same as that claimed in the aforesaid protest.

At Law. Application for a review of the decision of a board of United States general appraisers.

On October 8, 1890, Sherman, Cecil & Co., imported by the La Champagne, from a foreign country into the United States at the port of New York, certain cotton cloths called "Swiss Spots" and "Sprigs." These cloths had certain raised ornamental figures thereon of the kinds indicated by the words "spots" and "sprigs," and were classed for duty as "articles embroidered by hand or machinery," under the provision for "embroideries * * * and * * * articles embroidered by hand or machinery," contained in Schedule J of the tariff act of October 1, 1890, (N. T. 373;) and duty at the rate 60 per cent. *ad valorem* was exacted thereon by the collector of customs at that port. Against this classification and this exaction, Sherman, Cecil & Co., within the 10 days specified by section 14 of the administrative customs act of June 10, 1890, (chapter 407, 26 U. S. St. p. 131,) duly protested to the collector, claiming that the goods were dutiable at the rate of 40 per cent. *ad valorem* as "bleached cotton cloths counting over 100 threads and under 150 threads to the square inch, and valued at over 10 cents per square yard, under the provision for such cloths contained in Schedule I, (N. T. 346.) Thereafter the board of United States general appraisers took certain evidence, by which it appeared in brief that these cloths were not embroideries, and that the ornamental figures upon them, which the collector held rendered them "articles embroidered," etc., were not embroidered thereon, as the terms "embroideries" and "embroidered" were understood in trade and commerce of this country. The board, on March 31, 1891, (S. 11,027, G. A. 470,) decided that upon this evidence these cloths were not dutiable at 60 per cent. *ad valorem*, as "articles embroidered," etc., under the provision for such articles contained in Schedule J, (N. T. 373;) that, upon the authority of *Robertson v. Hedden*, 40 Fed. Rep. 322, these cloths were not dutiable at the rate of 40 per cent. *ad valorem*, as countable cotton cloths, etc., under the

provision for such cloths contained in Schedule I, (N. T. 346,) as claimed in the protest in this case, but were dutiable at the rate of 40 per cent. *ad valorem*, as "manufactures of cotton," under the provision for such manufactures contained in the same schedule, (N. T. 355;) and that the entry of these cloths should be reliquidated accordingly. Thereafter the collector applied to the United States circuit court for this district for a review of this decision. The case was thereafter tried by the circuit court upon the evidence taken by the board of general appraisers, and the only questions raised by either side were questions of law, and involved (1) a motion, made on the day of the trial, by the importers, to amend their protest to accord with the decision of the board of general appraisers, or by adding thereto a claim in effect that the cloths in suit, if not liable at 40 per cent. *ad valorem*, as "bleached cottons," etc., under paragraph 346, were dutiable at that rate, under paragraph 355 of said act, as "manufactures of cotton not specially provided for;" and (2) the decision of the board of general appraisers that these cloths were dutiable at 40 per cent. *ad valorem*, as "manufactures of cotton not specially provided for," under the provision for such manufactures, (N. T. 355,) and that the entry of these cloths should be reliquidated accordingly, notwithstanding no such claim had been made by the importers in their protest as served upon the collector.

William Forse Scott, for importers.

Edward Mitchell, U. S. Atty., and *Thomas Greenwood*, Asst. U. S. Atty., for collector.

WHEELER, District Judge. In this case one question is as to amending the protest. I think it is very clear that that cannot be done, because it would be making a new protest. The protest must be made within the 10 days specified by section 14 of the act of June 10, 1890, (chapter 407, 26 U. S. St. p. 131.) As those 10 days have elapsed, that cannot be done. Another question is on the point raised by the protest. If the collector assesses duty under one part of the statute, and the importer claims by protest that it should be another duty, under another part of the statute, then the case goes to a board of three general appraisers. Under the old law, in such a case, the only point was whether the importer was right in that. *Davies v. Arthur*, 96 U. S. 148. If he was, then the duty was to be changed accordingly; if not, not. But here the board of general appraisers said that it came under a third part of the law; that is, they did not decide that case, but decided another case, for that made another case under the tariff law. Precisely the same question was raised in a case before Judge LACOMBE. *In re Austin*, 47 Fed. Rep. 873. There the protest was from an assessment under one clause of the statute, and the importers claimed that the assessment ought to be under another clause of the statute. When it got into this court the court thought it ought to have been under a third clause, just as the board of general appraisers here thought it ought to have been under a third clause. But the court decided that they could not go to a third clause, although the third clause imposed a lesser rate of

duty than that imposed by the collector, but that it must be decided on the protest of the importers, the only question being whether the importers were right in claiming, as they did, on the grounds they did by their protest. Although they claimed a lower rate of duty, and the third clause imposed the same rate, still the court held that that was the question to be decided; and that is the question to be decided here. I must follow that case, and decide here that the importers were wrong, and the collector right, upon the questions made by the protest, and that he assessed the proper rate of duty; and that reverses the decision of the board of general appraisers. I follow that case as an authority, and because I think it is right. I think that is the meaning of the statute. The decision of the board of general appraisers is therefore reversed, and the decision of the collector affirmed.

In re BLUMENTHAL et al.

(Circuit Court, S. D. New York. January 7, 1892.)

CUSTOMS DUTIES—CLASSIFICATION—COLORED PENCILS—SCHOOL CRAYONS.

Pencils of wood from four to seven inches in length, filled with material of various colors, and known in trade and commerce as "colored pencils," and often, especially since March 3, 1883, as "school crayons," are dutiable under Schedule N of the tariff act of March 3, 1883, (Tariff Ind., New, 473,) as "pencils of wood filled with lead or other material," at 50 cents per gross, and 30 per cent. *ad valorem*, and not, under the same schedule, (Tariff Ind., New, 423,) as "crayons of all kinds," at 20 per cent. *ad valorem*.

At Law. Application by the importers, Blumenthal & Boas, under the provisions of section 15 of the act of June 10, 1890, entitled "An act to simplify the laws in relation to the collection of the revenues," for a review by the United States circuit court of the decision of the board of United States general appraisers at the port of New York, affirming the decision of the collector of said port in the classification for duty of certain merchandise entered by the said importers in July, 1890, which was classified by the collector as "lead-pencils," and duty assessed thereon at the rate of 50 cents per gross and 30 per cent. *ad valorem*, under the provisions of Schedule N, tariff act of March 3, 1883, (Tariff Ind., New, 473.) The importers duly protested, claiming that the merchandise was "crayons," and dutiable only at 20 per cent. *ad valorem*, under Schedule N of said tariff act, (Tariff Ind., New, 423.) The board of United States general appraisers affirmed the decision of the collector, finding, among other things, that "the articles in question are small sticks of colored composition incased in wood. They are commonly called 'colored pencils,' and are not known by the commercial designation of 'crayons.'" The importers procured an order from the circuit court under the provisions of said act of congress, requiring the board of United States general appraisers to file their return in said court, and, after filing of the

same; procured an order for the taking of further evidence in the case before one of said board of general appraisers as an officer of the court. Under this order testimony was taken on behalf of the importers, and also in behalf of the government. It was shown that the merchandise in question consisted of small pencils of wood, coming in different lengths from four to seven inches, and contained in paper boxes holding half a dozen of the little pencils each. The importers' main contention was that, at the time of the passage of the tariff act of March 3, 1883, these articles were generally known in trade and commerce in the United States as "crayons," or "school crayons," and, to sustain this proposition, they offered the testimony of numerous trade witnesses. They also proved that the articles were used chiefly by children in school for drawing or coloring of maps and engravings, and that they were also used and sold as a sort of toy. The importers also proved that several of the leading domestic manufacturers of this class of goods had made the same article to a limited extent before 1883, and very largely during the succeeding years, and described it in their catalogues and upon the paper boxes as "school crayons." On behalf of the government, testimony was introduced showing that the articles were manufactured, as were all other colored pencils, from wood which was cut into the proper lengths, rounded and smoothed, divided in halves, grooved and filled with a colored composition composed of coloring matter, kaolin, and some fatty substance; that the halves were then glued together, and the article was polished and put up for the market; that all colored pencils were made in this way, with differences in the grade of the coloring matter which was used and in the finish of the goods. A number of trade witnesses were also produced by the government, who testified that they had known the article in question in March, 1883, and prior to that date, by the name of "colored pencils," and that they were bought and sold in the trade at that time and since by that designation. Several of the witnesses admitted that during the past four or five years these articles were sometimes called for and known in trade as "school crayons," but that their general designation was "colored pencils." Testimony was also produced by the government showing that at the time of the passage of the tariff act of March 3, 1883, there was a well-known article in trade which went by the name of "crayons," and that it was composed of chalky material, coming in different sizes, shapes, and colors, generally without covering, sometimes covered with paper, and occasionally enameled, and that such an article was the one commonly known in trade at that time as "crayons," and not the article in suit.

Hartley & Coleman, for importers.

Edward Mitchell, U. S. Atty., and *James T. Van Rensselaer*, Asst. U. S. Atty.

WHEELER, District Judge. The tariff act of 1883, Schedule N, "Sundries," 423, laid a duty on "crayons of all kinds," and 473 a higher duty on "pencils of wood filled with lead or other material." The articles in question are pencils of wood filled with crayon material, and are,

in the trade, now sometimes called "crayons. This higher duty is laid upon these specific things particularly described. The nature of them is not changed, and they none the less remain these specific things by being sometimes, or even generally, called something else. If these are wood pencils, filled with crayon material, they are none the less pencils of wood filled, and dutiable as such. This is in accordance with the cases of *Arthur v. Lahey*, 96 U. S. 112; *De Forest v. Lawrence*, 13 How. 274; *Maillard v. Lawrence*, 16 How. 261; *Robertson v. Perkins*, 129 U. S. 233, 9 Sup. Ct. Rep. 279; and *Robertson v. Glendenning*, 132 U. S. 158, 10 Sup. Ct. Rep. 44. In each of these cases there was a specific description which left no room for trade names. They decide that where an act of congress lays right hold of a thing, and says that that particular thing shall have a duty upon it thus and so, when it is that thing the duty cannot be got rid of by calling it something else, or giving it some other name. Looking at this evidence carefully, it does not appear to me clear that they have got to calling these things so universally "crayons" that we can say, as matter of fact, that the trade name is "crayon," but generally they are known as "pencils." Much less were they known as "crayons" in 1883, at the passage of this act. As they are filled with crayon material, there is some propriety in using the name "crayon;" but if they are of wood, and filled with that or other material, they would still be pencils of wood, although the wood, without any material, would not be a pencil. The decision of the board of United States general appraisers is affirmed.

In re BLUMLEIN et al.

(Circuit Court, S. D. New York. January 5, 1892.)

CUSTOMS DUTIES—TARIFF OF 1883—CLASSIFICATION—SUMATRA LEAF TOBACCO.

Unstemmed Sumatra leaf tobacco consisted of 37 bales, composed, as to marks and numbers, of three lots, the tobacco being packed in the usual manner in which Sumatra tobacco is imported; weighed by the United States weigher upon arrival; one bale in ten being sent to the appraiser's stores for examination, and being there examined by the United States examiner by opening each of the sample bales in the usual manner employed in making such examinations in the tobacco trade, and ten hands being withdrawn from each sample bale duly examined by the examiner, and found to consist entirely of leaves suitable in size and fineness of texture for cigar wrappers; and the hands being thereupon weighed by the examiner and the leaves counted, and the proportion of hands containing leaves requiring more than 100 to weigh a pound, and those containing leaves less than 100 to the pound, being ascertained and separated; and the same proportions being calculated upon the sample bale and upon the lot represented by such sample bale; such proportion consisting, in the case of the first lot, of 20 per cent. of the tobacco found to be of leaves requiring more than 100 to weigh a pound, and 80 per cent. of leaves running less than 100 to the pound; in the second lot, of 18 bales, all of the hands being found to contain leaves requiring less than 100 to the pound; in the third lot, of 9 bales, 60 per cent. being found to contain leaves requiring more than 100 to the pound, and 40 per cent. containing leaves of less than 100 to the pound; and the duty being thereupon assessed by the collector upon the tobacco at the rate of 75 cents per pound upon the proportion containing leaves requiring more than 100 to the pound, and 35 cents per pound upon the proportion consisting of leaves running less than 100 to the pound: *held*, that the proceedings of the collector in the

ascertainment of the character, size, fineness, and weight of the tobacco were regular and proper, but that, the result of his examination showing that in no distinguishable mass of the tobacco was there 85 per cent. of the requisite size and of the necessary fineness of texture, and of which more than 100 leaves were required to weigh a pound, none of the tobacco was dutiable at 75 cents per pound under Schedule F, paragraph 246, Tariff Ind. (New,) of the tariff act of March 3, 1888, but that the whole 37 bales were dutiable only at 35 cents per pound, under paragraph 247, Tariff Ind. (New,) of the same schedule and tariff act.

At Law.

Application by the importers, Blumlein & Co., under the provisions of section 15 of the act of congress of June 10, 1890, entitled "An act to simplify the laws in relation to the collection of the revenues," for a review by the United States circuit court of the decision of the board of United States general appraisers at the port of New York, affirming the decision of the collector in the classification for duty of certain unstemmed Sumatra leaf tobacco, entered at said port by the above-named importers on June 30, 1890. The importers procured the return of the board of United States general appraisers to be filed in the circuit court, under the provisions of the above-cited act of June 10, 1890, and obtained from the court an order referring the matter to one of said board of United States general appraisers, as an officer of the court, to take further evidence therein. Upon this reference voluminous testimony was produced on behalf of the importers, and also on behalf of the collector and the government. The testimony so taken showed that the merchandise consisted of Sumatra leaf tobacco, unstemmed, packed in the usual and ordinary manner, in 37 bales, which were divided on the invoice, as to marks and numbers, in 3 lots,—the first lot containing 10 bales, the second 18 bales, and the third 9 bales; that upon the arrival of the merchandise it was weighed by the United States weigher, who made his return of the gross weight, of the tare, and of the net weight of the aggregate tobacco, and also of each bale thereof; that the collector designated and caused to be sent to the appraiser's stores for examination 1 bale from the first lot of 10, 2 bales from the second lot of 18, and 1 bale from the third lot of 9, making 4 bales out of the importation of 37 bales; that these 4 sample bales were opened by the United States examiner at the appraiser's stores by cutting the covering of the bales, and opening the contents, in the manner usually employed in examinations made in the trade dealing in a like class of tobacco; that from each sample bale 10 hands of the tobacco were withdrawn by the examiner, taking the hands indiscriminately from the different parts of the bale; that the examiner carefully examined the leaves of the tobacco in each hand so withdrawn, and determined that all the tobacco was of the requisite size and necessary fineness of texture to be suitable for wrappers; that each hand was weighed by the examiner, and the leaves in each hand counted; that from a table prepared by the treasury department, and issued to the examiners for their use, the number of leaves weighing over 100 to the pound was ascertained, and, in the case of the first lot of 9 bales, 8 hands were found to contain leaves running less than 100 to the pound, and were consequently placed under a column as dutiable at 35 cents per pound, under the provisions of Schedule F, paragraph 247, Tariff Ind. (New,) of the tariff act of March 3,

1883, and 2 hands were found to contain leaves requiring more than 100 to the pound, and were placed in a 75-cent column, as being of the tobacco dutiable at that rate per pound, under paragraph 246, Tariff Ind. (New,) of said schedule and tariff act, the proportion being, therefore, 20 per cent. of the lot dutiable at 75 cents per pound, and 80 per cent. dutiable at 35 cents per pound; that in the second lot of 18 bales all of the hands drawn as samples were found to contain leaves requiring less than 100 to the pound, and that whole lot was consequently returned as dutiable at 35 cents per pound; that in the third lot of 9 bales, out of the 10 hands drawn from the sample bale, 6 of such hands contained leaves requiring more than 100 to weigh a pound, and were returned as dutiable at 75 cents per pound, and 4 hands contained leaves weighing less than 100 to the pound, and were returned as dutiable at 35 cents per pound, namely, 60 per cent. of the lot at 75 cents, and 40 per cent. at 35 cents, per pound; that the entire invoice was liquidated at these same proportions in the lots, respectively, and the duty assessed accordingly by the collector.

The importers, in their protest, which consisted of 24 different alternative allegations of alleged error in the classification of the merchandise by the collector, took the ground, among other things, that the tobacco was not of the requisite size and of the necessary fineness and necessary weight to bring it within the 75-cent provision of the tariff act; that the examination was illegal, and contrary to law; that the tobacco was put up in the usual manner, and that any attempt to separate the leaves as they exist in the hands for the purpose of classification was illegal, and contrary to law; that the hand should be taken as the unit of quantity; that the bale should be taken as the unit of quantity; that the invoice should be taken as the unit of quantity; that the examination of only 10 hands of a bale was not in compliance with the requirements of sections 2901, 2989, Rev. St. U. S.; that the regulations of the secretary of the treasury with respect to the classification of such leaf tobacco had not been complied with; that the leaf tobacco in question, if found to be uniform in its putting up and packing, so as to constitute but one kind or line of tobacco, if 85 per cent. of it was not of the requisite size and of the fineness and of the weight specified in paragraph 246 of the tariff act of March 3, 1883, then the whole lot was dutiable at only 35 cents per pound, under paragraph 247 of said act. In behalf of the government the testimony of several trade witnesses was produced on the reference above mentioned, who testified that Sumatra leaf tobacco at the time of the passage of the tariff act of March 3, 1883, was examined in the trade, upon purchases and sales thereof, by opening one bale in ten, and sometimes one bale in four or five, and withdrawing from the sample bale from four to ten hands, in the same manner as was done in the present case; and that it was never customary in the trade to draw more than ten hands from a sample bale, as the withdrawing of more would tend to destroy the bale, or materially injure it as an original package.

On the trial in the circuit court, after the reading of the testimony as above, counsel for the importers argued against the regularity of all the proceedings by the collector and his subordinates, claiming that the ex-

amination was not a proper or sufficient one; that the character and weight of the tobacco could not be ascertained in the manner pursued by the government officers, and that it was the duty of the United States weighers to weigh the tobacco in the course of such examination when it became necessary to ascertain the weight of leaves weighing more or less than 100 to the pound; and that the United States weighers, not having officiated in weighing the leaves upon such examination, vitiated the result obtained by the examiner.

In behalf of the collector and the government, it was argued by the United States district attorney that the statute in the case of this merchandise only required a practical and business-like examination of the tobacco; that nothing in the law could be construed to require such examination as would seriously injure or perhaps destroy some part of the importers' merchandise; that the examination of no more than one bale in ten was required by law or by the treasury regulations; that such examination had been conducted, as was shown by uncontradicted evidence, in accordance with the usual proceedings in cases of examination of Sumatra leaf tobacco in the trade and commerce of this country at the time of the passage of the tariff act, and that such examination as made by the government officers was entirely fair and just; (citing *Sampson v. Peaslee*, 20 How. 571;) that the examiner having determined that all of the tobacco in the ten hands withdrawn by him from each sample bale was of the requisite size and fineness suitable for wrappers, (which finding was uncontradicted by evidence,) and having ascertained the proportion of the hands so examined in which the leaves weighed over 100 to the pound, and the proportion in which the leaves weighed less, and having determined and set apart in his examination those hands containing the light-leaved tobacco from the hands containing the heavy-leaved tobacco, was a division of the hands, and consequently of the sample bale, and of the whole lot represented by that bale, into two distinguishable quantities; that such division, so made, constituted the two masses of the tobacco as contained in each lot, and that such divisions were as separable and distinct for the purposes of classification as were the two kinds of tobacco separated in the bales in the case of *Falk v. Robertson*, decided in the supreme court of the United States, as reported in 137 U. S. 225, 11 Sup. Ct. Rep. 41; and that each of such divisions was the unit upon which the 75-cent rate should be computed; the bale, as decided, not being the unit. In the *Falk Case*, *supra*, it was further argued that the United States weighers had nothing to do with weighing any portion of the merchandise for the purpose of its classification for duty; the weight of the tobacco upon entry having been determined by the United States weighers, as shown by the return in this case. *Marriott v. Brune*, 9 How. 634. The United States district attorney also cited Rev. St. U. S. §§ 2882, 2890; Treas. Dept. Reg. 1884, arts. 1455-1470, incl.

Charles Curie, (Wm. Wickham Smith, of counsel,) for importers.

Edward Mitchell, U. S. Atty., and *James T. Van Rensselaer*, Asst. U. S. Atty., for the United States.

WHEELER, District Judge. In the matter of the appeal of Blumlein & Co. as to the duty on leaf tobacco. Schedule F of the act of 1883 provided that—

“Leaf tobacco, of which eighty-five per cent. is of the requisite size and of the necessary fineness of texture to be suitable for wrappers, and of which more than one hundred leaves are required to weigh a pound,—if not stemmed, seventy-five cents per pound; if stemmed, one dollar per pound.”

Here was a lot of leaf tobacco in bales, packed in the usual way, as tobacco is usually packed, all of it of the requisite size and necessary fineness of texture to be suitable for wrappers, and enough of it of the requisite lightness to make 20 per cent. of it light enough to take more than 100 leaves to weigh a pound, and 60 per cent. of other parts of it light enough to take over 100 leaves to weigh a pound. The bales were of uniform quality, and this percentage was made by sample of 10 hands, drawn from sample bales of more than 1 in 10, and weighing it. The custom-house officers ascertained this percentage, it seems to me, in the proper way. It is said that it ought to have been weighed by a United States weigher, but I do not think so. When it is getting at the classification of the goods, I do not think that is necessary. I do not see but that they proceeded regularly in ascertaining what these goods were. But when they got it done, (it was unstemmed,) they put 75 cents per pound on as many pounds of those bales in which there was tobacco of the requisite lightness in one case as 20 per cent. would be of the whole, and in the other case as 60 per cent. would be of the whole. They did not assess 75 cents a pound on any particular mass or quantity of tobacco, but they found in one mass 20 per cent. of the requisite lightness mingled in the usual way with the rest, and in the other mass 60 per cent. of the requisite lightness so mingled; and then computed the number of pounds there would be of the requisite lightness at those rates per cent., and assessed the duty on that number of pounds, as an undivided part of the whole, and exacted that duty, which was paid. If that is right, the decision is right; if not, not. Now this statute contemplates that in this tobacco there will be some that is heavy and some that is light; it will not be of uniform weight. It is not to be sorted out, and have all the tobacco that is light enough to take 100 leaves or more to make a pound in one package, and all the other in another package, for this purpose. The two kinds are to be put in together in the usual way, and that is shown by the fact that it says, if there is 85 per cent. of the light kind in with the other kind,—if it comes up to that,—then the duty shall be 75 cents per pound; which would not be the provision at all if it was to be classified the other way, and all that was of the requisite lightness picked out. When tobacco is put up for classification in a mass, they are to ascertain what per cent. there is in the mass which is of a uniform quality—that comes up to this standard; and, if 85 per cent. of it comes up, then it is to pay 75 cents a pound if unstemmed, and a dollar a pound if stemmed. The point was how this tobacco was to be rated. When they established what they did, they established as to one lot, packed in the ordinary

way, that 20 per cent. of it was of requisite lightness. The result was that the tobacco did not come up to 85 per cent., and was assessable only at 35 cents per pound. It was not of the quality that should pay 75 cents per pound; it did not come up to that. The collector assessed 75 cents per pound on this tobacco, which was in with that assessable at 35 cents per pound; that is, not 75 cents per pound on the whole mass, but 75 cents per pound on 20 per cent. of the whole mass, undistinguished from the rest. If that was the way this was to be done, this law ought to read, "seventy-five cents on as many pounds of the whole as the per cent. of tobacco of the requisite lightness makes;" which obviously is not the meaning of the act. It did not contemplate that the tobacco was to be assessed in that way, but the mass of tobacco of uniform kind was to be looked at, and, if the per cent. came up to 85, then it was to pay the higher rate; if not, the lower rate. So none of this tobacco came up to the higher rate. The highest was 60 per cent., instead of 85, and I think none of it was assessable beyond 35 cents a pound.

Now this case of *Falk v. Robertson*, 11 Sup. Ct. Rep. 41, which I tried, seems to be relied upon; but there, at the invitation of the customs officers, was packed into a bale a separate mass of tobacco of the requisite fineness and lightness. That was done for the purpose of bringing the bale down below 85 per cent. The point was whether that was right. I thought at first it was; I thought the bale was the unit. In thinking it over afterwards, I thought not. It was a mass of tobacco packed to be of the same grade as usually packed, and made part of a bale, distinguishable by itself, of the requisite fineness and lightness, and that was to be assessed accordingly. I so decided it, and the supreme court said that was right, not because there was to be found in there leaves of the requisite lightness, but because in some distinguishable mass there was tobacco of the requisite lightness. I think that was attempted to be followed here, but mistakenly, because here are only leaves packed in just as tobacco is packed ordinarily,—some of the requisite lightness and some not,—but not 85 per cent. of the requisite lightness in the mass; therefore I think that the decision of the appraisers should be reversed.

SOBY v. HUBBARD, Collector.

(Circuit Court, D. Connecticut. January 27, 1892.)

1. CUSTOMS DUTIES—TOBACCO WRAPPERS—PERCENTAGE OF QUALITY.

Under Act Cong. March 3, 1883, § 6, (22 St. p. 503,) imposing a duty of 75 cents per pound upon unstemmed leaf tobacco of which 85 per cent. is suitable for wrappers, and 35 cents on all other unstemmed leaf tobacco, but one rate of duty is payable upon the whole unit of quantity, whatever that may be; and whether that rate is 75 or 35 cents depends upon whether the percentage of wrappers in the unit is greater or less than 85 per cent.

2. SAME—UNIT OF QUANTITY.

The unit of quantity under the statute is the separated quantity of unstemmed leaf tobacco of a uniform grade; and where the entry consists of many bales of the same brand, honestly and fairly packed, the rate of duty is determined by ascertaining whether the percentage of wrappers in the whole lot is greater or less than 85 per cent. thereof. *Falk v. Robertson*, 11 Sup. Ct. Rep. 41, 137 U. S. 225, distinguished.

At Law. Action by Charles Soby against Charles C. Hubbard, as collector of customs, to recover duties paid under protest on certain imported tobacco. Judgment for plaintiff.

Lewis E. Stanton and *William Stanley*, for plaintiff.

George G. Sill, U. S. Dist. Atty., for defendant.

SHIPMAN, District Judge. This is an action at law by Charles Soby to recover from the collector of customs for the port of Hartford the duties, which are claimed to have been illegally exacted, and which were paid under protest, upon a portion of an importation of Sumatra tobacco into said port from Amsterdam, in June, 1890. The parties, by written stipulation in writing, and duly signed, waived a trial by jury, the cause was tried by the court, and the following facts are found to have been proved and to be true: The plaintiff, Charles Soby, a citizen and resident of Connecticut, purchased of Schroeder & Bon 100 bales of Sumatra unstemmed leaf tobacco, to be used for wrappers. The whole number of bales were, upon their arrival in New York from Holland in June, 1890, immediately transported, without appraisement, to the port of Hartford. The invoice consisted of two different plantation lots,—one of 43 bales from the "Lankat" plantation, and one of 57 bales from the "Senembah" plantation. The hands of tobacco had been properly packed in bales in the usual way in Sumatra, without fraud, or attempt to deceive or to evade the customs laws of this country, and had not been opened or repacked in Holland, and were all intended for wrappers. The tobacco in each separate lot was of uniform quality. Upon the entry of the goods in Hartford, the two plantation lots were separately examined, weighed, and appraised by the appraiser. Five bales of the Lankat lot and six bales of the Senembah lot were set apart, cut open, and ten hands were drawn from different parts of each bale. The hands from each bale were separately weighed, the weights were recorded, the leaves in each hand were separately counted, and the numbers were recorded.

According to the table furnished by the appraiser in New York, and approved by the treasury department, all hands of tobacco weighing from 3 to 3 1-32 ounces, and counting 18 leaves per hand, are equal to 100 leaves per pound. All those weighing from 3 2-32 ounces to 3 6-32 ounces, and counting 19 leaves to the hand, equal 100 leaves to the pound. No examination as to size or fineness of texture was made. The examination was made strictly in accordance with instructions which were approved by the treasury department, and no complaint is made of its accuracy, or of the accuracy of its results. There were 7,401 pounds in the Lankat lot, upon which the appraiser reported: "Leaf tobacco, over 100 leaves per pound, 6,941 pounds, or 93 1-4 per cent., 75 cents per pound; and all other leaf tobacco 460 pounds, or 6 3-14 per cent., 35 cents per pound." There were 9,816 pounds in the Senembah lot, upon which the appraiser reported: "Leaf tobacco, over 100 leaves per pound, 8,194 pounds, or 83 483-1009 per cent. of all, at 75 cents per pound. All other leaf tobacco, 1,622 pounds, or 16 526-1009 per cent. of all, at 35 cents per pound." The Lankat lot was withdrawn for transportation to New York, where the duty was paid, so that no question arises in this case in regard to that lot. The collector returned on the warehouse entry: "Senembah (M. Y.) P. Fifty-seven bales wrapper tobacco. Over 100 leaves per lb., 8,194 pounds, at 75 cents; not over 100 leaves per lb., 1,622 pounds, at 35 cents." A duty of 75 cents per pound was exacted, and paid under protest, upon 8,194 pounds, to obtain possession of said goods, and a duty of 35 cents per pound was exacted and paid upon 1,622 pounds. The plaintiff made due protest and appeal, and all the statutory prerequisites to the institution of a suit were duly complied with. No evidence was offered upon the trial to show that the Senembah tobacco had more or less than 85 per cent. of the requisite size and of the necessary fineness of texture to be suitable for wrappers. The plaintiff offered some evidence to show that some of the leaves were torn or broken, or worm-eaten, or rusty, but did not undertake to show that the percentage was more than 15 per cent. It was apparent that the percentage of inferior tobacco was quite small, but whether it was a trifle more or less than 15 per cent. did not appear. The torn and broken leaves became so in transportation and by rubbing against the outside of the bale.

The questions upon the foregoing facts are whether the statute was correctly construed, and whether the collector exacted the proper rate of duty. The tobacco was dutiable under section 6 of the Act of March 3, 1883, c. 121, (22 St. p. 503,) which is as follows:

"Leaf tobacco, of which eighty-five per cent. is of the requisite size and of the necessary fineness of texture to be suitable for wrappers, and of which more than one hundred leaves are required to weigh a pound, if not stemmed, seventy-five cents per pound; if stemmed, one dollar per pound. All other tobacco in leaf, unmanufactured, and not stemmed, thirty-five cents per pound."

This statute received, during its life-time, various constructions from the officers whose duty it is to construe the customs revenue laws. It

is not clearly expressed, and there were serious practical difficulties in the way of administering it, under any construction.

The first question is whether the provision in regard to weight relates to the 85 per cent. which is to be of the requisite size and texture, or whether the statute is to read, "Leaf tobacco, of which more than one hundred leaves are required to weigh a pound." The latter construction has never apparently been favorably considered by the treasury department or by the supreme court. The statute means that leaf tobacco, not stemmed, which has in its unit of quantity, whatever that unit may be, 85 per cent. of the requisite size, fineness, and weight, is dutiable at 75 cents per pound.

The next and most important question relates to the unit upon which the 85 per cent. is to be calculated. In *Falk v. Robertson*, 137 U. S. 225, 11 Sup. Ct. Rep. 41, there were in each bale two separate classes of tobacco, one "wrappers," and the other "fillers," and each class was separated from the other by strips of paper or cloth, so that when the bale was opened one class was readily separable from the other. The whole of the wrapper class was of the specified size, fineness, and weight. The supreme court held that in such case the unit was not the bale, but was the separated quantity of the wrapper leaf of the specified description. The facts in this case are very different from those in the *Falk Case*, but the idea which the court gives of the proper unit upon which calculation is to be made is also applicable to different states of fact. The unit is the separable and separated quantity of leaf tobacco wrappers of substantially uniform grade. A whole invoice, fairly packed, and consisting of one grade or lot, might be a proper unit. When the invoice consists of two or more separate lots, of different grades, it cannot be the unit. When bales are falsely packed, or the tobacco is fraudulently admixed with "filler" tobacco, or two classes of tobacco are presented in one bale, the leaf tobacco in wrappers, answering the statutory description in each bale, is, as in the *Falk Case*, properly the unit. In this case there were two separate lots, all the tobacco was for wrappers, the lot in question was of uniform grade, and there was no fraudulent admixture of inferior tobacco. I am of opinion that the proper unit was the quantity of tobacco in the Senembah lot. The quantity contained a fraction over 83 per cent. of the required weight. Whether it contained more or less of the requisite fineness and size is unknown. The instructions of the treasury department apparently proceeded upon the theory that the size and fineness would correspond with the weight; and, so far as the testimony in the case shows, I am not prepared to say that this theory is not a correct one. The examination of the appraiser having shown that 83 per cent. of the quantity had the statutory requisite as to weight, the collector exacted a duty of 75 cents per pound upon that percentage of the entire number of pounds, and a duty of 35 cents per pound upon the rest of the tobacco. I am of opinion that the statute imposed a duty of 75 cents per pound upon the whole quantity if 85 per cent. thereof came up to the statutory standard, and of 35 cents per pound if 85 per

cent. was not reached. The rule under which the collector acted ignored the requirement of the statute in regard to 85 per cent. The statute does not say that a duty of 75 cents is imposed upon so much of the unit of calculation as reaches the required standard, and a duty of 35 cents upon the residue; but it says that the higher rate is imposed upon the whole quantity if 85 per cent. thereof has the requisite description. The statute did not contemplate that from a unit of uniform grade the portion of tobacco which was of the required standard was to be sorted out, and considered as dutiable at 75 cents. If this is the correct theory, if a quantity of tobacco of uniform grade and honestly packed contains only 10 per cent. of the required standard, and 90 per cent. of inferior grade, the 10 per cent. is to pay 75 cents per pound. Again, if the unit happened to be 100 pounds, 86 of which were of the requisite standard in the three particulars of size, fineness, and weight, the collector would, in accordance with this rule, exact 75 cents per pound upon 86 pounds, and 35 cents per pound upon 14 pounds, whereas, the statute requires a duty of 75 cents upon the whole 100 pounds. Accordingly, the papers in the case show that the collector was about to collect upon 93 per cent. of the Lankat lot a duty of 75 cents per pound, and a duty of 35 cents per pound upon the remaining 7 per cent., whereas, if 93 per cent. conformed to the required standard, the entire quantity was dutiable at the larger rate.

The theory of the department is based upon those clauses in the decision in the *Falk Case* which say that the duty of 75 cents per pound is imposed upon any quantity of unstemmed leaf tobacco of the specified quantity and weight. This language is to be read in the light of the peculiar facts of that case, and in connection with other language of the court which shows that emphasis was placed upon these facts. I do not think that it was the intention of the court to hold, where leaf tobacco, designed and generally suitable for wrappers, and of uniform grade, had been packed without fraud or false packing, that so much of the tobacco in the uniform lot as conformed to the requisite description, without any reference to the 85 per cent. provision, was dutiable at 75 cents per pound, and the residue, whether more or less than 15 per cent. of the entire quantity, was dutiable at 35 cents per pound. Such a construction would create a new statute. The decision of Judge WHEELER, in the case entitled *In re Blumlein*, 49 Fed. Rep. 228, which was recently tried in New York, accords with the views which I have expressed.

Let judgment be entered for the plaintiff for the sum of \$3,277 and costs, and let a certificate of probable cause also be entered.

In re JORDAN.

(District Court. S. D. Iowa, E. D. February 9, 1892.)

1. HABEAS CORPUS—ISSUANCE.

Habeas corpus, though a writ of right, will not issue as of course from the federal courts, since Rev. St. U. S. § 755, provides that, on application, it shall issue forthwith, "unless it appears from the petition itself that the party is not entitled thereto."

2. SAME—FROM FEDERAL COURTS TO STATE OFFICERS.

Federal courts will proceed with great caution upon applications for writs of *habeas corpus* in behalf of a person imprisoned under process of the state courts, and, when practicable, will investigate the questions raised before issuing the writ.

3. SAME—QUESTIONS REVIEWABLE—VIOLATION OF STATE LIQUOR LAWS.

Where a person has been convicted of violating the prohibitory liquor law of Iowa by a state court of general jurisdiction having jurisdiction of the person and the subject-matter and authority to render the particular judgment, such decision cannot be reviewed in the federal courts on an application for a writ of *habeas corpus*, alleging that the sales for which the conviction was had were made in the original packages of importation, but also showing that the court charged the jury in strict accordance with the decision of the United States supreme court in the original package case, (*Letsy v. Hardin*, 10 Sup. Ct. Rep. 681, 135 U. S. 100.)

4. SAME—QUESTION OF FACT.

On *habeas corpus* to release a person convicted of crime in a state court the federal courts have no power to inquire whether the evidence was sufficient to support the verdict and judgment.

5. SAME—CONTEMPTS.

An application to a federal court for a writ of *habeas corpus* to release a person imprisoned by virtue of a judgment of a state court, based upon a finding of contempt, is to be determined by the same principles applicable in the case of a judgment on the verdict of a jury.

6. INTOXICATING LIQUORS—"ORIGINAL PACKAGE" DECISIONS.

In *Letsy v. Hardin*, 10 Sup. Ct. Rep. 681, the supreme court did not declare the Iowa prohibitory law void, either in whole or in part, but merely restricted its application to property entirely within the jurisdiction of the state. *In re Ruhrer* 11 Sup. Ct. Rep. 865, 140 U. S. 563, followed.

7. SAME—TAXATION AND PROTECTION—CONSTITUTIONAL LAW.

The payment of the tax imposed upon retail liquor dealers by the statutes of the United States in no wise entitles the dealer to protection against a state prohibitory law.

On Application for Writ of *Habeas Corpus*. Writ denied.

Liston McMillan, for petitioner.

D. H. Emery, for respondents.

WOOLSON, J. Upon January 23, 1892, the application of Kinsley Jordan for writ of *habeas corpus* was presented to this court. The application, with accompanying exhibits, is voluminous. In substance, it alleges that petitioner is restrained of his liberty by the sheriff of Wapello county, Iowa, who detains petitioner by reason, as claimed, of certain writs of execution or *mittimus*, issued upon judgments rendered by the district and circuit courts of said Wapello county, a portion whereof were rendered on verdicts of guilty in criminal cases, and the remainder upon findings of said courts that petitioner was guilty of contempts in having violated certain injunctions. All of said judgments are for alleged violations of statutes of Iowa with reference to sale of intoxicating liquor. These judgments, as exhibited, with application, are seven in number, and may be summarized as follows:

Date.	By what Court.	In what Proceedings.	Fine.	Sentence Adjudged. Imprisonment.
Nov. 21, '85.	Circuit.	Contempt.	\$ 500.	
April 3, '86.	Circuit.	Contempt.	\$ 500.	
Sept. 18, '86.	District.	Criminal.	\$ 600.	
Jan'y 29, '87	District.	Contempt.	\$1,000.	
Oct. 8, '87.	District.	Contempt.	\$1,000.	Six months.
Oct. 8, '87.	District.	Contempt.	\$1,000.	Six months.
April 28, '88.	District.	Criminal.	\$ 500.	

All of these judgments provide, in addition, that, if the fine and costs are not sooner paid, the judgment defendant shall be imprisoned in the county jail until the said imprisonment, at \$3.33½ per day, shall equal the amount of the fine. And the second sentence, rendered upon October 8, 1887, provides that it shall commence at the expiration of the first sentence of that date. The exhibits show that these injunctions, for whose violations petitioner was sentenced, were entered or issued in at least three, and probably four, different equitable actions under the Iowa statutes. But none of the decrees so rendered or writs issued in these three or four actions are exhibited or referred to, except as said exhibits recite their existence. The illegality of the restraint is alleged in two divisions, the first being, in the phraseology of the application, as follows:

"That all of said judgments were rendered in prosecutions against this defendant for alleged selling or keeping for sale intoxicating liquors, contrary to the laws of Iowa. All of the liquors referred to in the said prosecutions were manufactured outside of said state of Iowa,—in Illinois, Missouri, and other sister states,—and shipped from those states into the state of Iowa, on the order of petitioner, and were sold by him in the original package in which they were shipped into the state, or by drawing the same from said original package in the act of selling; and they were neither kept for sale nor sold by him in any other way; and he sold none to minors, drunkards, or lunatics; and he only sold them and kept them for sale to responsible adults. Petitioner avers that all of said business was transacted prior to the passage of what is commonly called the 'Wilson Bill' by the U. S. congress, August 8, 1890. Petitioner avers that under the constitution of the United States, (article 1 § 8,) which provides that congress shall have power to regulate the interstate commerce, as construed by the federal supreme court in what is commonly known as the *Bowman Case*, 8 Sup. Ct. Rep. 689, 1062, and the *Leisy Case*, 10 Sup. Ct. Rep. 681, the state traffic as carried on by your petitioner was lawful, being in harmony with the constitutional provision above quoted, and amply justified thereby; and petitioner avers that, so far as the prohibitory liquor laws of Iowa conflict with petitioner's said business, the same were contrary to the said provision of the federal constitution, and are null and void."

The second point of illegality alleged in application relates to payment of the United States tax, viz.: That petitioner had, during the periods embraced in said exhibits and acts therein adjudged against him, annually paid to the general government \$25 per year as the retail liquor dealer's special tax; and that all the liquors sold by him had paid to the government the per gallon or per barrel tax required by the United States statutes, whereby he was protected from state interference while disposing of said liquors; "the constitutional definition of the word 'tax' in article 1, § 8, of the federal constitution, making 'taxation' correlative

with 'protection,' and involving the duty and necessity of such protection by all the departments of the government receiving the taxes;" and that, therefore, the state prohibitory law, wherein it attempts to prohibit and punish the person selling such taxed liquors, is null and void, because in conflict with the federal constitution. It is also asserted that this application has not heretofore been presented to nor been refused by any court or judge.

Ordinarily, upon presentation of the application, the writ is at once granted, and the legality of the restraint is determined on the return of the restraining officer, or on the hearing. For reasons readily apparent from the foregoing synopsis of the application, I have proceeded with more hesitancy in this case; and because of the hesitation with which judges of the national courts interfere at any time with convictions which have been had before courts of general jurisdiction of the states, I entered a rule citing the sheriff and the county attorney of said Wapello county to appear and show cause, if any they had, why the writ should not issue as prayed. Hearing was duly had before the court, D. H. Emery, Esq., appearing in opposition to the application, and filing his demurrer thereto, as insufficient to authorize the issuance of the writ. And the point now to be decided is, does the application present a case justifying the issuance of the writ of *habeas corpus*?

The writ of *habeas corpus*, though a writ of right, will not issue as of course. Section 755, Rev. St., provides that the court to whom the application for a writ is made, shall forthwith award the writ, "unless it appears from the petition itself that the party is not entitled thereto." The courts of the United States have great respect for state authority; and it is only after full and most careful investigation and consideration, although acting within the undoubted scope of its jurisdiction, that a federal court will take from a state officer a person committed to him by a state court, and charged with an offense against state laws, which are attacked as in conflict with the federal constitution. *In re Hoover*, 30 Fed. Rep. 53, concisely illustrates this point. In that case the writ of *habeas corpus* from the United States court was sought against the sheriff of the state court by one imprisoned under judgment imposed for violation of a state law, which the application attacked as in violation of the United States constitution; and the federal court declared that "to enlist the process of this court in his behalf the petitioner must clearly show an irreconcilable antagonism between the state enactment and the constitutional declaration." Yet, when such investigation makes plain the fact of restraint in violation of the constitution of the United States or laws enacted thereunder, the federal court will not hesitate to act accordingly.

Should the writ issue herein? With regard to the second point alleged in application as grounds for action herein, I have no hesitancy in deciding. As to the payment of the special tax imposed upon the retail liquor dealer, the statute imposing the tax (section 3243, Rev. St.) itself withholds from petitioner relief herein. The payment of that special tax can in no manner or degree operate as a shield in the violation of the state prohibitory law. The supreme court of the United

States have in such numerous decisions recognized the right of each state to determine for itself the question of the regulation or prohibition of sale of intoxicating liquors that it is useless to cite the cases. One element only is withheld from this otherwise absolute right and power of the state in this respect, and that relates to interstate relations; being the first point in application. And without enlargement of argument I hold the second point of application to be insufficient to authorize the issuance of the writ.

As to the first point stated in application, viz., that asserting the attitude of petitioner with regard to "original packages" of intoxicating liquor, and his right to relief herein. The exhibits attached to application are expressly made a part of the application. These exhibits severally show that the courts which rendered the judgments are of general jurisdiction; that these courts had jurisdiction of the subject-matter before them, viz., the alleged violation by petitioner of the state laws with reference to selling or keeping for sale intoxicating liquor; and that these courts also had in each case (so exhibited) jurisdiction of the person of petitioner. In each of said cases petitioner appeared by counsel, except in the contempt case of January 29, 1887, and in that case the record shows petitioner had been duly served with notice of said proceedings. As this court takes judicial notice of the statutes of Iowa, it is also manifest that these courts had, under said statutes, the authority to render such judgments as those exhibited herein. Thus we have in each case exhibited (1) a court of general jurisdiction, having, under the Iowa statutes, jurisdiction of the subject-matter involved; (2) such court had jurisdiction of the person of the petitioner; (3) such court had authority to render the particular judgments exhibited. Wherein, then, exists the illegality upon which petitioner relies for relief? The writ of *habeas corpus* does not operate as an appeal, a writ of error, or *certiorari*, nor has it the effect of these proceedings; and this court in no wise sustains an appellate relation to the Wapello circuit or district courts. This court cannot, in this proceeding, nor in any other manner, review or correct mere errors or irregularities, if any exist, in the judgments of those courts. There lay within petitioner's easy reach the remedies provided by the Iowa statutes, whereby petitioner might have brought into review before the supreme court of that state whatever errors or irregularities in proceeding or decision were committed by those courts, and subject to review. Whether petitioner exercised these remedies, or any of them, the record does not disclose. But the proceeding on *habeas corpus* deals with more radical defects, with defects attaching to the jurisdiction of the court pronouncing judgment, or officer restraining thereunder, or to the jurisdictional or constitutional questions involved in the trials complained of. Even though, by prosecuting his appeal or writ of error or *certiorari*, petitioner might have had any existing errors reviewed, and, as a possible result thereof, received his immediate discharge in the state courts, yet the existence of such error furnishes no ground for his release on *habeas corpus*. *Platt v. Harrison*, 6 Iowa, 79; *Ex parte Watkins*, 3 Pet. 193; *Ex parte Parks*, 93 U.S. 49, no. 3—16.

U. S. 18; *Ex parte Reed*, 100 U. S. 13; *Ex parte Crouch*, 112 U. S. 178, 5 Sup. Ct. Rep. 96; *Church*, Hab. Corp. 474, and cases cited.

The application under consideration is not especially distinguishable, as to the writ prayed for, from one exhibiting only judgments rendered upon verdicts of guilty in purely criminal actions. The element here added of judgments upon findings by the court of contempts of its process of injunction does not materially change the questions which may be herein considered; for, though a contempt is in itself a distinct and substantial offense, yet in a court of general jurisdiction there is no distinction in principle between a judgment pronounced after trial on indictment and a judgment pronounced upon a finding of contempt proven, so far as concerns the question of collateral review or impeachment. In either case the court has pronounced on the jurisdictional facts. The presumption is that it has decided correctly, and the correctness of that judgment we may not review here. *Ex parte Krieger*, 7 Mo. App. 367; *Robb v. McDonald*, 29 Iowa, 334; *Hurd*, Hab. Corp., and cases cited. The application herein sets out no fact which the courts rendering the judgments exhibited might not legally have acted upon. And certainly, at least until it is attacked, the presumption must obtain in this court in this collateral proceeding that these courts of general jurisdiction decided correctly every point of law presented for their decision in the trials resulting in these judgments. If error was claimed to attach to their decision on any point, the right therein remained to petitioner to bring before the highest court of the state for review and correction the point wherein error was claimed; and the presumption must obtain that the supreme court of the state would decide correctly. "It often occurs in the progress of a criminal trial in a state court, proceeding under a statute not repugnant to the constitution of the United States, that questions occur which involve the construction of that instrument and the determination of rights asserted under it. But that does not justify an interference with its proceedings by a court of the United States upon a writ of *habeas corpus*, sued out by the accused, either during or after trial in the state court; for, as was said in *Robb v. Connolly*, 111 U. S. 624, 637, 4 Sup. Ct. Rep. 544, 'upon the state courts, equally with the courts of the nation, rests the obligation to guard, enforce, and protect every right granted or secured by the constitution of the United States and the laws made in pursuance thereof, whenever those rights are involved in any suit or proceeding before them;' and 'if they fail therein, and withhold or deny rights, privileges, or immunities secured by the constitution or laws of the United States, the party aggrieved may bring the case from the highest court of the state in which the question could be decided to this court for final and conclusive determination.'" *Wood v. Brush*, 140 U. S. 286, 11 Sup. Ct. Rep. 738.

Counsel for petitioner, in the argument under the rule, claimed (as the application itself alleges) that in the *Leisy Case*, 135 U. S. 100, 10 Sup. Ct. Rep. 681, the supreme of the United States had declared the Iowa prohibitory law to be unconstitutional, and therefore null and void, as to liquor shipped into the state and sold in the "original pack-

age;" and that, as the application alleges (for the purpose of this decision we will not dispute the construction of application which makes it so claim and allege) that the sales on which petitioner was adjudged to be imprisoned (and under which judgments he is now held) were "original package" sales only, therefore the writ must issue; and these facts, if proven on the hearing, must necessarily entitle petitioner to his release under the writ. But we have the authority of the supreme court itself for asserting that neither in terms nor in effect did that court declare the Iowa prohibitory statute in any particular null and void. In *Re Rahrer*, 140 U. S. 563, 11 Sup. Ct. Rep. 865, the supreme court, speaking of the scope and effect of the Leisy decision, say:

"This [the Leisy decision] was far from holding that the statutes in question were absolutely void, in whole or in part, and as if never enacted. On the contrary, the decision did not annul the law, but limited its operation to property strictly within the jurisdiction of the state."

The application herein must be held to include the exhibits attached to it, and made, by express reference therein, a part of it. The application contains no averment that in any of the cases whose judgments are so exhibited the courts decided adversely to the decision in the *Leisy Case*. There is brought to this court no recital of denial to petitioner of the full force, in the several cases and proceedings exhibited, of that construction of the Iowa law which obtains in the Leisy decision. So far as shown by this application for the writ, the jury, in the cases wherein a jury was impaneled, were charged by the court on the very lines as to "original packages" which the *Leisy Case* lays down. And, so far as in application shown, the court, in its findings in the contempt cases, held to the same construction of the Iowa statutes. And, in the absence of any statement in application to the contrary, this court is bound to presume that the district and circuit courts of said Wapello county did hold and charge correctly, in all respects, the law applicable to the trials and proceedings which terminated in the judgments exhibited. To presume otherwise would be to assume that which is not stated either in the application or in the various exhibits, which constitute its larger part; and we are bound to presume that the application states the matter in the strongest terms, and in the manner most favorable to the petitioner, in which the facts could be presented, and therefore the application brings before this court no question of law, as decided by the state courts in said cases complained of in application, which is to be, or, indeed, can be, decided in this proceeding.

The sole question remains under the application,—and which is a mere question of fact,—did the evidence submitted on the several trials, which resulted in the judgments exhibited, did this evidence as to selling or keeping for sale intoxicating liquors, justify the verdicts of guilty, as returned by the juries, and the findings of guilty of contempt, as decided by the courts? In other words, were the courts and jury justified, in the several trials, in finding petitioner guilty on the facts proven on the respective hearings? For, the law having been, as we have seen, correctly held by the court, and the courts having had jurisdiction of the subject-matter and of defendant, and also having had authority to

render the particular judgments exhibited, there remains only the fact element,—the question of evidence. Petitioner may on each of the trials have testified in his own behalf. He may have introduced the testimony of other witnesses, and such evidence may have tended to prove the averments of petition, as to petitioner making sales only in "original packages." But the jury or courts, in the cases, respectively, tried before them, were the sole and rightful judges of the truthfulness and weight of the evidence submitted. They were authorized to accept or reject evidence, as they found it true or false. And they may have been abundantly justified in discarding the testimony of petitioner and his witnesses, and accepting evidence introduced by the prosecution, tending to prove guilt. As to this matter this court may not inquire. For this court cannot, upon *habeas corpus*, consider the sufficiency and comparative weight of evidence as establishing guilt or innocence. This court has no power to determine whether such evidence justified the verdict and findings reached. To do so is to assume appellate jurisdiction of these cases, and over the state courts which tried them. Upon the fullest hearing possible on *habeas corpus* this court could not review or re-examine the evidence which was submitted on trial; for, if this court were to hear evidence as to the facts, and the same evidence introduced on these trials were to be introduced here, what then? Shall this court assume to decide that the state courts or the juries therein erred in finding petitioner guilty? And should this court therefore find him not guilty, wipe out the judgments exhibited, and acquit him, and then release him from the custody of the sheriff in whose custody application avers him to be? The statement of this monstrous proposition is its complete refutation. But, on the other hand, were a hearing had under the writ applied for, and evidence as to fact submitted, the petitioner might not introduce evidence not introduced on the trials. Such hearing would not only be a new trial of the issues of fact, but, more objectionable still, it would be a new trial upon new evidence. It would not be an examination of the matters complained of. Had this new testimony been introduced on the former trials, possibly acquittal might have there resulted. Under any possible consideration of the subject, new testimony could not be here admitted as a basis for reversing the findings heretofore made and releasing petitioner. Here, again, the statement of the proposition is its refutation. The authorities abundantly sustain the position thus reached that this court cannot—certainly cannot on *habeas corpus*—hear evidence of facts bearing on the justice of the judgments complained of, or with reference to the guilt or innocence of the petitioner. I know of no authorities which hold to the contrary. *Ex parte Siebold*, 100 U. S. 377; *Ex parte Yarbrough*, 110 U. S. 651, 4 Sup. Ct. Rep. 152; *Ex parte Crouch*, 112 U. S. 178, 5 Sup. Ct. Rep. 96; *Ex parte Bigelow*, 113 U. S. 328, 5 Sup. Ct. Rep. 542. I find, therefore, that under the allegations of the application petitioner could not obtain his release if the writ of *habeas corpus* were to issue. Thus "it appears from the petition itself that the party is not entitled" to the writ. It is accordingly ordered that the rule to show cause be and it is discharged, and writ refused.

WILLIAMS *et al.* v. GOODYEAR METALLIC RUBBER SHOE CO.

(Circuit Court, D. Connecticut. February 6, 1892.)

1. PATENTS FOR INVENTIONS—INVENTION—RUBBER SHOES.

Letters patent No. 131,201, issued September 10, 1872, to Isaac F. Williams, for a rubber overshoe with bellows flaps, are void for want of invention.

2. SAME.

In view of the prior state of the art, as shown by the English patent to Stephen Norris, and the Evory & Heston shoes, (American patent No. 59,375, issued November 6, 1866,) the conception of a bellows flap in a rubber overshoe, for the purpose of making it water-tight, was not the exercise of inventive genius.

3. SAME—MECHANICAL ADAPTATION.

The adaptation of the bellows flap to the arctic overshoe by running the hinge of the flap forward to a point near the arch of the shank, in order to give sufficient room for the insertion of the shoe-clad foot, thus placing the hinge almost at right angles to the draft line of the shoe, did not require inventive faculty.

4. SAME.

Nor did it require inventive faculty to abandon the use of separate gores, and make the flap integral with the vamp and the quarter, since experiment would promptly show that in inserting the shoe-clad foot the strain would be too great for the seams, and the substitution of an integral extension for a gore would naturally occur to the shoemaker.

5. SAME—EXTENT OF CLAIM—ESTOPPEL.

The application for letters patent No. 166,669, issued August 10, 1875, to Isaac F. Williams, having been made for an improved rubber boot as distinguished from a shoe, and the whole course of the proceedings in the patent-office having proceeded on that theory, the inventor is estopped to claim that the patent covers a rubber shoe.

In Equity. Bill by Isaac F. Williams and the National Rubber Company against the Goodyear Metallic Rubber Shoe Company for infringement of patents. Bill dismissed.

Wilmarth H. Thurston and Charles E. Mitchell, for plaintiffs.

John K. Beach and Charles R. Ingersoll, for defendant.

SHIPMAN, District Judge. This is a bill in equity founded upon the alleged infringement by the defendant of letters patent No. 131,201, dated September 10, 1872, for an improved cloth and rubber gaiter overshoe, and letters patent No. 166,669, dated August 10, 1875, for an improvement in rubber boots. Each patent was granted to Isaac F. Williams, the present owner and one of the plaintiffs. The National Rubber Company is the exclusive licensee under each patent.

No. 131,201 was an improvement upon the well-known cloth and rubber shoe known as the "arctic," and was designed to render the shoe water-proof. The specification and drawings of the patent represented that it consisted in a peculiar construction of double water-proofed, jointed flaps, which were extensions of the vamp and quarter, and integral therewith, and that they were "so arranged that the flap tongue, passing over the instep, will draw equally upon the sides of the quarter when buckled to the foot." The claim of the patent was as follows:

"As a new article of manufacture, a cloth and rubber gaiter overshoe having a double water-proof flap, composed of extensions of the vamp and quarter, folded on each side of the instep, and provided with a buckle and flap tongue, which are arranged to draw equally on each side of the quarter across the instep, substantially as described."

In May, 1880, two suits in equity against L. Candee & Co.,—one by the present plaintiffs, upon the patents now in controversy, and the other

by Evory & Heston and the National Rubber Company, upon letters patent No. 59,375, dated November 6, 1866, granted to Evory & Heston for an improved shoe,—were tried in this court. The respective opinions are in 2 Fed. Rep. 683 and 542. It was claimed that each patent was being infringed by the defendants in the manufacture of the same shoe. In the suit upon the Williams patent the Evory & Heston patent was not introduced in evidence. The suit was originally defended, not upon the ground that the Williams extension was not a patentable novelty, if the proper, limited construction should be given to the patent, but upon the ground that in view of the Stephen Norris English patent of 1856 the Williams invention was limited to the "cut" of vamp and quarter, and of their extension into a flap tongue, which was shown in the drawings, and that the defendant's shoes had a different "cut," which was a union of the arctic quarter and of an extension of the vamp, which was the Norris gore, but, if the Williams patent should receive a broad construction, it was anticipated by the Norris shoe. The plaintiff's reply was that this shoe was not a water-tight shoe, but had necessarily a leak-hole at the apex of the gore, and that at the union of the vamp, quarter, and gore there was no turning of the water by a fold of the leather, and therefore Williams was a pioneer in making a water-proof overshoe by means of overlapping flaps. The court was of opinion that the "improvement upon the arctic shoe consisted in overlapping the vamp and the quarter beneath the rubber foxing, and extending the vamp and quarter so as to form bellows-like, water-excluding flaps, folded on each side of the instep, and buckled together over the instep;" and, further, that "the gist of the Williams invention consisted in such a cut of vamp and quarter that the two overlapped or folded upon each other, and thereby the leak-hole at the junction of the Norris gore with vamp and quarter was obviated;" and that the patent was "not to be limited to the precise shape of the 'cut' of each part of the extension which is shown in the drawings, but it covers, also, such other forms of cut which are substantially like the pattern shown and described, and which accomplish the same result." In this case, the defendant relied upon the Evory & Heston patent, under which, as a licensee, it claimed to have made the infringing shoes, and defended upon the ground that the shoe described in the patent was an anticipation of the Williams invention, and, if not, that, in view of the state of the art at the date of the Williams improvement, it was not a patentable invention. While the complainants were taking evidence in reply to the defendant's case, the latter offered the Norris patent of 1856 to show the state of the art, but offered no oral testimony in regard to said patent. In the case of *Burt v. Evory*, 133 U. S. 349, 10 Sup. Ct. Rep. 394, the supreme court held that, in view of the Norris shoe and other shoes which were in existence at the date of the Evory & Heston application, the shoe therein described was not a patentable invention. This shoe was made of leather, and was intended to cover a stocking-clad foot. It had an expansion gore flap made of a separate piece of leather, the external fold of which was attached to and in front of the quarter, and the internal fold of which was attached to and in rear of the vamp. The apex of the gore was directly in front

of the ankle line. The vamp and quarter overlapped at the point of junction for the purpose of holding each other together, and there was no leak-hole at the apex of the gore. It is obvious that the Ivory & Heston shoe could not be used without alteration as an overshoe for a shoe-clad foot. So long as the hinge of the flaps is in a line with the ankle line, there will not be room enough at the instep to receive a shoe, with its protruding and rigid heel. A mere enlargement of the flaps at that point will not make an acceptable overshoe. The location of the flaps must be changed. A shoe, in order to be generally useful, must be a substantial improvement upon the Ivory & Heston shoe. To that end the overshoe would naturally be a brogan, and an improvement upon the arctic, in which the quarter overlapped and buckled upon the instep over a large vamp, which could be turned back to receive the shoe-clad foot. In defining and explaining the nature of the Williams invention, the patentee and one of the plaintiffs' experts substantially abandoned the position in the *Candee Case*, that the gist of the invention consisted in that overlapping of the vamp and quarter (which in the Williams shoe was below the foxing) whereby the Norris leak-hole was obviated. Their position is that the improvements in the location of the flaps, and the principle upon which they were constructed, constituted the invention, and made for the first time a water-tight cloth and rubber overshoe. It is truly said that the line on the overshoe extending from the instep to the heel is the one upon which the overshoe must have capacity to open or extend. This line is called the "draft line," and by the shoemakers is called the "line of the instep measure." Furthermore, after the overshoe has been drawn over the inner shoe, the opening, which has been extended for this purpose, must be contracted; and the heel portion of the overshoe must be drawn up to, and held firmly against, the heel of the inner shoe. In the opinion of the plaintiffs, the Williams invention consisted in abandoning the gore or gusset idea, and in extending or prolonging the vamp of the arctic overshoe, and folding it so that the line or hinge of the fold would be substantially at right angles to the draft line, and that the apex of the fold would be in a line with the forward edge of the extended quarter, and the two would meet at the edge of the foxing. Mr. Williams testifies that in his experiments he tried separate gores or gussets, and was forced to abandon them, and make his flaps integral with the vamp and quarter, because in no other way could he make them resist the strain which was brought upon the seams of the gussets at the apex of the gore. He also says that the construction of the arctic was such that it was liable to tear at the point of contact of quarter and foxing, and sometimes the opening of the shoe was so small that it would give way at that point, and that to prevent this liability he extended the vamp, which folded upon itself, so that it joined the quarter at its forward line; the apex or bottom of the fold meeting the forward edge of the quarter. This apex was about on a line with the forward edge of the quarter of the old arctic.

The question in the case is that of patentable improvement, in view of the Ivory & Heston shoe and the arctic overshoe. In other words, bellows flaps being known, and an existing thing, in leather, and an ar-

tic rubber overshoe being well known, did it require invention to place the Williams bellows flaps upon a cloth and rubber brogan? The mere fact that the pre-existing devices were in leather is not important. There is much more force in the necessary differences between a flap in a shoe for a stocking-clad foot and in an overshoe; and it is necessary to see whether these differences, in view of the existence of the arctic shoe, presented real difficulties, which required inventive genius to overcome. It is said, in the technical language which is used in the case, that the patentee made a patentable departure from the pre-existing bellows flaps, which were hinged vertically upon the ankle line, by locating his flaps so as to expand the shoe on the draft line of the overshoe, making the hinge line of the flaps practically at right angles to the draft line, and extending the hinge line below the draft line, and that by this construction strain is avoided, a sufficient opening for the insertion of the inner shoe is furnished, and when the flaps are buckled across the instep the opening is contracted upon the draft line. The buckle and flap tongue of the arctic overshoe drew equally on each side of the quarter across the instep. The shoe opened on and below the draft line, and was contracted on the same line. It opened between the vamp and the quarter, near the sole, at the arch of the shank. Into such a shoe the patentee desired to put bellows flaps. He had very little room for choice as to the place where they were to be put. They must be placed so as to continue the opening on the draft line, and could be successfully placed nowhere else. The hinge line of the flap must run forward to a point near the arch of the shank in order to give sufficient room, and to be about at right angles with the draft line. As matter of fact the direction and position of the hinge line of the Williams shoe were substantially the same as the direction and position of the opening between the vamp and quarter in the arctic shoe, except that in the latter the quarter overlapped the vamp at the line of the foxing, near the sole. Unless the idea of putting expansible bellows flaps upon an arctic overshoe was the conception of an inventive mind, the position and location of the flaps and the location of the hinge line were matters which do not rise to the dignity of invention, because they are within the scope of the skilled workman. In view of the Norris and the Evory & Heston shoes, of which the public is presumed to have had knowledge, I do not think that the conception of bellows flaps in a rubber overshoe was an inventive idea.

The remaining point is that the patentee, after many experiments, abandoned separate gores as useless, and made his flaps integral with the vamp and quarter. The separate gore idea is the one which would first naturally occur to any one when thinking of the way in which flaps could be made; but it cannot be safely contended that making the extensions of the vamp integral with it, instead of by the use of gores, involved invention. Experiment would promptly show the inutility of separate gores, by reason of the strain that would come upon the seams and at the apex in the act of drawing the shoe upon the foot, but the substitution of an integral extension for a gore appears to me to be a matter which would naturally promptly occur to the shoemaker.

I place no importance upon the Letherbury patent of June 4, 1867, which was for a folded enlargement of the leg of a boot, the folds being buckled together. Neither this device nor the Kilsheimer patent of May 10, 1870, seems to me to have weight in the case. The Williams improvement approaches the border line of invention, and it is very likely that upon the testimony in the case it would have been generally held patentable by the circuit courts before the recent decisions of the supreme court on the subject of invention. The tendency of those decisions is to confine patentability within narrower limits than formerly. They especially demand that a device which is an improvement upon a pre-existing one must, in order to be patentable, contain a new idea, and perform some new function, and not present changes of degree only, or simply "new or more extended applications of the original thought." *Smith v. Nichols*, 21 Wall. 112; *Burt v. Ivory*, 133 U. S. 349, 10 Sup. Ct. Rep. 394.

Patent No. 166,669, known in the case as the "Patent of 1875," is described in the specification as follows:

"My improved boot consists, in fact, of an inner and an outer upper and a suitable sole, the inner upper being made to fit the last, and therefore requiring to be slit open from near the sole upward, while the outer upper is made much larger than the inner upper, and requires the surplus stock to be overlapped and fastened in order to fit the boot closely to the ankle and leg. My invention, further, consists in a boot made with an overlapping leg section and an overlapping ankle section, the latter being provided with a so-called 'bellows flap,' formed of continuations of the front and rear uppers; and my invention, still further, consists in a peculiar outline of the edge of the overlapping section, at a point adjacent to the ankle."

The claims, of which the first only is said to have been infringed, are as follows:

"(1) The improved boot composed of textile fabric and rubber, having an inner upper cut to fit the last or foot, and an outer upper cut larger than the inner upper, with the surplus portion thereof overlapped, substantially as described. (2) The improved boot, having an open overlapping leg section and the overlapping ankle section, provided with the bellows flap, formed of continuations of the front and rear uppers, substantially as described. (3) In a boot, the overlapping leg and ankle section, provided with the recess, D, at the edge between the said sections, substantially as described."

The flaps in the shoe of 1872 were lined with the same thick material which was used inside the shoe, and were therefore clumsy. This method of lining the flaps was caused by the manner in which the shoe was made. The inside lining was cut to conform to the outside cloth upper. The two were placed together, "built up," and a finished upper was formed before placing it upon the last. After the patent of 1875 the plaintiffs lined the flaps with a thin material, which they were enabled to do by making the shoes in the following way: The inner lining is fitted to the last. The outer upper is cut larger than the inner, and the united vamp and quarter, which is divided at the heel, are put together upon the inner lining, and, except the bellows flaps, are secured thereto. The shoe is vulcanized, and the inner lining is

slitted to permit the removal of the shoe from the last. The old arctic was also made by first fitting the lining to the last, and then "building up" the outer upper upon it, but the vamp and quarter were put on the inner lining separately. Herein is the distinction between the method of the shoe of 1875 and the arctic method. In the 1875 shoe the vamp and quarter are united together before being placed upon the inner lining. In the *Candee Case* the novelty and patentability of the 1875 patent were not denied. In this case both are denied.

The first point which the defendant makes is that the history of the patent, as it progressed through the patent-office, shows that it was granted for a boot as distinguished from a shoe. The argument of counsel is not that the first claim, taken by itself, showed that the improvement was for a boot as distinguished from a shoe, or that a patent for an improved boot is necessarily to be construed as including only a covering for the foot and leg, any more than that a patent for an improved table-spoon excludes the like improvement in a tea-spoon; but the contention is that the application was presented and urged before the patent-office for an improved boot, as distinguished from a shoe, and that under the appearance of obtaining a patent for a boot only the one now in question was obtained, and is presented to the public as covering a thing which was not the subject of the application. It cannot be denied that the original application for this patent was for a leg extension composed of rubber and cloth in overlapping sections, combined with a foot, (all the drawings but one having a foot with bellows flaps,) and that the claim which was asked for was for a rubber and cloth foot, but not necessarily a "bellows flap" foot, and a leg constructed in overlapping sections. An improved rubber and cloth boot, the improvement consisting in a leg constructed in overlapping sections, was the only subject of the application. The first amendment of the specification, and all the correspondence on both sides, and the rejections of the application, both by the examiner and the examiner in chief, proceed unmistakably upon the idea that a patent for a leg section in combination with a foot was asked for. There was no suggestion of novelty in the foot portion. On the other hand, the specification apparently states that the bellows flaps in the foot portion are to be made in accordance with the inventor's various patents of 1872. Finally, the decision of the acting commissioner says:

"I am not prepared to say that no invention may be involved in extending the shoe upwards to form a boot retaining the same manner of folding so as to form a close-fitting, water-tight leg. While the point at which the shoe in its upward extension ceases to be a shoe and becomes a boot may not be always easy to indicate, yet no one fails to recognize these articles, and distinguish the one from the other. I think, however, that the specification and claim are so broad in this case as to include what has already been shown in the art."

This language shows that the head of the office supposed that he was dealing with an application for a boot, as distinguished from and as an improvement upon a shoe. It would be useless to go over this history in

detail, for the sole subject of the application is everywhere manifest. The commissioner having rejected the application upon the ground that the claim was so broad as to be anticipated, the applicant further amended his specification in the manner now presented in the patent as granted. Upon this amendment the examiner says that it is limited to specific features, and, as there is reason to believe some novel points do exist, he recommends that it be accepted for examination. The decision of the commissioner was to the effect that the applicant had asked for a broad claim for a boot as distinguished from a shoe, and that there might be particulars in the extension of the shoe upwards to form a boot which possessed invention. The applicant amended for the purpose of presenting a more limited claim for those particulars. If he had modified his proposed specification so as to clearly show that he had made and claimed an improvement in the method of constructing a bellows-flap shoe, I am not prepared to say that such an amendment would be invalid. But not a word is said in the amended specification of clumsy bellows flaps, and the new way to avoid them. The new specification, read in the light of the previous history, was apparently for specific features of the same combination which had previously been asked for. Read in the light of the subsequent history of the patent, it can be seen that the applicant might then have had another purpose. The principle of estoppel has been frequently applied of late in the construction of letters patent; and a patentee cannot, after obtaining a patent with a misty claim, abandon the express terms of his previous specifications, which clearly specify and limit the invention, and assert that it is for a different and undisclosed thing. He cannot say that it relates to another invention than the one which he had originally represented, and a patent for which he had accepted. In this case the patentee applied for a patent upon a boot as distinguished from a shoe. The patent-office said, "Perhaps you can have a narrow patent for such an article." He amends his application without disclosing a change of subject, obtains his patent, and now claims that it covers an improvement in a shoe. That contention he is estopped from making. The bill is dismissed.

THE MAJOR WILLIAM H. TANTUM.¹SHOE *et al.* v. Low Moor Iron Co. *et al.*

(Circuit Court of Appeals, Second Circuit. December 14, 1891.)

GENERAL AVERAGE—VOLUNTARY STRANDING—SAVING OF LIFE.

Where the master of a vessel, which was dragging her anchor in a gale and in danger of going ashore, slipped the cable, and voluntarily stranded her, in substantially the same place, under the same conditions, and with the same result to her cargo, as must necessarily have soon resulted from her dragging anchor, *held no case of general average.* 46 Fed. Rep. 125, affirmed.

In Admiralty. Appeal from a decree of the district court of the United States for the southern district of New York, dismissing the libel of the libellant. Affirmed.

The schooner Major William H. Tantum, loaded with a cargo of iron, went for refuge inside the Delaware breakwater, September 8, 1889. The bad weather developed into the great storm of September, 1889, and the vessel gradually dragged her anchors, until the 10th, when some of her anchor chains gave way, and at 4 o'clock in the afternoon but a single one remained, and the vessel was drifting towards the beach, broadside on. In this situation, her master, fearing for the lives of those on board, determined to slip his cable and run ashore, head on. The cable was accordingly slipped, and the vessel, without canvas, paid off and went head on the beach, afterwards turning broadside to the sea, and becoming a total loss. Part of the cargo was saved, and forwarded to its destination. The ship-owner claimed a general average, and brought this suit against the cargo-owner to recover \$2,939.03, the amount charged against the cargo by the average adjusters. The district court held that the act of the master in slipping his cable was done for the purpose of saving life, and with no other motive, and therefore dismissed the libel. 46 Fed. Rep. 125. The libellants thereupon appealed to this court.

Wing, Shoudy & Putnam, for appellants.

Sidney Chubb, for appellees.

Before WALLACE and LACOMBE, Circuit Judges.

PER CURIAM. At the time she slipped her cable, the Major William H. Tantum was on the eve, not of foundering in deep water, as her counsel contends, but of going ashore. Her hatches were not even started, she was making no water, and, at the rate at which she was drifting, all the indications were that she would, in a few minutes, ground on the beach, to leeward of her, broadside to the seas. The master slipped his cable, and thus hastened the end, not averting any imminent peril of foundering in deep water, selecting no more favorable locality for stranding, and, though she struck bow on, swinging afterwards broadside to the seas;

¹Reported by Edward G. Benedict, Esq., of the New York bar.

in other words, as the learned district judge expresses it, stranding her "substantially in the same place, under the same conditions, and with the same result to the cargo," though by striking bow on there was secured a better chance to save the lives of all on board. No case of general average is made out. The decree of the district court is affirmed, with costs.

McKEEN v. MORSE.¹

(*Circuit Court of Appeals, Second Circuit. November 7, 1891.*)

1. DEMURRAGE—FAILURE TO PROTEST—LACHES.

On claim of demurrage it was shown that neither the charter nor the bill of lading contained any provision as to demurrage; the master made no formal protest against the delay, but signed without objection the bill of lading, and did not bring suit until long after. *Held*, that demurrage could not be recovered.

2. ACCORD AND SATISFACTION—RETAINING CHECK—PROTEST.

A master of a vessel received from the charterer a check, which charterer claimed was in full payment of the master's claim for demurrage. The master retained the check, but notified the charterer that it was not sufficient, and that he would sue. *Held*, that his retaining the check was not an accord and satisfaction.

In Admiralty. Appeal from a decree of the district court of the United States for the southern district of New York, dismissing the libel of the libellant.

The respondent chartered libellant's schooner to carry ice from Richmond, Me., to New York. The vessel arrived at Richmond August 27, 1890, and her master at once gave notice of his readiness to load. The loading was not completed until September 10th. Libellant claimed that five days would have been sufficient in which to load, but it appeared that he made no formal protest against his detention. Neither the charter nor the bill of lading contained any provision in regard to demurrage, and the master signed the bill of lading without protest. He also made no complaint on his arrival in New York, or at any time until the commencement of this suit. The district court dismissed this part of the libellant's claim. There was also a further claim by the libellant for demurrage at Poughkeepsie. The respondent admitted some liability, and gave the master a check for \$125. The latter retained it, but did not agree to accept it in full settlement, or to retain it. He also notified the charterer that he would sue. On suit being brought, respondent claimed that the retaining of the check by the master was an accord and satisfaction. The district court declined to sustain the claim, and awarded judgment to the libellant for \$484 demurrage, less the \$125 already paid, and both parties appealed to this court.

Wilcox, Adams & Green, for libellant.

Wing, Shoudy & Putnam, for respondent.

Before WALLACE and LACOMBE, Circuit Judges.

¹Reported by Edward G. Benedict, Esq., of the New York bar.

PER CURIAM: There is no merit in the claim of the libellant for the detention of his vessel at Richmond. He was aware of this himself, and did not assert any such claim in his conversations with the respondents, but insisted upon compensation for the detention at Poughkeepsie. The respondents, recognizing their liability for the detention at Poughkeepsie, tried to induce him to accept \$100 in full. He refused, and they handed him a check for \$125. When he read it, and saw the amount, he told them it would not satisfy the owners; but they insisted upon his keeping it, telling him, if he found it did not satisfy the owners, to return it; and he replied that he would sue them. Not only did he not promise to accept the check in full settlement, but he did not expressly promise to return it. If his conduct led them to suppose he would return it before suing them, they have lost nothing by his omission to do so. Even if he had expressly promised to do so, his subsequent neglect or refusal would not afford the respondents a defense. He was entitled to a much larger sum; and nothing short of an accord and satisfaction, or the acceptance of the check as a discharge in full, is a release. The decree is affirmed, without costs of this court to either party, both parties having appealed, and the cause is remanded to the circuit court with instructions to enter a decree accordingly, with interest.

THE FRED. JANSEN.

LYNCH *et al.* v. THE FRED. JANSEN *et al.*

(*Circuit Court of Appeals, Second Circuit. January 13, 1892.*)

COLLISION—SAIL AND TUG WITH TOW.

The schooner T. was going westward through East river, at flood-tide, keeping close to the eastern shore of Ward's island to avail herself of the slack-water. The wind died out as she reached Negro point, and here she was overtaken by a tug towing a schooner on a hawser of about 800 feet. The tug passed on her port side at a distance of from 40 to 150 feet, but, as the T. struck the tide, which here sets strongly towards Long island, she sheered to port, and struck the tow, though she put her wheel hard a-port, and dropped her main peak. *Held*, that the tug was solely in fault, as it was her duty, as an overtaking vessel, to take sufficient room for a safe passage. 44 Fed. Rep. 773, reversed.

Appeal from the Circuit Court of the United States for the Southern District of New York.

In Admiralty. Libel by Daniel Lynch and others against the steam-tug Fred. Jansen for collision. The libel was dismissed in the district court, which decree was affirmed by the circuit court. Libellants appeal. Reversed.

Edward D. McCarthy, for appellants.

Wm. W. Goodrich, for appellee.

Before WALLACE and LACOMBE, Circuit Judges.

LACOMBE, Circuit Judge. This is an appeal from a decree of the circuit court, affirming a decree of the district court for the southern district of New York, dismissing the libel.

On May 22, 1890, about 11 A. M. the schooner Titus, loaded with sand, was proceeding through Hell Gate, between Ward's island and the Long Island shore, bound for Newark, N. J. She was keeping towards the Ward's Island shore, and her witnesses claim that she was hugging it closely, so as to avail of the slack-water, the tide being then flood. She was heading about south-westerly, with her booms on the starboard side. There had been a little wind about E. N. E., but this died out. As she reached Negro point, which projects into the channel from the Ward's Island shore, she suddenly took a sheer, or rather swept over bodily, towards mid-channel, although, as the answer alleges, "she had put her wheel hard a-port, and dropped her main peak, but was unable to control her movements." Before she took this sheer she was overtaken by the steam-tug Fred. Jansen, towing the schooner William O. Snow on a hawser about 300 feet long. The tug passed the Titus on the latter's port side, and had got beyond her when this sheer took place. The Titus swept over and came in collision with the Snow, although the latter starboarded to avoid her, coming, in consequence, into contact with a lighter on her own port hand. The material point in the case is the distance at which the tug passed the Titus; for, being the overtaking vessel, it was her duty to allow a sufficient margin of safety for herself and her tow, or to delay passing the Titus till a wider channel, the absence of other craft, or a more favorable condition of wind and tidal currents gave assurance that she might pass in safety. There is great difference between the witnesses in their estimates of the distance between the tug and the Titus when the former passed her. The witnesses from the Titus make it about 25 feet, those from the tug and the master of the tow 100 to 125 feet, and the tug's pilot 300 feet. Disinterested witnesses estimate it at from 40 to 150 feet. There is a like discrepancy in the estimates as to the distance of the Titus from shore. The district judge found the place of collision to be nearer 300 than 200 feet from shore, and that the tug passed the Titus with a margin of 200 feet, (which is a larger estimate than that of any witness except her pilot;) and held that to be a reasonable distance to pass, because, though the tug's pilot might expect some swinging by the Titus when she struck the flood-tide, he could not expect her to swing out so far. It appears by undisputed testimony that when the tide is flood there is slack-water along the Ward's Island shore, extending out some way from the shore above Negro point, and a sharp set of the tide from Negro point over towards the Long Island shore, the natural tendency of which is to throw a vessel coming out of the slack-water into the tide over towards mid-channel.

The testimony seems to leave no doubt that the movement of the Titus was caused by the action of this tidal current, which she was unable to counteract, because, the wind dying out, she had not sufficient motive power to make headway against it, and that she did all that

good seamanship required in putting her helm hard a-port and dropping her main peak. Whatever, then, may have been the distance of the Titus from the shore when she struck the tide, and at whatever distance the tug passed her, it was undoubtedly so short that a schooner such as the Titus, having but little way on her in so light a wind, would be, by the action of the tide alone, carried over that distance in the time it took the tug and the tow to move about 150 feet; for the Titus did not begin to swing till the Jansen had passed half the length of the towing hawser beyond her. There is no suggestion that there was any abnormal condition of the tide on the day of the collision. Its set and strength is known to navigators in those waters, and was known to the master of the Jansen. He admitted that, "provided the Titus had been in the slack-water, and then had dropped into the tide, it might cause her to make a little sheer,—quite a sheer if the tide was strong;" insisting, however, that she was not in the slack-water, but in the tide, when he passed her. We are satisfied, however, as was the district judge, that the Titus was in the slack-water, going close along the shore, and that her swing followed naturally from her striking the tide. It was a movement, therefore, that should have been anticipated and guarded against by the master of the tug if he decided to overtake and pass her in that part of the channel. The precise moment when the wind died away is not entirely clear upon the evidence; but it was certainly so light when the Jansen passed that he had reason to anticipate that the Titus would not have sufficient headway to control herself when she struck the tide; She was moving, as he admits, so very slowly then,—“scarcely stemming the tide,”—that he supposed she must be retarded by the flood-tide; mistakenly, for we are satisfied she was then in slack-water. The master of the Grace Fee, a tug bound eastward at that time with a tow, and who was called as a witness by the claimants, thought there would be a collision before the Titus began to sheer, because, the wind being light, and the Titus having “little way,” he expected the tide would cut her out into the stream far enough to hit the Jansen’s tow. For not anticipating and providing for that contingency, we think the Jansen, an overtaking steam-vessel, was in fault. The decree of the circuit court is reversed, and the cause remanded, with instructions to enter a decree in favor of the libelants for damages, with costs of the district court, disbursements of the circuit court, and costs of this court.

DRESSER v. EDISON ILLUMINATING CO.

(Circuit Court, D. Rhode Island. February 12, 1892.)

1. JURISDICTION OF FEDERAL COURTS—CITIZENSHIP—RESIDENCE.

Where the parents of a minor remove from the state of her birth when she is 10 years old, her citizenship follows theirs, although for nearly 10 years longer she remains in the original state, completing her education, and spends but part of each year at the new home of her parents.

2. SAME.

One who depends entirely upon her grandparents for support, and makes her permanent home with them at the place of her former residence, continues to be a resident of that place, though in company with her grandmother she spends about half of each year in a different state, living in different rented houses, and has the *bona fide* intention of becoming a resident of the latter state.

At Law. Action by Susan L. R. Dresser against the Edison Illuminating Company. Heard on motion to dismiss for want of jurisdiction. Granted.

Wm. G. Roelker, for plaintiff.

Saml. R. Honey and Arnold Green, for defendant.

COLT, Circuit Judge. The defendant moves to dismiss this suit for want of jurisdiction, upon the ground that the plaintiff, at the time of bringing the suit, was a citizen of the state of Rhode Island, and not a citizen of the state of New York, as alleged in her writ. It appears from the affidavits that the plaintiff is the daughter of George W. Dresser, and that she was born in the city of New York in 1864, where her parents then lived. Subsequently, Mr. Dresser moved to Newport, R. I., and he became a resident of that city as early as 1875. This appears from the following facts: He began paying personal property taxes in Newport in that year; he registered in Newport as a voter in 1873; he was on the voting lists of that city from 1878 to 1881, and voted there in 1880; he died in Newport in 1883, and was buried there. Mrs. Dresser, the plaintiff's mother, died in Newport a short time before her husband, and was buried there. The plaintiff remained at school in New York after her father changed his residence to Newport, and down to about the time of her father's death, in 1883, spending only a portion of each year in Newport. This circumstance, taken in connection with the fact of her birth in New York, is urged to support the position that she still remained a resident of New York. When Mr. Dresser established his residence in Newport, the plaintiff was a minor, about 10 years of age. Her place of residence, therefore, would naturally follow that of her parents, and would be in the place where the family home was located. Although the plaintiff continued her education in New York, and passed only a part of each year in Newport, she became legally a resident of Newport when her parents became residents of that city, and made it their permanent domicile and place of family abode. I have no doubt, therefore, that Newport was the legal residence of the plaintiff on the death of her father in 1883, she being then 19 years of age. Upon the death of their parents, the Dresser children,

comprising the plaintiff, her three younger sisters, and a brother, went to live with their grandfather, Daniel Le Roy, at his residence No. 206 Bellevue avenue, Newport, and, with the exception of the brother, these children have continued to make this their home down to the present time. The grandfather, Daniel Le Roy, died in 1885, and since then they have lived with their grandmother, Mrs. Le Roy. The plaintiff derives her entire support from her grandmother. While the plaintiff's permanent home has been at the Le Roy house in Newport since her father's death, she has not in fact resided there continuously, for it appears that she was absent portions of each year prior to 1888, visiting relatives or friends in New York, Boston, and other places, and that since 1888 Mrs. Le Roy and herself have spent about half of each year in New York in several different rented houses. During the spring, however, the family have always returned to their residence in Newport. I do not think these absences from Newport effected a change of residence on the part of the plaintiff, because they were only temporary; her permanent residence continuing to be Newport.

Daniel Le Roy, the plaintiff's grandfather, was a resident of New York down to 1882, and it is claimed that he was still a resident of New York when he died at Newport, in 1885. Stress is laid by the plaintiff upon this circumstance, in connection with the testimony of Mrs. Le Roy, who says that her husband never intended to change his residence to Newport, and that she always considered herself a resident of New York. Whether the plaintiff's grandfather, Daniel Le Roy, at the time of his death in 1885 was a resident of Newport or of New York, it is not necessary for us to determine, but, as bearing upon this point, and upon the general question of the residence of the Le Roy and Dresser families at the present time, it is important to note certain facts brought out in the affidavits: Mr. Le Roy gave up his residence on Twenty-Third street, New York, in 1883, owing to the encroachments of business, and moved with his family to Newport. He died in Newport, and his will was probated there. One of his daughters, Mrs. Dresser, the plaintiff's mother, lived in Newport at the time of her death, in 1883, and was buried there. Another daughter, the widow of Edward King, has lived in Newport for many years. A son, Stuyvesant Le Roy, has for a long time been a resident of Newport, and votes in that city. His widow, Mrs. Le Roy, has lived in the same house in Newport since the death of her husband in 1885, and it has been her only permanent residence, and the Dresser children, except the son, have lived with her, and have made her house their home. Residence does not depend upon intent alone, but such intent must be accompanied by acts showing what the fact really is. A person may actually reside in one place, but intend to reside in another, but such intention is not sufficient to create a change of residence. So, too, a person may have been born and have resided in a certain place, and may have removed temporarily to another place, intending to return to the former place; but, if the latter place becomes in fact his fixed abode, the mere intention to return will not keep alive the residence in the former place.

I do not doubt the good faith of the plaintiff in alleging herself to be a citizen of New York, nor of her intention to become a resident of that state, but upon the facts as presented, I feel bound to hold that she became a resident of Newport, R. I., about the year 1875, and that she has continued to remain a resident of that city. Suppose the defendant in this case had been a citizen of New York, instead of Rhode Island, and the alleged wrong complained of had happened in New York, and the plaintiff had brought suit in the federal court there, would the defendant have been entitled to have the cause dismissed, upon the papers submitted in this case, on the ground that the plaintiff was in fact a citizen of New York?

The motion to dismiss for want of jurisdiction is granted.

McCLELLAN *et al.* v. PYEATT *et al.*

(Circuit Court of Appeals, Eighth Circuit. February 1, 1892.)

1. WRIT OF ERROR—RETURN-DAY—IRREGULARITIES.

Where on error to the circuit court of appeals the citation is made returnable 60 days after its date, (as allowed by rule 14, par. 5, 47 Fed. Rep. vii.,) and the writ of error on a day named which is less than 60 days therefrom, it will be presumed that the fixing of the latter day was an oversight, and the writ will not be dismissed where the record is filed thereafter, but within 60 days, though rule 13, Id. viii., requires the record to be filed "by or before the return-day."

2. SAME—RECORD—CERTIFICATE—MISTAKE.

Where the clerk of the lower court transmits the transcript to the circuit court of appeals under the proper caption, the fact that he certifies on the writ of error that he "therewith transmits to the supreme court of the United States" a duly-certified transcript, etc., is an immaterial mistake.

3. SAME—CITATION—AMENDING RETURN.

Where there is nothing in the record to show that the person served with the citation was a person upon whom a lawful service could be made, the return may be amended to show that he was in fact attorney for defendant in error.

4. SAME—BOND—IRREGULARITY.

The mere fact that a *supersedeas* bond which is sufficient in all other respects was taken and approved before the writ of error was sued out is an immaterial irregularity, as the court will presume that it was reapproved upon the issuance of the citation and the allowance of the writ.

5. SAME.

When the security of the *supersedeas* bond is sufficient, as required by Rev. St. U. S. § 1000, it is immaterial that it is signed by only one of the plaintiffs in error.

In Error to the United States Court in the Indian Territory.

Motion to dismiss the writ of error and vacate the *supersedeas*.

John H. Rogers, for the motion.

George E. Nelson and William M. Cravens, opposed.

Before CALDWELL, Circuit Judge, and SHIRAS and THAYER, District Judges.

THAYER, District Judge. This case comes from the United States court in the Indian Territory. The record shows that final judgment was rendered against the plaintiffs in error on July 8, 1891. On the 29th

of July, 1891, a *supersedeas* bond was presented to the judge of the lower court, which was approved by him on that day, and was filed with the clerk of the court on July 31, 1891. On the 15th of August, 1891, a writ of error was allowed and a citation duly signed. The citation was served on one W. T. Hutchins, September 10, 1891. A return was made to the writ of error by lodging a transcript of the record in this court on October 12, 1891.

We are asked to dismiss the writ of error mainly on the following grounds: Because the record was not filed in this court, as required by rule 16; "by or before the return-day;" because no return has been made to this court of the writ of error; because the citation has never been served; and because the bond antedates the writ of error, and is otherwise irregular and defective. It is sufficient to say that, as the cause was docketed and the record filed in this court within 60 days after the citation was signed, we think the first ground of the motion is untenable. The record shows that the writ of error was made returnable on October 7, 1891, whereas the citation issued on the same day admonishes the defendant in error to be and appear in this court 60 days after it bears date; that is, after August 15, 1891. Paragraph 5 of rule 14 requires writs of error and citations to be made returnable "not exceeding sixty days from the day of signing the citation." In view of these facts, we must infer that the return-day stated in the writ was due to oversight; very likely to an error made in the computation of time. The record having been filed within 60 days after the writ was issued, we will not, under such circumstances, hold that there has been any such default as warrants a dismissal of the writ.

The second ground of the motion is likewise untenable. The clerk of the lower court certifies on the writ of error that he "herewith transmits to the supreme court of the United States a duly-certified transcript of the record," etc. But the caption of the return, and the fact that the record was lodged in this court, shows conclusively that this was what the court intended. We will ignore such obvious mistakes, which do not tend to prejudice either party.

The third ground of the motion, above stated, has more merit. There is nothing in the record before us to show that W. T. Hutchins, upon whom the citation was served, was a person upon whom such service could lawfully be made; and by appearing specially for the purpose of this motion only, the defendant in error has not waived service of the citation. We are assured, however, that service was had upon an attorney who represented the defendant in error on the trial in the lower court, and it is clearly within our power to permit the return on the citation to be amended so as to show that fact.

The objections taken to the bond are not adequate to warrant us in dismissing the writ of error or in vacating the *supersedeas*. If there are defects in the bond, we have undoubted authority to allow a bond to be given which shall cure such defects. *O'Reilly v. Edrington*, 96 U. S. 724, 726; *Davidson v. Lanier*, 4 Wall. 453, 454; *Broien v. McConnell*, 124 U. S. 489, 490, 8 Sup. Ct. Rep. 559; *Anson v. Railroad Co.*, 23

How. 1. But, in view of the nature of the objections made to the bond, we are of the opinion that it is not necessary to require another bond to be given. It is made payable to the proper parties, it contains the proper statutory conditions under section 1000 of the Revised Statutes of the United States, and no objection is made to it on the ground that the penalty or the sureties are insufficient to secure the debt, damages, and costs, if the plaintiffs in error fail to prosecute their writ to effect. The sole objections to it seem to be that it was taken and approved by the lower court before a writ of error was sued out, and that it is not signed by both of the plaintiffs in error. Section 1007 evidently contemplates that security shall be taken when the citation issues; and such is the usual and proper practice. It was irregular, therefore, to take, approve, and file a *supersedeas* bond reciting the allowance of a writ of error before any such writ had in fact been allowed. But it was competent for the court to reapprove the bond on the issuance of the citation, and such approval may be inferred or presumed, and we think it ought to be conclusively presumed from the subsequent issuance of the citation and allowance of the writ of error. *Brown v. McConnell*, 124 U. S. 490, 8 Sup. Ct. Rep. 559; *Sage v. Railroad Co.*, 96 U. S. 714.

The objection taken to the bond because it was only signed by one of the plaintiffs in error has much less weight. The statute (section 1000) only requires the court "to take good and sufficient security." That such security has been taken (the bond being signed by two sureties) is not denied. The bond accordingly satisfies the requirements of the statute, though only signed by one of the plaintiffs in error.

The motion to dismiss the writ of error and vacate the *supersedeas* will accordingly be denied, if within 30 days the return on the citation is amended so as to show due service, and leave to amend such return is hereby granted.

PULLMAN'S PALACE-CAR CO. v. CENTRAL TRANSP. CO.¹

(Circuit Court, E. D. Pennsylvania. December 14, 1891.)

1. EQUITY—DISCONTINUANCE—CROSS-BILL.

The complainant in an equity suit will not be allowed to discontinue where an injunction has been granted and the defendant seeks, by a cross-bill consonant with the purpose of the original bill, to take advantage of the testimony in the case and to secure rights which he would otherwise have to secure by an independent action.

2. SAME—WHEN CROSS-BILL MAY BE FILED.

A cross-bill may be filed after answer filed, where the complainant is seeking to discontinue, and the object of the cross-bill is to enable the defendant to take an aggressive attitude and settle finally the rights in litigation.

In Equity. Motion by complainant for leave to discontinue and by defendant for leave to file a cross-bill. Bill by Pullman's Palace-Car

¹Reported by Mark Wilks Collet, Esq., of the Philadelphia bar.

Company against the Central Transportation Company to enjoin it from collecting rent under lease, to ascertain compensation due for the use of cars and to terminate relations between parties, and for a preliminary injunction restraining the collection of rent accruing subsequently. Complainant's motion refused. Defendant's granted.

Wayne MacVeagh, J. H. Barnes, and A. H. Wintersteen, for complainant, cited as to right to dismiss:

Chicago & A. R. Co. v. Union Rolling-Mill Co., 109 U. S. 702, 8 Sup. Ct. Rep. 594; *Railroad Co. v. Hendee*, 27 Fed. Rep. 678; *American Zylonite Co. v. Celluloid Manuf'g Co.*, 32 Fed. Rep. 809.

John G. Johnson, for defendant.

Before *ACHESON*, Circuit Judge, and *BUTLER*, District Judge.

BUTLER, District Judge. The bill which the plaintiff asks leave to withdraw, avers (among other things) that the lease therein named is invalid; and furthermore, that (if it is not) the plaintiff is authorized by its eighth section, and the happening of a contingency therein stated, to terminate it, on notice to the defendant; that the contingency has happened, the authority been exercised and notice given. It therefore prays the court to enjoin the defendant against proceeding at law to collect rent under the lease; to assist the plaintiff in making delivery of the leased property, and in ascertaining what compensation should be rendered to the defendant for its previous use; and generally to afford its aid in settling the controversy which has arisen out of the transactions between the parties, and terminating, finally, their relations. The court, acknowledging the plaintiff's right to terminate the lease under the circumstances stated, granted an injunction against proceeding at law to recover rent accruing subsequently to such notice; and declined to interfere with an action, then pending, brought to recover rent previously due, because the question of validity raised, could be interposed and decided on the trial thereof. Subsequently on such trial, and review by the supreme court, the lease was found to be invalid. The plaintiff in the bill now seeks to discontinue proceedings under it, while the defendant endeavors, through the instrumentality of a cross-bill, to avail himself of its use as a means of recovering possession of his property, or its equivalent, and compensation for the plaintiff's enjoyment of it under the lease. We do not think the plaintiff's motion should prevail. The propriety of allowing discontinuances in equity depends upon whether defendants may be prejudiced thereby. A decree, or decretal order, entered is usually a conclusive answer to the application. Here, not only was such an order entered, but it now appears that the proceeding, or a similar independent one commenced by himself is the defendant's only means of enforcing his rights—rights which the bill in a measure concedes. The principal object of the proceeding, originally, was to accomplish the object which the defendant now seeks; and considerable testimony has been taken with a view to this end. The defendant would, therefore, be seriously prejudiced by its discontinuance. Not

only would he lose the benefit of this testimony, but he would also be delayed, and might be compelled to seek the plaintiff in another jurisdiction. The object of the cross-bill is to enable the defendant to assume an aggressive attitude in the proceeding, and to use it as a means of settling and closing up the entire controversy on which it is founded. This object seems proper and commendable; and we do not find anything in the rules governing equity pleading, which forbids its allowance. The decisions in which it has been held that cross-bills come too late after answers have been filed—that they should be presented as soon as practicable, so as to avoid delaying the plaintiff's efforts to obtain a trial,—are not applicable to the circumstances of this case. The plaintiff's motion must therefore be dismissed and the defendant's allowed.

ACHESON, Circuit Judge, concurs.

SOUTHERN PAC. R. Co. v. STANLEY *et al.*

(Circuit Court, S. D. California. February 8, 1892.)

1. QUIETING TITLE—RAILROAD LAND GRANTS.

The rule that a suit to quiet title can only be maintained upon the legal title does not apply as against a railroad company, with respect to lands granted to it by the government, when it has done everything required to entitle it to the grant, since it is powerless to compel the government to issue a patent therefor.

2. SAME.

It would be inequitable to regard such a company as the legal owner for the purpose of imposing taxes upon it, while denying it the same standing with respect to the enforcement of its rights.

3. SAME—FOLLOWING STATE STATUTES.

Code Civil Proc. Cal. § 738, permitting actions to quiet title to be brought by persons not in possession, is applicable to suits in the federal courts.

4. RAILROAD LAND GRANTS—PASSING OF TITLE.

Under Act Cong. March 8, 1871, granting lands in aid of the Texas Pacific Railroad Company, the full equitable title passed at the time of filing the map of definite location of the road, and, as against such title, no rights could attach between that date and the date of the order withdrawing the land from market.

5. SAME—CLOUD ON TITLE.

A bill to quiet title, alleging that the United States had full title at the time complainant's grant attached, and that defendant claims under a patent issued by the state as for land to which the state was entitled in lieu of certain other grants, shows a cloud upon the title, although it is not alleged that such lands were ever listed to the state; since the state patent creates a presumption that all steps necessary to its issuance have been complied with.

6. SAME—LIMITATIONS—INTEREST OF GOVERNMENT.

In an action to quiet title to railroad grant lands, in respect to which the company has performed all the requisite conditions, and has constantly sought, without success, to obtain a patent, against one claiming under a state patent issued as for lands selected in lieu of other grants, the United States being legally liable to make the company's title good, has such an interest in the suit, although not a party, as will prevent limitation from running against the company's cause of action.

7. SAME—LACHES.

In an action by a railroad company to quiet title to lands granted to it by the United States no laches can be imputed to the company with respect to time passing between the date of the grant and the time of complete performance of the conditions thereof; for, though the title passes as of the date of the grant, it only does so by relation, upon the performance of the conditions, and before performance no such suit could be maintained.

In Equity. Suit by the Southern Pacific Railroad Company against Stanley and others to quiet title to lands. Heard on demurrer to the bill. Overruled.

Joseph D. Redding and Creed Haymond, for plaintiff.

Houghton, Silent & Campbell, for defendants.

Ross, District Judge. By the bill filed in this case the complainant seeks to have its alleged title to the land in controversy established, and to obtain a decree that the patent under which the defendants assert title to the premises is null and void, and enjoining defendants from claiming title thereto thereunder or at all. The demurrer raises a number of objections to the bill. The title claimed by the complainant comes from the act of congress of March 3, 1871, entitled "An act to incorporate the Texas Pacific Railroad Company, and to aid in the construction of its road, and for other purposes." The bill shows that the line of road thereby authorized to be located and built was located and built by the complainant, and that it thereby earned the granted lands. It alleges that on the 3d day of April, 1871, a map showing the definite location of the road was filed in the office of the secretary of the interior and in that of the commissioner of the general land-office; that the lands in controversy are within 20 miles of the line of the road as so definitely located and afterwards constructed; that at the time of the definite location of the route they had not been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of, for any purpose whatever, and that the United States had full title thereto on that day; that subsequent to the said 3d day of April, 1871, one J. Q. A. Stanley "made a location upon said land, as lieu land, in lieu of a portion of a sixteenth section of school land lost to the state of California under the grant of congress to it of March 3, 1853;" that thereafter the land was awarded to Stanley by the state of California; and that on the 24th of July, 1874, the state issued to him its patent therefor, under which the defendants assert title to the premises.

The first objection urged to the bill on the part of the defendants is that it does not appear therefrom that no other right than that set up in the bill attached to the land prior to the order withdrawing it from market, which the bill alleges was made on the 10th day of May, 1871. The answer to this is that, according to the averments of the bill, the title of the complainant attached to the land, not at the date of the order for its withdrawal from market, but at the time of the definite location of the route of the road. *Sioux City & St. P. R. Co. v. Chicago, M. & St. P. Ry. Co.*, 117 U. S. 408, 6 Sup. Ct. Rep. 790; *St. Paul & S. C. R. Co. v. Winona & St. P. R. Co.*, 112 U. S. 726, 5 Sup. Ct. Rep. 334; *Van Wyck v. Knevals*, 106 U. S. 360, 1 Sup. Ct. Rep. 336. The land in question, then, being, according to the allegations of the bill, vacant, unappropriated public land of the United States, became, by virtue of the congressional grant, the property of the complainant. True, the dry, legal title remained in the government; and this fact is the ground of another objection to the bill.

It is said that a suit to quiet title can only be maintained upon the legal title. Undoubtedly the general rule in equity practice is that such a bill cannot be maintained without clear proof both of the legal title and possession in the complainant. *Frost v. Spitley*, 121 U. S. 552, 7 Sup. Ct. Rep. 1129. But this rule, I think, should not be held to apply where, as here, the grant is from the government; where all of its conditions have been complied with, the land earned, and become taxable to the grantee in the state where it is situate; where the grantee's equity has become perfect, and nothing remains to be done but the conveyance of the dry, legal title, which the grantee is powerless to compel the government to make. See *Frost v. Spitley*, 121 U. S. 556, 7 Sup. Ct. Rep. 1129. It is certainly not in accordance with equitable principles to regard the complainant as the legal owner of the land for the purpose of imposing the burden of taxation upon it, (*Van Brocklin v. Tennessee*, 117 U. S. 169, 6 Sup. Ct. Rep. 670,) and not consider it in the same light when it comes to seek the enforcement of its rights respecting the property. By the rigid rules of law, complainant could not be regarded as the legal owner until the conveyance to it of the legal title from the government, and therefore in this court it could not maintain an action of ejectment for the recovery of the land. But this is an additional reason why a court of equity should regard the complainant in the light already indicated.

It is also contended that, as the bill fails to show possession of the land in complainant, it cannot be maintained. The point would be good but for the statute of California permitting such actions to be maintained whether the complainant be in or out of possession. Code Civil Proc. Cal. § 738; *People v. Center*, 66 Cal. 551, 5 Pac. Rep. 263, 6 Pac. Rep. 481; *Castro v. Barry*, 79 Cal. 446, 21 Pac. Rep. 946. Such a state statute, enlarging, as it does, the class of cases in which relief was formerly afforded by a court of equity in quieting the title to real property, is applicable to, and may be administered in, the federal courts. *Holland v. Challen*, 110 U. S. 15, 3 Sup. Ct. Rep. 495.

It is further urged that the bill does not show that the claim set up by the defendants casts a cloud upon the complainant's alleged title; and this because it is not alleged that the land in question was ever selected by the state or listed to it by the United States. But the bill does allege that the United States had full title on the day the complainant's grant attached to the land, and that thereafter the state issued to Stanley a patent therefor as land to which the state was entitled in lieu of a portion of a sixteenth section granted to it by the act of congress of March 3, 1853. The government of the United States is the original source under which both complainant and defendants claim title; the complainant under direct grant to it from congress, and defendants under a congressional grant to their grantor. "Every instrument purporting by its terms to convey land from the original source of title, however invalid, creates a cloud upon the title, if it requires extrinsic evidence to show its invalidity." *Pixley v. Huggins*, 15 Cal. 128. A patent from the state for lands in lieu of a sixteenth or thirty-sixth section

granted to it by the act of congress of March 3, 1853, shows at least a *prima facie* title in the holder, on which he could recover in ejectment in the absence of evidence overcoming it. The patent is attended with the presumption that every step necessary to its issuance has been complied with, including the listing of the land to the state. Unless this is so, it is difficult to perceive the use of such an instrument. The existence of such a patent creates a cloud upon the true title. *Van Wyck v. Knevals*, 106 U. S. 370, 1 Sup. Ct. Rep. 336.

Another objection urged by the defendants to the bill is that it is barred by lapse of time. It is therein alleged, in effect, that, ever since the grant to complainant attached to the land in question, complainant has been persistently and continuously, but in vain, endeavoring to procure from the officers of the land department of the government a patent for this, among other lands embraced by its grant. Counsel for defendants contend that the fact that complainant was during all of this time pressing its demand for a patent from the government does not excuse its delay in bringing the present suit against the defendants, which was not commenced until February 20, 1890; that complainant had the same title to the land in question on April 3, 1871, that it had on February 20, 1890; and that its right to maintain a suit of this nature, if it ever existed, accrued when the state patent was issued, on the 24th of July, 1874, and that complainant's long delay in asserting its rights against defendants ought to bar the suit. It is true the right to maintain the suit would have accrued to complainant upon the issuance of the state patent in July, 1874, if the land had then been earned by the building of the road; otherwise not. Complainant's title only became perfect by the compliance on its part with all of the conditions of the grant, and when that was done, the title related back to the date of the grant. It does not appear from the bill that the title of the complainant to the land in question thus became perfect prior to January, 1878. But, independent of this consideration, it seems to me that the reason of the court for denying the soundness of a like position of counsel in the case of *U. S. v. Curtner*, (decided in this circuit by Mr. Justice FIELD and Judge SAWYER,) (Cal.) 38 Fed. Rep. 1, applies to the present case. It is true the suit there was brought in the name of the United States, but it was brought in the interest of the railroad company, to procure a decree annulling the listing over to the state of certain lands selected by the state in lieu of certain sixteenth and thirty-sixth sections, and annulling certain patents issued by the state therefor; it being claimed that the lands were embraced in the grant to the railroad company. The court said:

"There has been no laches on the part of the railroad company. It has been pressing its claim earnestly before the department from the first, and it could not go any faster than the business and course of procedure of the department permitted. The company could not sue the government. Besides, we do not think the government is wholly without interest. If these lands are within the statutory grant, the company has earned them by a full performance of its part of the statutory contract, and an absolute, indefeasible right to a patent, unincumbered by any cloud, has vested. The government,

in that case, is legally bound to make a good title. It is legally liable to perform its part of the contract, and issue the patent, as required by the statute. The United States are therefore responsible to the railroad company for the land, or its full value. By the mistake of their officers, they have put it out of their power to comply with their contract, and they are interested to the full value of the land in setting aside the listing and patents resulting from their mistakes, or having them judicially adjudged inoperative and void, in order that they may relieve themselves from their liability."

Time does not run against the government when it is a party to the suit, unless it be a mere nominal party. The reason for this rule would seem to apply where the suit involves a liability of the government for its failure to do what the complainant has persistently and continuously sought to get it to do, and what complainant seeks by the suit to accomplish.

Demurrer overruled, with leave to defendants to answer within the usual time.

UNION LOAN & TRUST CO. v. SOUTHERN CAL. MOTOR ROAD CO.

(Circuit Court, S. D. California. February 8, 1892.)

STREET RAILWAYS—FORECLOSURE OF MORTGAGE—RECEIVERS.

In the foreclosure of a mortgage against a street-railway company, the receiver will not be directed to pay out money in his hands for the purpose of grading and macadamizing the street along and between the rails, in accordance with an order of the town trustees, when there is no lien in favor of the town for such an expenditure.

In Equity. Suit by the Union Loan & Trust Company, trustee, against the Southern California Motor Road Company, to foreclose a mortgage. Application by the city of San Bernardino for an order directing the receiver to pay out certain moneys for grading and macadamizing the street. Refused.

Rolfe & Freeman and John Brown, Jr., for city of San Bernardino.

S. M. White, for receiver.

E. H. Lamme, for complainant.

Ross, District Judge. This is an application by the city of San Bernardino for an order directing the receiver in possession of the property of the defendant company to pay out certain of the moneys in his hands, as such receiver, for the purpose and under the circumstances hereinafter stated. A part of the property of the defendant company of which the receiver took possession under his appointment was a street railroad on E street, in said city, built by R. W. Button, the assignor of the motor road company, under and by virtue of an ordinance of the city granting him the right to do so, which did not designate the kind or character of rails to be used, or how they should be laid, but did require that—

"Said Button shall macadamize the entire length of the street used by his tracks between the rails, and two feet on each side of said track; also be-

tween the tracks at those points where there may be turn-outs, side-tracks, or switches, and shall keep the same constantly in repair, flush with the grade of the street as it now is, or may hereafter be established by the board of trustees, with good crossings."

The road was built with T rails laid on ties. It was operated at heavy loss by Button's assignee, the defendant motor company, and, although the losses were much reduced by the receiver, its operation continued a non-paying business. On the 21st of April, 1891, the board of trustees of the city passed a resolution of intention to order a certain portion of E street on which the street railroad was constructed to be graded and macadamized, except such portions thereof required by law to be kept in order or repair by any person or company having railroad tracks thereon; and on the 4th day of August following, it ordered the work to be done. The board of trustees then notified the receiver to remove the T rails and ties in use on the road, and replace them with stringers and flat rails. The receiver, in acknowledging the receipt of the notice, declined to comply with the requirement contained in the order of the board, upon the ground that it was contrary to the franchise under which the road was constructed, and informed the trustees that, upon the return of the judge of the court to the district,—he then being in San Francisco holding court,—he (the receiver) would recommend an abandonment of the franchise, not only as respected the portion of the street proposed to be graded and macadamized, but for the entire line. A few days after this, to-wit, on the 25th of August, the board of trustees passed a resolution directing, among other things, that R. W. Button, his successors or assigns, grade and macadamize that portion of E street mentioned in the resolutions of April 21st and August 4th, between the rails and for two feet on each side thereof. On the 8th day of September, 1891, the court, for good cause shown, made an order authorizing and directing the receiver, among other things, to abandon the franchise under which the road was constructed and operated, and to remove the rails and ties from the street, which he did. The position of the city now is that there is an equitable obligation upon the defendant company to pay for grading and macadamizing that portion of the street described in the resolution of August 25th, falling between the places where the rails existed before their removal, and for two feet on each side thereof.

In view of the fact that the board of trustees, without the slightest legal or equitable right so to do, adopted an order requiring the receiver to take up the T rails and ties with which the road was built under the franchise theretofore granted to Button, and to replace them with stringers and flat rails, it is by no means clear that the equitable obligation contended for by the city exists; for such a costly change in the construction of a non-paying road would probably have been worse than its confiscation. And when it is remembered that the board of trustees notified the receiver to make that change without any right to do so, it is not easy to see any good ground for complaint on its part that the objectionable rails and ties were removed from the street, nor any just ground to complain that they were not replaced with stringers and flat

rails. But if it be conceded that there is some sort of moral obligation resting upon the defendant company to pay for the grading and macadamizing in question, it would not, upon well-settled principles, justify the court in directing the receiver to make such payment out of moneys in his hands. It is not pretended that any lien exists upon any of the property of the defendant company for the proposed work. Nor is it pretended that there was any specific contract on the part of the company for the payment of the proposed work. Even if there had been such a contract, the receiver could not properly be required to pay the money as requested; for, as there is no lien, such payment would be, in effect, to give a preference to such indebtedness. High on Rec. §§ 391, 398; *Ellis v. Railway*, 107 Mass. 1. In the case of *Southern Exp. Co. v. Western N. C. R. Co.*, 99 U. S. 191, the contract between the express company and the railroad company was that the latter should give to the former the necessary facilities for the transaction of all its business upon the road; forward, without delay, by the passenger trains, both ways, all the express matter that should be offered; do all in its power to promote the convenience of the express company both at the way and terminal stations; and carry free of charge the messengers in charge of the express matter; and the officers and agents of the express company passing over the road on express business. The consideration for these stipulations was a loan by the express company to the railroad company of \$20,000, to be expended in repairs and equipments for the road, the loan to bear interest at the rate of 6 per cent. per annum, and the payment of 50 cents per 100 pounds for all express matter carried over the road, to be applied in discharge of the loan and interest. The contract was to continue for one year from the 1st day of January, 1866, and until the principal and interest of the debt should be fully paid. The bill averred that the receiver had refused to carry out the contract, and that the principal of \$20,000, and a part of the interest, were unpaid. Among other things, the court said:

"There is another objection to the appellant's case which is no less conclusive. The road is in the hands of the receiver, appointed in a suit brought by the bondholders to foreclose their mortgage. The appellant has no lien. The contract neither expressly nor by implication touches that subject. It is not a license, as insisted by counsel. It is simply a contract for the transportation of persons and property over the road. A specific performance by the receiver would be a form of satisfaction or payment which he cannot be required to make. As well might he be decreed to satisfy the appellant's demand by money as by the service sought to be enforced. Both belong to the lienholders, and neither can thus be diverted. The appellant can therefore have no *locus standi* in a court of equity."

The application is denied.

UNITED STATES v. CASE *et al.*

(District Court, N. D. New York. February 19, 1892.)

ACTION ON POSTMASTER'S BOND—EVIDENCE—EX PARTE SETTLEMENT OF ACCOUNTS.

Ex parte accounts of officials of the post-office department, ascertaining a deficit in the accounts of a postmaster, are insufficient to support a judgment for the United States in an action on his bond, if the said officials act in a judicial and not in a ministerial capacity in arriving at the balance due.

At Law. Action by the United States against Riley W. Case on his bond as postmaster, to recover an alleged deficit in his accounts. It was tried at the term of this court held at Rochester, May 12, 1891. The plaintiff to prove its case depended solely upon statements of account made by the officials of the post-office department, and certified as required by law. It was contended on behalf of the plaintiff that these statements were sufficient to establish liability under sections 886 and 889 of the Revised Statutes, and the act of June 17, 1878, (20 St. at Large, pp. 140, 141,) which latter act provides—

"That in any case where the postmaster general shall be satisfied that a postmaster has made a false return of business, it shall be within his discretion to withhold commissions on such returns, and to allow any compensation that under the circumstances he may deem reasonable."

A verdict *pro forma* was ordered for the plaintiff, the court reserving the consideration of the defendants' objections until the hearing of the motion which was thereupon made, to set aside the verdict and for a new trial. This motion was based upon the ground, *first*, that the accounts offered did not prove a cause of action; and, *second*, that the matters in dispute between the parties had, before the commencement of this action, been fully allowed and settled. The district attorney withdraws opposition to the motion upon the authority of *U. S. v. Hutcheson*, *infra*. Motion granted.

D. S. Alexander, U. S. Atty., and *John E. Smith* and *Frank C. Ferguson*, Asst. U. S. Attys.

Walter S. Hubbell and *John Van Voorhis*, for defendants.

Coxe, District Judge. The accounts offered in evidence by the plaintiff bring the defendants into debt, because the officials of the post-office department have charged the defendants in gross with "commissions illegally claimed" and "property illegally retained," without a word of proof, so far as the accounts show, to sustain the charges. These officials have tried the question at issue between the department and the postmaster, found him guilty of malfeasance, assessed the damages against him and certified their findings. The evidence, if there was any, on which these findings are based, has not been returned. There is nothing to show what the property was that the postmaster is accused of retaining improperly, or its value, or the reasons which induced the officials of the department to make the charges relating thereto. The account does not show why the commissions are illegal. It contains nothing but the unsup-

ported decree of condemnation. If this sweeping and arbitrary power is conceded to the officers of the department, they could as well have made the deficiency twice or three times as great as it is. They have only to make a charge, no matter how unfounded it may be, and have it certified, and the postmaster and his bondsmen are without remedy. Of course the foregoing suggestion is made merely by way of illustration, without intending to intimate that such abuse of power has ever taken place; in the case at bar the officials unquestionably acted with entire good faith. It is thought, however, that it was not the intention of the law that executive officers should be clothed with the power thus to usurp the province of court and jury and decide, finally and irrevocably, questions of fact upon *ex parte* and hearsay statements. Such power is not found in the sections of the statute referred to. They were intended to promote the convenience of the departments and the courts. If the original of a paper, book or account is evidence, a copy properly certified, is equally admissible. It was not the intention of congress to admit incompetent evidence under the guise of a certificate. The following authorities are in accord with these views: *U. S. v. Jones*, 8 Pet. 375; *U. S. v. Forsythe*, 6 McLean, 584; *U. S. v. Buford*, 3 Pet. 12; *Hoyt v. U. S.*, 10 How. 109; *U. S. v. Smith*, 35 Fed. Rep. 490; *Cox v. U. S.*, 6 Pet. 172, 202; *Smith v. U. S.*, 5 Pet. 292; *U. S. v. Edwards*, 1 McLean, 467; *U. S. v. Patterson*, Gilp. 47; *U. S. v. Battie*, Id. 97; *Bruce v. U. S.*, 17 How. 437, 440; *U. S. v. Eckford's Ex'rs*, 1 How. 250.

Again, it is said that the provisions of the act of June 17, 1878, which authorize the postmaster-general to withhold commissions on returns which he is satisfied are false, do not permit him to charge a postmaster with commissions on alleged false returns where the accounts have, in the due course of business, been settled and allowed. He may withhold commissions, but having allowed them, he cannot recover them without due process of law. There is great force in this position. *U. S. v. Hutcheson*, 39 Fed. Rep. 540; *U. S. v. Johnston*, 124 U. S. 237, 8 Sup. Ct. Rep. 446.

It follows that the verdict must be set aside, and a new trial granted.

In re WALLER.

(District Court, W. D. South Carolina. February 12, 1892.)

1. WITNESSES—FEES—POST-OFFICE.

A person employed by a postmaster who receives a fixed salary, without any allowance for clerk hire, is not a "clerk or officer of the United States," within the meaning of Rev. St. U. S. § 850, declaring that such persons shall receive only their necessary expenses when summoned as witnesses in behalf of the government.

2. Post-Office.

There is no such office as deputy-postmaster of the United States.

Application of Lewis Waller for witness' fees. Allowed.

SIMONTON, District Judge. Lewis Waller, styling himself deputy-postmaster at Greenwood, S. C., is attending this court as a witness for a defendant. This defendant, being unable to pay his witnesses, obtained an order under section 878, Rev. St., and his witnesses, among them Waller, were summoned, and will be paid by the United States. Waller, being about to be discharged, claims the usual mileage and *per diem* of witnesses. Were he an officer of the United States, and summoned on behalf of the government, he would be entitled only "to his necessary expenses, stated in items, and sworn to, in going, returning, and attendance on the court." Rev. St. § 850. The same rule would be observed when an officer of the United States is summoned, and attends as a witness for the defendant, at the expense of the United States. Section 878, Rev. St., after stating the conditions under which the court may order witnesses to be summoned in behalf of an impecunious defendant, goes on: "In such case, the costs incurred by the process and fees of the witnesses shall be paid in the same manner that similar costs and fees are paid in case of witnesses subpoenaed in behalf of the United States." If he would be paid similar costs and fees as he would have secured had he been subpoenaed in behalf of the United States, he would get only his actual expenses. But this man calls himself deputy-postmaster. No such office is provided for in the acts of congress. It appears that the postmaster at Greenwood gets a fixed salary, out of which he pays such clerks as he may appoint. He need not appoint any. Under these circumstances, Waller cannot be called an officer of the United States. *U. S. v. Mouat*, 124 U. S. 303, 8 Sup. Ct. Rep. 505. Let him have the mileage and *per diem* of a witness, under section 848, Rev. St.

In re ROESSLER & HASSLACHER CHEMICAL CO.

In re W. J. MATHESON & Co., Limited.

(Circuit Court, S. D. New York. November 25, 1891.)

1. CUSTOMS DUTIES—CLASSIFICATION—PREPARATIONS OF COAL-TAR.

Where the determining characteristic of a product is something which it has derived from coal-tar the same is dutiable at 20 per cent. *ad valorem* as a "preparation of coal-tar," under the tariff act of March 3, 1883, (Tariff Ind., New, par. 83,) instead of as a "chemical compound," under paragraph 92, notwithstanding that some of the constituents of coal-tar have been eliminated and other materials added.

2. SAME.

Under this rule, "naphthionate of soda" and toluidine base are dutiable as "preparations of coal-tar."

Appeals from Decision of the Board of United States Appraisers. Reversed.

The report of the district attorney to the secretary of the treasury in the *Roessler & Hasslacher Chemical Company Case* is as follows:

"The proceeding was an appeal by the importers from a decision of the board of U. S. appraisers at this port, affirming the decision of the collector upon the classification of certain merchandise imported into this district by said importers in the S. S. *Nederland*, August 25, 1890, which was classified by the collector as 'chemical salt,' and assessed for duty at the rate of 25 per cent. *ad valorem*, under the provisions of Tariff Ind. (New,) 92, of the act of March 3, 1883. Against this classification the importers protested, claiming that the merchandise was a 'preparation of coal-tar,' dutiable only at 20 per cent. *ad valorem*, under paragraph 83, Tariff Ind. (New,) act of March 3, 1883. * * * It was proved by the importers that the merchandise consisted of 'naphthionate of soda,' and that it was at present known, and was known in March, 1883, in the trade and commerce of this country, as a preparation of coal-tar. The importers also called as a witness a chemist in the laboratory of the appraisers' department in this city, and proved by his testimony that the product in question was a combination of naphthionic acid with soda, and that naphthionic acid was derived from naphthaline, which was a product of coal-tar, the proportion derived from coal-tar being about 87 per cent., and the soda about 13 per cent.; that it was in fact a preparation of coal-tar, applicable to the commercial use of making so-called 'coal-tar colors,' but was itself not a color or dye; that there was no one product that embraced and included all the substances found in crude coal-tar."

The report of the district attorney to the secretary of the treasury in the *Matheson Case* is as follows:

"The proceeding was an appeal from the decision of the board of U. S. appraisers for this port, affirming the decision of the collector of this port on the classification of certain merchandise entered at the port of New York by the above-named importers per *Bohemia*, June 25, 1890, which merchandise was classified by the collector as a 'chemical compound,' and duty assessed thereon at the rate of 25 per cent. *ad valorem*, under Tariff Ind. (New,) 92, tariff of March 3, 1883. Against this classification the importers duly protested, claiming that the merchandise was a preparation of coal-tar, dutiable at 20 per cent. *ad valorem*, under Schedule A, tariff act of March 3, 1883, (Tariff Ind., New, par. 83.) * * * No evidence was taken before the board of general appraisers, and, after the proceedings were transferred to the circuit court, the importers procured an order from the court for the taking of testimony herein before one of the U. S. general appraisers as an officer of the court. On such reference the importers proved that the merchandise in question was known as 'toluidine base,' was a derivative of coal-tar, and was commercially known to the trade and commerce in this country in March, 1883, as a preparation of coal-tar. They also proved by the testimony of a chemist from the U. S. laboratory in the appraisers' department in this city that the so-called 'toluidine base' was made from toluole, which exists in coal-tar, and is first isolated by the process of distillation; that the toluole is transferred to nitro-toluole by the action of nitric acid; that the nitro-toluole, by treatment with caustic soda and zinc dust, becomes transformed to azo-toluene, which body becomes converted into hydrazo-toluene, from which the base is precipitated from the solution; that more than 80 per cent. of the toluidine base is derived from coal-tar, and that the commercial source of toluole, from which toluidine base is made, is coal-tar; that toluidine base itself was not a color or dye; that there was no one product that embraced and included all the substances found in crude coal-tar."

Comstock & Brown, for importers.

Edward Mitchell, U. S. Atty.

LACOMBE, Circuit Judge. The question as to such a compound as this being improperly described as a product of coal-tar because some of the constituents of coal-tar have disappeared, is, I think, sufficiently answered by the testimony, which shows that from pitch, which is expressly enumerated as one of the coal-tar products, several of its constituents have been eliminated. I do not think it was the intention of congress to restrict these paragraphs to products or preparations in which the entire constituents of coal-tar still remained, simply changed in some way or other by manufacture. Nor is it particularly material that other substances have been added, if the determining characteristic of the product or preparation is something which it has received from coal-tar, and this the testimony shows. For these reasons the decision of the board of appraisers is reversed. The articles should be classified under paragraph 83, as preparations of coal-tar, (not colors or dyes,) and not under the extremely broad designation of the other paragraph as "chemical compounds."

HAMMOND BUCKLE Co. v. GOODYEAR RUBBER Co.

(Circuit Court, D. Connecticut. February 13, 1892.)

PATENTS FOR INVENTIONS—INFRINGEMENT—PRELIMINARY INJUNCTION.

When there are grave doubts as to whether there is an infringement, and a prompt final hearing is assured, a preliminary injunction will be denied.

In Equity. Suit by the Hammond Buckle Company against the Goodyear Rubber Company for infringement of a patent shoe buckle. Heard on motion for a preliminary injunction. Injunction refused.

George W. Hey, for plaintiff.

C. H. Duell, for defendant.

SHIPMAN, District Judge. This bill in equity is to prevent the alleged infringement of letters patent No. 301,884, dated July 15, 1884, issued to Theodore E. King and Joseph C. Hammond, Jr., for a shoe clasp. The present hearing was upon a motion for a temporary injunction. The clasp of the patent was described and the patent was construed in the opinion of this court in *Buckle Co. v. Hathaway*, 48 Fed. Rep. 305, and in a subsequent decision of this court upon a motion for rehearing in the same cause. 48 Fed. Rep. 884. The buckle of the defendant is made under letters patent No. 418,924, dated January 7, 1890, to John Nase, and consists of two plates, firmly riveted together at the forward end, and free at the other end. The upper plate is bifurcated at its rear end, so as to form rearwardly extending arms. "The tongue is provided with flattened, laterally projecting pivots, which are journaled in angular flanged bearings, formed by bending the ends of the

lower plate upward at right angles, and the upper plate is cut through or slotted in each of the rearward extensions, permitting the upwardly extending ends or lips of the lower plate to project through the slots." The pivots of the tongue pry apart the two leaves of the tongue-plate in opening the clasp, and the upward projections of the under plate are and must be long enough to be retained in the slots in the upper plate when the clasp is opened, so that the tongue shall not slip out from the tongue-plate. When the tongue engages with the catch-plate, the latter is pulled over the bifurcated extensions of the upper plate, and rests upon the upwardly projecting ends of the lower plate, which constitute one side of the bearings in which the tongue is pivoted. These projections support the catch-plate when strain is applied by the pull of the tongue upon it. The bifurcated extensions of the double-leaved tongue-plate of the patented buckle were for the purpose "of forming supports, upon which the catch-plate is drawn as the tongue is closed, and which prevent the catch-plate from changing its position." The plaintiff and its experts think that each plate of the defendant's buckle extends rearwardly beyond the pivots, and that both plates form the supports which are described in the patent. It is not clear to me that the arms of the lower plate extend rearwardly of the pivot in the sense in which that language is used in the patent. The ends of the lower plate form the bearings for the tongue, and are turned upward at right angles; and it does not seem to me, though I do not assert it positively, that the rearward extension beyond the pivot of the lower plate of the patented buckle exists in the defendant's buckle, as contemplated in the patent, though it may nominally exist.

Upon the question of infringement, it is to be premised that the arctic buckle patents and the modifications of the same general type of clasp buckles are so numerous that the scope of each patented improvement must be a narrow one, and differences in construction which are apparently slight may make patentable differences. It has been heretofore held upon this patent that the mere facts that the upper plate of an alleged infringing buckle is a spring-plate, and that the lower plate does not extend rearwardly of the pivot, do not prevent infringement, provided the bifurcated upper plate extends on both sides of the tongue rearward, to afford a bearing surface for the catch-plate.

The defendant's buckle has an additional peculiarity of construction. If the suggestion which has been made is correct, the lower plate does not extend rearwardly of the pivot, and the catch-plate rests upon its upturned ends, whereas the catch-plate of buckle, D, in the *Hathaway Case*, rested directly upon, and was supported by, the upper plate. In this buckle the catch-plate is directly supported by the upwardly projecting sides of the bearings in which the tongue is journaled. The position of the defendant is that it is not indirectly supported by the upper plate, but that the extensions of that plate are for the purpose of protecting or walling in the upturned ends of the under plate, so that they shall not be drawn away, and thus permit the pivots of the tongue to slip out from their bearings.

I do not decide that there is no infringement, but I think there are such doubts in regard to the question that a temporary injunction should not be granted, especially as assurances were given that a prompt final hearing can be had. The case is in such narrow limits that these assurances can be fully carried out.

JAROS HYGIENIC UNDERWEAR Co. v. SIMONS *et al.*

(Circuit Court, D. Massachusetts. February 15, 1892.)

TRADE-MARK—INFRINGEMENT.

An underwear trade-mark, consisting of a sun surrounded by rays, having a distinctly marked human face, and frequently, though not necessarily, bearing the words "Warmth is Life," is not infringed by a symbol having an imperfect outline, somewhat resembling sun-rays, but whose characteristic feature is a circle inclosing a monogram, the label never bearing the words "Warmth is Life," but always having the name of the manufacturing company using it.

In Equity. Suit by the Jaros Hygienic Underwear Company against Stephen B. Simons and others, for infringement of a trade-mark; Bill dismissed.

William P. Preble, Jr., for complainant.

Charles L. Burdett, for defendants.

COLT, Circuit Judge. This suit is for the infringement of a trade-mark representing the sun. The bill alleges that the complainant, the Jaros Hygienic Underwear Company, is a corporation organized under the laws of the state of New York, and a citizen of that state. The evidence discloses that the trade-mark in controversy is the property of the Jaros Hygienic Underwear Company, a corporation organized under the laws of the state of Illinois, and located and doing business at Chicago, Ill. There is no evidence going to prove that the complainant company succeeded to the property and rights of the Illinois company. Upon the record as it stands, therefore, the complainant has not proved any title to the trade-mark in question. The trade-mark consists of a symbol of the sun, surrounded by rays. This mark is frequently used with the words "Warmth is Life" on the face of the sun, but this is not an essential feature. The trade-mark shows the sun as a circular body, with a distinctly marked face, comprising eyes, nose, and mouth.

The real defendants in this case are the Beach Manufacturing Company of Hartford, Conn., the nominal defendants being their selling agents. While the design which the Beach Manufacturing Company use upon their underwear has an imperfect outline, which might be called the rays of the sun, yet the distinctive characteristic of their label or mark is their monogram, inserted in the center of a circle. They do not use the words "Warmth is Life." They print in prominent characters upon the label the words "The Beach M'fg Co., Hartford, Conn." Considering the striking differences between the two designs, I do not

think there is any infringement, and it is not shown that any purchaser has ever been deceived in buying the underwear made by the Beach Manufacturing Company for the underwear made by the complainant company.

Bill dismissed.

THE JULIA FOWLER.

HANSEN v. THE JULIA FOWLER.

(District Court, S. D. New York. January 28, 1892.)

PERSONAL INJURIES—DEFECTIVE ROPE—KNOWLEDGE OF MATE OF VESSEL—ACQUISITION OF SAILOR.

While libellant, a seaman, was employed in scraping the mainmast of the Julia Fowler, on a triangle surrounding the mast, the rope holding the triangle broke, precipitating libellant to the deck, and causing injuries, to recover for which this suit was brought. The evidence showed that the rope was old and spliced, and that the attention of the mate, who rigged the triangle and was in charge of the work, had been called to its character before the accident. It also appeared that all the men considered the rope of doubtful sufficiency, but that they continued the work without objection, without demanding a new rope, and there was no evidence to show a new one would not have been furnished them had they asked for it. *Held*, that this was an acquiescence in the wrongful act of the mate, charging libellant also with negligence. Four hundred dollars damages awarded.

In Admiralty. Libel by Frank S. Hansen against the schooner Julia Fowler for personal injuries. Decree for libellant.

Carpenter & Mosher, for libellant.

Henry D. Hotchkiss, for claimant.

BROWN, District Judge. On the 7th of August, 1891, the libellant, a seaman on board the Julia Fowler, was at work with two others scraping the mainmast on the triangular frame-work of wood surrounding the mast, which had been rigged up by the mate of the vessel for them to sit on while at work. One side of the triangle was held by the end of the main throat-halliard, which gave way while the libellant was at work, so that he fell upon the deck and suffered injuries which up to the present time have disabled him from work. The above libel is filed to recover his damages, alleging negligence in that the halliard was known to be unfit for the purpose.

The evidence shows that the triangle was rigged up under the immediate direction and inspection of the mate; that the halliard was broken at a splice; that it had not been used for the same purpose before, and was unfit and insufficient to support the three men who were sent to work in the triangle in the way that it was rigged, namely, to sustain the triangle by a single line, or purchase, instead of having the line rove through the three sheaves of the block above, and the two sheaves of a block below, which would have divided the weight among five parts or purchases of the same line. The master, who at the time

was sick below, states that the line would have been sufficient had it been rigged in the latter way; and that the latter was the proper and usual mode of rigging the triangle, though it is sometimes done in the mode used in this case. The mate's statement that he had never seen any other mode used at sea makes me discredit his testimony on all controverted points.

It is plain that the mate was negligent in the performance of his duties in the use of such a line to rig the triangle in that manner. He ordered the use of this particular rope, and superintended the rigging of it. The defect in the line was manifest upon inspection, as it was spliced, and whipped for smooth running. The negligence of the master, or chief officer who acts in the master's place, to provide safe appliances for the use of the seamen, and the deliberate use of rigging or methods plainly unsafe, affects both ship and owners with liability for the consequent damage. The chief officer was not acting in the mere capacity of a fellow-laborer, as in *Quinn v. Lighterage Co.*, 23 Fed. Rep. 363; *The Queen*, 40 Fed. Rep. 694, 697; *Hedley v. Pinkney*, (1892,) 1 Q. B. 58. The case is substantially the same as that of *The A. Heaton*, 43 Fed. Rep. 592, in which this rule was applied in respect to the use of a rotten gasket. See, also, *The Frank and Willie*, 45 Fed. Rep. 494. The libelant had nothing to do with preparing or rigging the triangle; but when it was ready, he was ordered aloft to work upon it, and obeyed.

In defense it is urged that not long after the libelant and his companions had begun work aloft, and while he was sitting in the triangle, the mate noticed from the deck that the rope was defective, and called the attention of the men to it, and asked Hansen if the rope was secure, and said that he did not like the looks of it; that the libelant thereupon examined the rope, and replied that it looked all right; and that the men continued at work for a half hour afterwards before the halliard broke. I do not credit this version, but that of the men, who say that Hansen's reply was in effect that it was a mighty poor rope for such work; and the weight of evidence on this point, notwithstanding the fact that the libelant does not remember his language, is that he further suggested that they hurry on, so that if they fell, they would have a less distance to fall. Does that fact release the mate and ship from the consequence of their prior negligence, and transfer the whole risk thenceforth to the seamen? I think not. The men were neither told to come down, nor does the mate say that he authorized the men to come down, if they thought the rope insufficient. The men testify that what the mate said was, "Look out boys; that is a poor rope." The direction amounted to little if anything more than to be cautious in their work and movements, so as not to make any unnecessary strain upon the rope. The insufficiency arose not merely from the splice, but in adjusting the rope with a single bearing. The evidence leaves no doubt, however, that all the men considered the rope of doubtful sufficiency, and that they would have been justified in demanding another rope, or a readjustment of it in a safe manner; but that they continued to work without objec-

tion. Nor can I find that, if a proper rope or readjustment had been asked by them, it would not have been allowed. I do not see how I can hold this to be less than acquiescence by them in the wrongful act of the mate, such as to charge the men also with negligence or want of reasonable care. The case falls, therefore, within the principles of *The Max Morris*, 137 U. S. 1, 11 Sup. Ct. Rep. 29, 24 Fed. Rep. 860. Though the libelant is yet far from well, his ultimate recovery, upon the evidence, seems probable. I allow him \$400, and costs.

THE HOPE.

SUN INS. CO. v. THE HOPE.

(District Court, D. Washington, N. D. February 11, 1892.)

MARITIME LIENS—INSURANCE PREMIUMS.

Under the general maritime law there is no lien on a vessel for marine insurance premiums due from her owner.

In Admiralty. Libel by the Sun Insurance Company against the bark Hope, etc., to recover insurance premiums. Heard on exceptions to the libel. Sustained.

Wm. H. Whittlesey, for libelant.

C. D. Emery, for claimant.

HANFORD, District Judge. This is a suit *in rem*, to recover the amount of a premium for marine insurance issued to the owner of the vessel libeled. The claimant has filed exceptions to the libel on the ground that there is no lien to support process *in rem*, and the court is without jurisdiction. There is no statute giving a lien for insurance premiums in this state, and whether such a lien exists under the general maritime law is a question upon which I find a conflict of authority. But a majority of the cases, and I think the weightier decisions, affirm that insurance for the personal benefit of an owner is not essential to render a vessel seaworthy, or an aid to navigation, and there can be no reason for giving credit to the vessel for such expense; therefore, the lien does not exist. *Henry*, Adm. p. 130; *The John T. Moore*, 3 Woods, 61; *The Jennie B. Gilkey*, 19 Fed. Rep. 127; *The Waubaushene*, 22 Fed. Rep. 109; note to *The Dolphin*, 1 Flip. 580. I hold to this view, and will sustain the exceptions.

KERRUISH v. HAVEMEYERS & ELDER SUGAR REFINING CO.**CHURNSIDE v. SAME.**

(Circuit Court of Appeals, Second Circuit. November 14, 1891.)

SHIPPING—DELIVERY OF CARGO—SHORTAGE.

On the evidence, *held*, that all the sugar received by the steam-ships Ixia and Hampshire had been delivered, the contents of the missing bags having been put into new bags by the ships' men; and respondent's claim to make a deduction from the freight because of such alleged shortage should not be allowed. 42 Fed. Rep. 511, affirmed.

Appeal from the Circuit Court for the Southern District of New York.

In Admiralty. Suit by the masters of the vessels Hampshire and Ixia against the Havemeyers & Elder Sugar Refining Company to recover a balance of freight. A decree for libelants was affirmed by the circuit court, and respondent appeals. Affirmed.

The evidence showed that the respondent took charge of the unloading, and its employes handled the bags roughly, destroying some of the bags, and obliterating their marks; that a great deal of sweepings remained after the discharge, which were placed in new bags by the ships' coopers. The Hampshire delivered 211 more bags than the bills of lading called for; the Ixia, 76. The shortage in weight was not 1 per cent. of the amount stated in the bills of lading, which could be accounted for by the tendency of sugar to vary in weight from inherent causes. The district court held that all of the sugar received had been delivered, and hence that the alleged offset to libelants' claims failed, and they were entitled to recover, (42 Fed. Rep. 511;) and, on appeal, a *pro forma* affirmance was rendered by the circuit court, whence respondent appealed to this court.

Parsons, Shepard & Ogden, for appellant.

Conners & Kirlln, for appellees.

Before WALLACE and LACOMBE, Circuit Judges.

PER CURIAM. There is no proof of a short delivery of cargo in these cases, except as to the sugar in the 11 cargo bags not delivered by the Ixia, and the 15 not delivered by the Hampshire. We are satisfied that the contents of these bags were delivered in the 76 new bags of the Ixia, and the 211 of the Hampshire, containing sweepings, and that some of the cargo bags were destroyed by rough usage during the discharge, and others, partly destroyed, were put inside the new bags. The decree of the circuit court in each case is affirmed, with interest, and the costs of the appeal to be paid by the appellant, and the cause remanded to the circuit court for further proceedings in conformity with this opinion.

THE SAMUEL W. HALL.

HALL v. KELLY.

(District Court, S. D. New York. January 30, 1892.)

1. SHIPPING—CHARTER-PARTY—OPTION TO REJECT VESSEL—WHERE EXERCISED.

Upon charters for loading the ship in remote places across the seas, options providing for the acceptance or rejection of the charter are to be exercised at the place where the ship is to load, and the ship has no right to call upon the charterer to exercise his option elsewhere.

2. SAME—NON-ARRIVAL AT PORT OF TRADE BY SPECIFIED DATE.

A charter of a vessel from Macoris to the United States stated that the charterer was to have option of canceling charter if vessel had not arrived at Macoris on or before June 20, 1891. On June 22d, the vessel still being at Guadaloupe, her master telegraphed to his agents at Philadelphia asking whether he should go to Macoris. They consulted the charterer in New York, and, no release of the charter being obtained, the vessel proceeded to Macoris, arriving there July 1st to find her cargo had been shipped on another vessel. On suit brought to recover damages for non-fulfillment of the charter, *held*, that the ship took the risk of not finding the cargo after the appointed day, and could not recover in this suit.

In Admiralty. Suit by John W. Hall against Hugh Kelly for damages in failing to load vessel under a charter. Decree for defendant.

Wilcox, Adams & Green, for libellant.

George A. Black, for respondent.

BROWN, District Judge. On the 9th of April, 1891, by a charter-party made between the defendant and Thomas Mumford, master of the schooner Samuel W. Hall, then lying at Philadelphia, the vessel was chartered for a voyage from Macoris, San Domingo, with a cargo of sugar, to the breakwater for orders, and to discharge between Hatteras and Boston. The charter stated:

"It is understood vessel loads lumber at Bucksville for Guadaloupe and when discharged there it is to proceed to Macoris to enter upon this charter.
* * * The charterers to have option of canceling charter if vessel not arrived at Macoris on or before June 20th, 1891."

On the 22d of June, the schooner being still at Guadaloupe, her master telegraphed to her agents in Philadelphia to ascertain whether she should proceed to Macoris, and not obtaining any release of her charter obligations, she proceeded thither. She sailed from Guadaloupe on the 28th of June, arrived at Macoris on the 1st of July, and on reporting to Mr. Mellor, the defendant's correspondent there, was informed that the cargo designed for the Hall had been shipped on the 26th of June on board another vessel; and that he had no cargo for her. The master thereupon proceeded to Turk's island, where he obtained a cargo of salt for Providence, R. I.; and thereafter filed this libel for \$621 alleged damages for the refusal to load the cargo of sugar at Macoris.

I cannot sustain the libellant's claim. The charter was in fact made for account of Mr. Mellor, who had a sugar plantation at Macoris, and had been accustomed to obtain through the defendant charters of vessels to come thither for his products. The present charter, however, did not

state that it was for account of Mr. Mellor; but though Mr. Beattie in his conversation with the defendant on the 23d of June, had sufficient notice that the charter was for account of the defendant's "friends" at Macoris, I regard even this fact as immaterial, and should decide in the same manner if the charter had been on defendant's own account and he had intended to load the vessel with his own sugar at Macoris. The covenant of the charter-party was that the vessel should go "to Macoris to enter on the charter." If she did not arrive there by the 20th of June, the defendant had the option to refuse to load. Upon such charters for loading at remote places across the seas, it has always been the law that the option provided for was to be exercised at the place where the ship was to load. Whoever represents the charterer there is the person to exercise the option. There has been no question as to the law upon this point since the decision of Lord MANSFIELD in *Shubrick v. Salmond*, 3 Burrows, 1637. In that case, it is true, the terms of the charter-party indicated more explicitly than in this case that the option was to be exercised after the ship's arrival. But no stress is laid upon this circumstance in the decision, the ground of which was that the ship had covenanted to go there at all events; that the ship thereby became the "insurer of the risk" of getting there before the time specified, in which event she was sure of a freight; but still had a general *chance* of getting a freight even though she should not arrive until after that time. The pleadings in that case admitted that the ship failed to arrive at the time appointed, "through contrary winds and bad weather."

The whole object of such a stipulation is to relieve the charterer of the necessity of holding back his cargo beyond a fixed date for the ship's benefit, if other means of forwarding it are at hand; while the ship, unless relieved, remains bound to go forward and take the risk of any shipment before her arrival. In the present case the vessel had no right, before reaching Macoris, to call upon the defendant to exercise his charter option at New York; nor does the evidence indicate that any such call was understood or intended to be made. From the nature of the case any such call would be unreasonable, both because at such a distance the charterer in New York could not keep informed of all the circumstances at such a place as Macoris; and also because the ship had still a voyage to make in order to reach Macoris. Whether, if she sailed, she would ever reach there, and the time when, if ever, would depend on the contingencies of the voyage; and the charterer was not required to take any of these risks. No doubt the charterer, when informed that the vessel could not arrive at the time appointed, might, if he chose, make a new agreement, or absolve the ship from the charter; but he was under no obligations to do so, or to relieve the ship from any of the risks she had assumed by the charter. Communication with Macoris was slow. A telegram and reply required from five to seven days. Even had telegraphic communication been much easier, the defendant was under no obligation to keep in telegraphic communication with Macoris for the ship's benefit, and merely to enable him to answer instantly her inquiries at New York, rather than at Macoris, the proper place.

When the defendant was applied to in New York to know whether the ship should proceed or not, it is manifest from the letter written by Mr. Beattie, and from Mr. Beattie's testimony as well as Mr. Kelly's, that the latter declined to exercise any option in the matter; that Mr. Beattie understood that this option must be exercised at Macoris, where the vessel was to be loaded; that Mr. Kelly had no positive information; but as he had no advices of shipment on any different vessel, he thought the chances were very strong that "his friends" at Macoris would not have loaded the cargo on another vessel, because there were not many vessels there. Even Mr. Beattie's testimony is wholly inconsistent with the idea that Mr. Kelly intended at that interview to exercise any option under the charter; plainly he left the option to the parties at Macoris, stating only his impressions of the chances.

The letter written by Mr. Beattie, of which so much is made by the libellant, was not competent evidence except in so far as admitted by the libellant in subsequent interviews with him; but it is plain that the defendant never admitted the exactness and completeness of Mr. Beattie's version of the interview. On the contrary, in his interview with Mr. Beattie, his friend, the defendant complained that the letter had brought him into trouble, and that Mr. Beattie might have expressed himself differently. As between friends who had no wish to quarrel, this means much; but Mr. Beattie's own testimony shows that the defendant had no precise information of the facts at Macoris, and only spoke of the great chances that the vessel would get the cargo; and that there was no idea that Mr. Kelly was exercising his charter option. Mr. Beattie did not inquire who were the parties at Macoris, nor propose telegraphic inquiries there; evidently because communication was slow, and he supposed the vessel was *ready to sail at once*. The substance and effect of the interview were that in the absence of exact information, there was no help for the vessel but to proceed to Macoris, as the charter required, and take the chances. In this sense the letter of Beattie was substantially correct. In such a reply to Beattie's inquiries the defendant was acting strictly within his legal rights, and, under the circumstances shown, without any violation of the slightest equitable right of the ship.

The conduct of the master of the ship, on the contrary, was most reprehensible in its disregard of the interests of the charterers. He knew from a week to 10 days before the 20th of June that he could not be at Macoris on the 20th, the time required by the charter. Fairness, as well as reasonable prudence on the ship's account, required him, if he did not wish to take all chances, to notify the charterers at once. He waited until two days after the time appointed; and when he telegraphed to his own agents, it was without notice to them that the ship was not even then ready to sail; and she did not sail until five days afterwards.

The evidence shows nothing to relieve the vessel from the obligations which she assumed by the charter, and the risk of finding the cargo gone if she arrived after the 20th. Decree for the defendant with costs.

MCQUADE v. McNAUGHTON *et al.*¹

(District Court, E. D. Pennsylvania. January 29, 1892.)

SHIPPING—FAILURE TO SHIP FULL CARGO—NEGLIGENCE OF CHARTERER.

The failure of a charterer to load a full cargo on a vessel before she was obliged to leave to reach another port, where she had contracted to be ready to deliver by a certain date, will not be excused on account of the incapacity of the master when the receipt of cargo and management of the vessel were in the hands of a competent person, and the failure to load resulted from the charterer's lack of expedition.

In Admiralty. Libel by James McQuade, master of the barge Kathleen, against Henry McNaughton & Co., to recover damages for failure to deliver a full cargo. Decree for libelant, with order to appoint commission if parties do not agree on damages.

Flanders & Pugh, for libelant.

John A. Toomey, for respondents.

BUTLER, District Judge. The respondents on June 7, 1890, chartered the barge Kathleen, owned and commanded by the libelant, to carry a cargo of railroad ties from King's Creek, Va., to Philadelphia, for 17 cents per tie. The charterers were to load the ties—which were to reach Philadelphia by July 1st. The barge arrived at King's Creek June 15th ready to load. Several days elapsed before any ties were put on board, and when it became necessary to start for Philadelphia she had taken in but 1,556. With these she proceeded on her voyage, as the charterers required her to do. The libel sets out claims to damage for the failure to load (or pay for,) a full cargo—which the libelant says is 3,000 ties; and for delay at Philadelphia. The second claim, however, is abandoned.

The respondents do not deny that the cargo was short; they admit that the barge could have carried only about 2,300. But it is alleged that the failure to load more than were carried arose from fault of libelant—that he was intoxicated during most of the time while at King's Creek, and that the respondents were thereby hindered and delayed in loading. The burden of proof respecting this is on the respondents; and the testimony does not support their allegation. There is no doubt that the libelant was drinking; to what extent need not be determined. The receipt of cargo, and management of the barge for the time, was in charge of his son, a young man 24 to 25 years old, fully competent for the service; and I do not find anything to justify belief that the respondents were delayed in their work by the libelant or by anything for which he is responsible. On the other hand it seems pretty clear that their failure to load a full cargo resulted from their own want of expedition. They had several other vessels to dispatch at the same time, and seem to have been tardy in beginning the work. The ties were gathered from different places, some at an inconvenient distance,

¹Reported by Mark Wilks Collet, Esq., of the Philadelphia bar.

and carried in lighters—several of which were too small to be well adapted to the service.—I do not believe, however, that the barge had capacity for 3,000 ties. On the only previous occasions when she is shown to have carried a similar cargo, she had on 2,328 to 2,363. One of her own witnesses, Mr. Dempsey, says 2,300 oak ties, such as are made in the neighborhood of King's Creek, is a full load for her, in his judgment. The libelant and his son put her capacity a good deal higher. In view of all the evidence touching this point I do not think it would be safe to credit her with a capacity to carry more than 2,400.

The libelant will be allowed a decree for the balance unpaid, estimating her capacity at this rate. If the parties agree on the sum to be paid, in this view of the facts, the expense of a reference will be avoided.

Otherwise a commissioner must be appointed.

THE WILLIAM L. NORMAN.¹

SMITH v. THE WILLIAM L. NORMAN.

(District Court, E. D. New York. November 20, 1891.)

SEAMEN'S WAGES—CANAL-BOATS—REV. ST. § 4251—WHAT IS CANAL-BOAT.

Section 4251, Rev. St. U. S., provides that "no canal-boat * * * shall be subject to be libeled in any of the United States courts for the wages of any person who may be employed on board thereof," etc. On suit brought for the value of services rendered by the libelant on board the William L. Norman, in form a canal-boat, *held*, that a vessel engaged in navigating canals is a canal-boat, within the meaning of the statute, without reference to its form, and a boat not engaged in navigating canals is not a canal-boat, within the meaning of the statute, whatever may be its form.

In Admiralty. Suit against the William L. Norman to recover wages.

Stewart & Macklin, for libelant.

Peter S. Carter, for claimant.

BENEDICT, District Judge. This is an action to recover for services rendered by the libelant on board a vessel called the William L. Norman. This vessel was in form a canal-boat, and was employed in navigating the canal until April in the year 1889, when she changed owners. Since that time the vessel has not been engaged in navigating the canal, but has been employed in the harbor of New York, in transporting grain and other articles about the harbor. The principal question in the case is whether this boat is exempted from liability to be proceeded against for wages by reason of section 4251 of the Revised Statutes of the United States, which provide as follows:

¹Reported by Edward G. Benedict, Esq., of the New York bar.

"No canal-boat, without masts or steam-power, which is required to be registered, licensed, or enrolled and licensed, shall be subject to be libeled in any of the United States courts for the wages of any person who may be employed on board thereof, or in navigating the same."

No case is found where this question has been decided. It is new in this court. Looking to the object of the statute, it seems to me that it must be held that the words "canal-boat," as used in the statute, refer to the employment in which the vessel is engaged at the time of the rendition of the service, and not to the form of the vessel. A vessel engaged in navigating the canals should, I think, be held to be a canal-boat, within the meaning of this statute, without reference to its form. A boat not engaged in navigating canals is, in my opinion, not a canal-boat, within the meaning of this statute, whatever may be its form. In this view the statute is no obstacle to the present action.

As to the defense that the boat has been sold since the rendition of the service, my opinion is that the transfer of the boat disclosed by the evidence does not affect the libellant's lien, nor does the case show laches sufficient to deprive the libellant of the right to recover the wages due him. If the parties do not agree upon the amount due, let there be a reference.

THE MARIE, (DOMINICK DUPEE, Libellant.)

(District Court, D. Oregon. February 11, 1892.)

NORWEGIAN VESSEL—CREW OF—AMERICAN CITIZEN.

Any person who, in pursuance of any arrangement or contract, for a long or a short period or voyage, is on board of a Norwegian vessel, aiding in her navigation, is a member of the crew of such vessel, within the purview of article 13 of the treaty of 1827 between the United States and the kingdom of Norway and Sweden, and the consul of that country has exclusive jurisdiction of any difference arising between him and the master of such vessel; and it matters not if such person is an American citizen, and shipped at an American port.

(Syllabus by the Court.)

In Admiralty. Suit by Dominick Dupee against the steam-ship Marie. Exceptions to the libel sustained.

Mr. John Ditchburne, for libellant.

Mr. Edward N. Deady, for claimant.

DEADY, J. This suit is brought by Dominick Dupee against the steam-ship Marie to recover a balance of \$63.16 which he claims to be due him.

In the amended libel it is alleged that the libellant shipped at San Francisco on October 2, 1891, on board the steam-ship, as cook, at the monthly wages of \$35 per month; that he signed articles written in the Norwegian language, which were not interpreted to him nor understood by him; that libellant is informed that said articles contain a stipulation

that the port of discharge should be some place in Great Britain, but the libelant had an agreement with the master that he should have the right to leave the vessel at any port at which she might touch; that the vessel sailed from San Francisco for Departure Bay, in British Columbia, where she arrived on February 2, when the libelant demanded of the master his discharge and wages, which the latter refused, when, as it is implied rather than stated, he left the vessel without permission; that his wages during this period amounted to \$141.16, of which he has received \$78, leaving a balance due him of \$63.16, for which he prays a decree.

The claimant and master of the vessel, T. A. Schjott, excepts to the libel as follows:

The Marie is a Norwegian vessel, owned wholly by subjects of Norway and Sweden. That in and by the treaty between the United States and kingdom of Norway and Sweden all differences arising between the captains and crews of vessels belonging to the kingdom shall be settled by the consuls thereof, without the interference of the local authorities.

This treaty stipulation is contained in article 13 of the treaty of July 4, 1827. Pub. Treaties, p. 740.

Counsel for the defendant contends that an American citizen, shipping in an American port, with a right to leave the vessel at any port at which she may touch, is not within the purview of this treaty.

But it does not appear from the libel that the libelant is an American citizen. From his appearance in court, he is evidently a "colored" person of some nationality. However, it may be taken for granted he is an American citizen.

From an inspection of the articles, which have been exhibited to me, it appears they were signed by the libelant before the Swedish consul in San Francisco. They are a printed formula in the Norwegian language, with blanks filled with a pen, and at the bottom, in the same writing, there is a special clause in English, in these words: "This contract is binding for one year on the part of Dominick Dupee, or until the vessel reaches England." The signature of the libelant is immediately under this clause, and the master's also.

But this question must be disposed of upon the statement contained in the libel.

By the treaty the consuls of either nation have a right "to sit as judges and arbitrators in such differences as may arise between the captains and crews of the vessels belonging to the nation whose interests are committed to their charge, without the interference of the local authorities."

The words "crews of the vessels," as here used, include all of the ship's company,—all the seamen and officers, except the captain. Rap. & L. Law Dict. *verb.* "Crew;" *U. S. v. Winn*, 3 Sum. 209.

The crew of a vessel,—the ship's company,—in a general sense comprises all persons who, in pursuance of some contract or arrangement with the owner or master, are on board the same, aiding in the navigation thereof. It matters not whether the contract is verbal or in writing, or for a long or short voyage or period.

In this view of the matter, and taking the very improbable story of the libelant as to the terms of his shipment to be true, he was one of the crew of the *Marie* from the time he signed the articles in San Francisco until his arrival at Departure Bay. Here a "difference" arose between himself and the captain as to whether he was entitled to his discharge or not.

This is the very case provided for in the treaty, of which the consul is thereby made the "judge and arbitrator;" and this court, being a local authority, is prohibited from interfering with him. But it is contended that the treaty does not apply to an American citizen shipped at an American port on a Norwegian vessel, and, assuming that the libelant is such citizen, the consul has no jurisdiction and this court has.

In the case of *Ross v. McIntyre*, 140 U. S. 453, 11 Sup. Ct. Rep. 897, it was held that the petitioner, a British subject, who, while serving as a seaman on an American vessel, in the harbor of Yokohama, committed murder thereon, of which he was convicted by the consular tribunal for Japan, was an American seaman, and subject to the laws relating thereto.

Mr. Justice FIELD, speaking for the court, said:

"While he (Ross) was an enlisted seaman on the American vessel, which floated the American flag, he was, within the meaning of the statute and the treaty, an American, under the protection and subject to the laws of the United States equally with the seaman who was native born."

Of course, the doctrine of this case applies equally well to an American citizen who ships as a seaman on a foreign vessel. The libelant was for the time being a Norwegian, and owed obedience to the laws of Norway and Sweden.

The treaty of 1827 is a law of that kingdom, and by it the consuls of that country are given exclusive jurisdiction of all "differences"—controversies—between the captain and crew of a Norwegian vessel. This, in effect, forbids—disables—the libelant from resorting to any other tribunal for the settlement of such "difference." The treaty is also a law of the United States, and forbids this court from interfering in a case of a "difference" between the master and crew of a Norwegian vessel.

The libelant voluntarily assumed the obligations and restraints of a seaman upon a Norwegian vessel, and he must take the consequences.

The exception is sustained and the libel dismissed.

BLUE BIRD MIN. CO., Limited, v. LARGEY *et al.*

(Circuit Court, D. Montana. February 8, 1892.)

1. REMOVAL OF CAUSES—FEDERAL QUESTION—MINING ACTS.

Whether a certain mine is a "vein," "lode," or "ledge," within the meaning of Rev. St. U. S. §§ 2320, 2322, 2325, is a question of fact to be determined from the use of those terms among practical miners, and the decision thereof involves no federal question, within the meaning of the removal of causes acts.

2. SAME.

A question as to what is the top or apex of a vein is also one of fact, which involves no federal question.

3. SAME—DOUBTFUL QUESTION.

A cause is not removable when there is any doubt as to whether a federal question is presented.

4. SAME—PRIOR DECISION BY SUPREME COURT.

When the apex of a vein passes through one end line and one side line of the claim, the owner's rights are determined by *Iron Silver Min. Co. v. Elgin Mining & Smelting Co.*, 118 U. S. 198, 6 Sup. Ct. Rep. 1177, and the case comes under the rule that, when a proposition has been decided by the United States supreme court, it no longer involves a federal question.

5. SAME—PATENT BY UNITED STATES—QUESTIONS OF FACT.

The conveyance by patent of a vein or lode whose top or apex is cut by the end lines of the claim is a complete grant of the vein throughout its entire depth, although it may extend outside the vertical lines of the location, and hence any subsequent dispute as to boundaries is a controversy of fact, which involves no federal question.

At Law. Action in the state court by the Blue Bird Mining Company, Limited, against Patrick A. Largey and Lulu F. Largey to quiet title to the Blue Bird vein or lode. The cause was removed to this court by defendants, and is now heard on motion to remand to the state court. Granted.

Forbis & Forbis, for plaintiff.

F. T. McBride, (*E. W. Tbole*, of counsel,) for defendants.

KNOWLES, District Judge. This cause was commenced in the district court for Silver Bow county, state of Montana. Defendants filed their petition for a removal of the cause from that court to this. The parties are citizens of Montana. If this court has jurisdiction of this cause, it must be that its determination involves the decision of a federal question. Plaintiff brought its action in equity to quiet its title to the Blue Bird vein or lode, which it is alleged departs in its dip from the side lines of the Blue Bird lode claim into ground called the "Little Darling Lode," which is owned in part by defendants. Both plaintiff and defendants have a patent title to their respective claims. The petition for removal sets forth that plaintiff claims to have within the limits of its lode claim a certain vein, lode, ledge, or mineral deposit, carrying silver and other precious metals, which has its apex or top within the boundary lines of its said claim; and that said vein or lode is such a one as is within the meaning of the acts of congress mentioned in sections 2320, 2322, and 2325 of the Revised Statutes of the United States. It is further asserted that plaintiff claims that this Blue Bird vein or lode has its top or apex within the boundaries of the Blue Bird claim, and that said apex is crossed by the

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end lines of said claim. The said petition also shows that defendants deny that the said Blue Bird vein, as found within the Blue Bird claim, is a vein, lode, or ledge of rock in place, bearing silver and other precious metals, within the meaning of sections 2320 and 2322 of said Revised Statutes. They deny that the veins or deposits in dispute lying within the boundaries of the Little Darling claim have their apexes or tops within the boundary lines of the said Blue Bird claim. They also deny that the apex of what is called the "Blue Bird Vein," under a proper and correct definition of the word "apex" as used in said Revised Statutes, is crossed by the end lines of the said Blue Bird claim, and aver that said vein runs out at least one of the surveyed side lines of said Blue Bird claim. They also set forth that, notwithstanding the said Blue Bird vein or lode does cross the end lines of said claim, plaintiff claims the right to follow the same outside of the vertical side lines of said claim beneath the surface of the Little Darling claim. They further set forth that the vein within the Blue Bird claim is not such a vein as, under the laws of congress, plaintiff is permitted to follow outside of the side lines of its claim, and is not a vein or lode, within the meaning of the aforesaid sections of the said Revised Statutes. They further show that there is a dispute as to whether the vein or lode of plaintiff and that of the Little Darling are distinct veins or lodes. And, lastly, they aver that plaintiff claims the right to drift and cross-cut through the country rock of the said Little Darling claim for the purpose of reaching the ore deposits in dispute, and to use such cross-cuts or drifts, which defendants deny. Much is set forth in this petition which is not thought to be of sufficient importance to be set forth in this opinion. I think the points sought to be presented might have been presented in fewer words.

The first question for discussion is as to the dispute as to whether the Blue Bird vein, lode, or ledge is such a one as is referred to in the mineral acts of congress. This is not a question of law, but of fact. Language used in an act of congress should be construed according to its ordinary and natural import. *Sedg. St. & Const. Law*, § 220; *Waller v. Harris*, 20 Wend. 555; *Martin v. Hunter's Lessee*, 1 Wheat. 305. When the meaning of the terms "vein," "lode," or "ledge" is sought, we do not go to the mineral acts of congress, but to the miners who use these terms. Said Justice FIELD in the *Eureka Case*, 4 Sawy. 302, in discussing these terms:

"These acts were not drawn by geologists or for geologists; they were not framed in the interest of science, and consequently with scientific accuracy in the use of terms. They were framed for the protection of miners in the claims which they had located and developed, and should receive such a construction as will carry out this purpose."

In this case the learned justice shows that the miners made definitions of these terms before they were made by scientific men. Hence, in determining what is a "vein," "lode," or "ledge" of rock in place, bearing silver or other precious metals, miners themselves must be called in. What is their understanding of the meaning of these terms must control or give meaning to the acts of congress. If a dispute as to whether a

given deposit is a "vein," "lode," or "ledge" makes a federal question, then every case involving a dispute as to mineral lands could be drawn into the national courts.

As to what is the "top" or "apex" of a vein is also a question of fact, and not of law. These words are not scientific expressions, but words in common use, the meaning of which a common dictionary will determine. There is an issue, it appears, as to whether or not the apex of the Blue Bird vein is cut by the end or side line of the Blue Bird claim. This is an issue of fact, to be determined by the evidence. Admitting that, if it should be determined in favor of defendants, then there would be presented a federal question, still, until that question is determined, there must be doubt as to whether or not a federal question is presented; and, when there is a doubt upon this point, the federal courts never take jurisdiction of a case. Said Judge CALDWELL in *Fitzgerald v. Missouri Pac. R. Co.*, 45 Fed. Rep. 812: "When it is settled that the jurisdiction of a court in a removal cause is doubtful, all doubt as to what the court should do is dispelled, and the cause is remanded." But if it should appear that the apex of the Blue Bird vein did not pass through the end lines of that claim, but passed through one end line and one side line, then the rights of plaintiff, at least, are determined by the case of *Iron Silver Min. Co. v. Elgin Mining & Smelting Co.*, 118 U. S. 196, 6 Sup. Ct. Rep. 1177. And when a proposition has once been decided by the supreme court of the United States it no longer involves a federal question. Dill. Rem. Causes, (5th Ed.) § 79; *State v. Bradley*, 26 Fed. Rep. 289.

As to the right of plaintiff to follow its vein outside of its side lines, if its apex is not cut by both end lines of its claim, was fully determined in the case of *Iron Silver Min. Co. v. Elgin Mining & Smelting Co.*, *supra*, just referred to.

The point as to the dispute as to the identity of the Blue Bird and Little Darling lodes or veins is a question of fact. Where the contest is about facts only, no federal question is presented. *Austin v. Gagan*, 39 Fed. Rep. 626.

The question of the right of plaintiff to cross-cut through the country rock of the Little Darling claim is not involved in the determination of this case, and, if it was, this right would be determined by sections 1495, 1496, Comp. St. Mont., and not by any act of congress.

The general question as to whether there was presented a federal question when the right of a holder of a lode claim to follow a vein or lode, whose apex lies within the boundaries of his claim, into the premises held by another beneath the surface of the same, was decided by Judge HANFORD in the case of *Murray v. Mining Co.*, 45 Fed. Rep. 385. This was a case involving a dispute about the same ground, and must be considered as fully covering this point.

There cannot be much dispute but that, when the United States has parted with its title to land, any dispute concerning the same which does not draw in question the validity of the grant by which the title was conveyed presents no federal question. *Trafton v. Nougues*, 4 Sawy. 178;

Romie v. Casanova, 91 U. S. 380; *McStary v. Friedman*, 92 U. S. 723; *Hoadley v. San Francisco*, 94 U. S. 4.

The conveyance by a patent of a vein or lode whose top or apex is within the limits of a mining claim, and whose apex is cut by the end lines of the claim, is as complete and full as the conveyance of the surface of the claim or of any piece or parcel of agricultural land. The grant is of this vein or lode throughout its entire depth, extended downward vertically, although it may so far depart from a perpendicular in its course downward as to extend outside the vertical side lines of the surface location. Rev. St. U. S. § 2322. As far as this lode or vein is concerned, it is in the nature of the conveyance of a mine which may be carved out of any portion of land embracing the same. If there is any dispute as to the question of boundaries, this is a question of fact. If there is any dispute as to whether any portion of land is that conveyed, it is a question of fact. If there is any dispute as to whether a given parcel of land is a vein or lode, we consult men experienced in mining, and determine the question as a fact, and not as a matter of law. If we wish to learn what is a "vein," "lode," or "ledge" containing precious metals, we must take the ordinary signification of these words as used by practical men devoted to the calling of mining. Should we have to go to scientific men for a definition of these words, this would not make it a question of law. If it is said that the object is to ascertain in what sense the term was used in the act of congress, and therefore a legal question to be determined by the federal courts as a federal question, the answer is that, if this should be maintained, then, whenever a party should allege that he wished to determine the meaning of any term, such as an acre of land, or a section of land, as used in an act of congress, then a federal question would be presented. This would hardly be contended for. Finding, as I do, that no federal question is presented in this case, the motion to remand this cause to the state court from which it came is hereby sustained; and it is so ordered.

LARGEY v. BLUE BIRD MIN. CO., Limited.

(Circuit Court, D. Montana. February 3, 1892.)

At Law. Action by Patrick A. Largey against the Blue Bird Mining Company, Limited. Heard on demurrer to the complaint. Demurrer sustained. *F. T. McBride and Toole & Wallace*, for plaintiff. *Forbis & Forbis*, for defendant.

KNOWLES, District Judge. The property described in the complaint in this case is the same as that described in the case of *Blue Bird Mining Co. v. Largey*, 49 Fed. Rep. 289, which, having been removed from the district court of Silver Bow county, Mont., was remanded by this court back to said state court, for the reason that no federal question was involved in determining the same. Precisely the same points, as involving federal questions, which were presented in

that case are presented in this. The decision in that case, then, as to this question settles this. The opinion in that case discusses all the questions presented in this. The view of the court, as expressed in the former case, is that no federal question was presented under the facts alleged. The defendant demurred to the complaint upon the ground that this court had no jurisdiction of the case presented. The demurrer is sustained, and the cause is dismissed, at plaintiff's cost.

CENTRAL NAT. BANK OF BOSTON v. HAZARD *et al.*

(Circuit Court, N. D. New York. February 26, 1892.)

1. STATE AND FEDERAL COURTS—CONFLICT OF JURISDICTION—INJUNCTION.

A state court has no authority to enjoin the proceedings of a federal court, or of the parties thereto, in a suit in which the federal court has first acquired jurisdiction of the controversy and the *res*.

2. SAME.

When a federal court has ordered the sale of a railroad, and its officer has advertised the same for sale, that court has complete dominion thereof, so as to exclude all interference by a state court.

3. SAME—VACATING DECREE.

A proceeding in a state court to set aside a former decree thereof for fraud in its procurement is an original suit, and does not revive the dominion exercised in the former suit over the *res*, so as to exclude the jurisdiction of a federal court which has attached in the mean time.

4. COURTS—JURISDICTION IN REM—SALE OF PROPERTY.

The dominion of a court over a railroad sold by its decree entirely ceases upon the conveyance thereof to the purchasers.

In Equity. Suit by the Central National Bank of Boston, in its own behalf and in behalf of all other certificate holders, against Rowland N. Hazard, William Foster, Jr., and others, to declare and enforce the lien of certain receiver's certificates against the Lebanon Springs Railroad Company. Heard on petition for an order directing an officer of the court to proceed with a sale of the railroad property, in accordance with a decree heretofore entered. **Granted.**

Esek Cowen, for petitioner.

E. W. Paige, for defendants.

WALLACE, Circuit Judge. The petitioner asks the court to set in motion one of its officers *pro hac vice*, who, by a decree made on the 24th day of March, 1887, (30 Fed. Rep. 484,) was directed to sell at public auction, after giving due notice of the time and place of sale, according to law and the practice of this court, certain real and personal property consisting of the railroad, rolling stock, etc., which formerly belonged to the Lebanon Springs Railroad Company. The petitioner invokes the action of the court because a decree has been made by the supreme court of the state of New York in a suit brought subsequent to the rendition of the decree of this court, which, among other things, perpetually enjoins and restrains the parties in this suit from proceeding with the sale of the property under the decree of this court. The petitioner was not a

formal party to the suit in the state court, and, as the suit in this court was prosecuted in his behalf, as one of those similarly situated with the complainant, he has a *status* which enables him to intervene, as is supposed, without violating the injunction of the state court. If there were any reason to impute contumacy to the officer who has halted in the performance of the duty imposed upon him by the court, the appropriate application would be one for his removal; but it is apparent that his conduct is influenced by a desire to respect the injunction of a state court, which in spirit, though not in terms, prohibits him from proceeding with the sale until the instructions of this court have been obtained.

The case is this: Prior to the year 1880, the Lebanon Springs Railroad Company had mortgaged its property, to secure bonds to the amount of \$2,000,000, to the Union Trust Company, as trustee, and that mortgage had been foreclosed and the property sold, and, by mesne conveyances from the purchaser, the title to the property had been acquired by the New York, Boston & Montreal Railway Company. In the year 1880 an action was brought in the supreme court of the state of New York by one Sackett, who owned some of the mortgage bonds, in his own behalf, and that of all other owners of the bonds, the object of which was, in substance, to obtain an adjudication that the equitable title to the property was still in the bondholders, and a decree for a sale of the road for the benefit of the bondholders. During the pendency of the action the court appointed a receiver, and authorized the receiver to issue certificates to the amount of \$350,000, to constitute a first lien upon the property. That action resulted in a decree entered in January, 1885, adjudging that the title to the railroad property was in the original bondholders, and ordering the road to be sold for their benefit, subject to the principal and accrued interest upon the receiver's certificates. A sale was made pursuant to that decree, and upon the sale Hazard & Foster became the purchasers. By the terms of the purchase Hazard & Foster assumed and agreed to pay the receiver's certificates, but after acquiring a deed they made default. The complainant in the present suit was the owner of \$250,000 of the certificates, and in April, 1886, brought this suit, in behalf of itself and all the other certificate holders, to obtain a decree declaring the certificates to be a lien upon the property, and to enforce payment by a sale of the property and a personal judgment against Hazard & Foster for any deficiency. Hazard & Foster contested the suit, but it resulted in a decree adjudging the certificates to be a lien, ordering a sale of the property, and requiring Hazard & Foster to pay to the complainant, and the other holders of the certificates, any deficiency remaining unsatisfied after the sale of the property. The decree also reserved leave to the complainant and to the other certificate holders to apply to the court at any time for the appointment of a receiver to take possession of the property, and keep it until the sale. The property was duly advertised for sale pursuant to this decree, but the sale was adjourned from time to time until late in the year 1890, when the suit was brought by Stevens and others in the supreme court of the state of New York, in which the injunction was granted which

has given rise to this application. Stevens was the owner of some of the bonds. The object of his suit was, in substance, to impeach the decree in the Sackett suit for fraud, and to obtain a strict foreclosure of the mortgage made by the Lebanon Springs Railroad Company. The theory of the action was that the Sackett suit had been prosecuted for the benefit of a portion of the bondholders, and in fraud of the interests of others. That suit resulted in a decree, by which it was adjudged that the Sackett suit was fraudulently conducted as against certain of the bondholders whom he purported to represent, and solely in the interest of bondholders representing only about \$1,200,000 of the \$2,000,000 of bonds. The decree vacated the judgment in the Sackett suit, ordered a sale of the property, declared that the owners of the receiver's certificates were entitled to only the distributive share of the proceeds of the sale as might be applicable to the bonds which were actually represented in the Sackett suit, and ordered the perpetual injunction which has been referred to.

No federal court has ever recognized the authority of a state court to enjoin its proceedings, or to enjoin parties from proceeding, in a suit in which the federal court has first acquired the jurisdiction of the controversy and the *res*, but such authority has been uniformly denied by the federal courts. *McKim v. Voorhies*, 7 Cranch, 279; *Riggs v. Johnson Co.*, 6 Wall. 166; *Mayor v. Lord*, 9 Wall. 409; *Supervisors v. Durant*, Id. 415; *Amy v. Supervisors*, 11 Wall. 136. "The forbearance which courts of co-ordinate jurisdiction, administered under a single system, exercise towards each other, whereby conflicts are avoided by avoiding interference with the process of each other, is a principle of comity, with perhaps no higher sanction than the utility which comes from concord; but between state courts and those of the United States it is something more. It is a principle of right and of law, and therefore of necessity. It leaves nothing to discretion or mere convenience. These courts do not belong to the same system, so far as their jurisdiction is concurrent; and, although they co-exist in the same space, they are independent, and have no common superior. They exercise jurisdiction, it is true, within the same territory, but not in the same plane; and when one takes into its jurisdiction a specific thing, that *res* is as much withdrawn from the judicial power of the other as if it had been carried physically into a different territorial sovereignty. To attempt to seize it by a foreign process is futile and void. The regulation of process, and the decision of questions relating to it, are part of the jurisdiction of the court from which it issues." *Covell v. Heyman*, 111 U. S. 183, 4 Sup. Ct. Rep. 355. These principles were recognized and enforced by one of the federal courts in a case which is very much in point. In *Fox v. Railroad Co.*, 2 Abb. (U. S.) 151, a court of the state of Pennsylvania had proceeded to a decree in a suit to foreclose a mortgage executed by the railroad company, and after the decree, and pending a sale ordered by the decree, executions were issued upon judgments rendered by the United States circuit court, and levies were made upon the mortgaged property. The federal court set aside the levy, holding that the court of Pennsylvania having by its decrees and authorized officers taken judicial control of the prop-

erty, and ordered its sale, the property could not be taken in execution by process from any other jurisdiction.

In the present case, after the decree was made by this court ordering the property to be sold by its officer, and the officer had proceeded towards executing the decree by advertising the property for sale, the property was under the dominion of this court as effectually as though it had been seized upon an execution. And it is equally clear that after the sale had taken place under the decree in the Sackett suit, and the property had been conveyed to Hazard & Foster, the property passed from the dominion which the state court had previously exercised over it. The Stevens suit was an original and independent proceeding, not a supplementary proceeding connected with the Sackett suit. As was said in *Barrow v. Hunton*, 99 U. S. 80:

"If the proceedings are tantamount to a bill in equity to set aside a decree for fraud in the obtaining thereof, then they constitute an original and independent proceeding; * * * a new case arising upon new facts, although having relation to the validity of an actual judgment or decree."

The case, therefore, is one for the application of the rule that the jurisdiction of a court of the United States once obtained over property by its being brought within its custody continues until the purpose of the suit is accomplished, and cannot be impaired or affected by any proceedings subsequently commenced in a state court. *Railroad Co. v. Gomila*, 132 U. S. 478, 10 Sup. Ct. Rep. 155.

It is not necessary to consider whether a state court, in the exercise of equity jurisdiction, may not annul the judgment of a federal court for fraud, and, as an incident to relief, enjoin the enforcement of the judgment to the extent necessary to do justice. *Johnson v. Waters*, 111 U. S. 640, 4 Sup. Ct. Rep. 619. In the present case the state court has not assumed to disturb the decree of this court. It has adjudged that the lien of the certificate holders has no priority over that of the bondholders, but is one to be satisfied *pari passu* with theirs; and by its decree it subordinates the title which will be acquired under the sale by this court to the title which will be acquired by a sale under its own decree. The decree of this court finally determines the rights of the parties to the suit as between themselves. Manifestly the decree of the state court does not disturb the right of the certificate holders to enforce the payment of their certificates against Hazard & Foster by a sale of their property and a personal judgment for the deficiency. A personal judgment cannot be obtained under the present decree without a sale of the property, in order to ascertain the deficiency and fix the amount recoverable. Such a sale cannot injuriously affect the property interests which are recognized and protected by the decree of the state court. A sale under its decree will extinguish all subordinate titles, good as well as bad.

It would be rank injustice to the complainant and the other certificate holders to postpone the enforcement of their demands against Hazard & Foster to await the result of the litigation in the state court, which seems likely to be a protracted one. The order applied for is therefore granted.

UNITED STATES v. SOUTHERN PAC. R. Co. *et al.*

(Circuit Court, N. D. California. February 14, 1892.)

1. CIRCUIT COURTS—JURISDICTION—PRESUMPTIONS.

The federal circuit courts possess no powers except such as the constitution and acts of congress concur in conferring, and the presumption is that every case is without their jurisdiction until the contrary affirmatively appears.

2. SAME—RESIDENCE OF PARTIES.

Act Cong. March 3, 1887, requiring suits in which the federal jurisdiction is founded only on diversity of citizenship to be brought in the district of the residence either of the plaintiff or the defendant, does not apply to suits brought by the federal government, since it is present everywhere within the territorial limits of the United States. The only restriction with respect to such suits is that they shall be brought in the district of which the defendant is an "inhabitant."

3. SAME—CITIZENSHIP OF CORPORATIONS—"INHABITANCY."

While, under the acts respecting the jurisdiction of the federal courts, a corporation is a "citizen" only of the state under whose laws it was organized, yet, with respect to the district in which it may be sued, under Act Cong. March 3, 1887, a railroad or telegraph company, chartered either by a state or the United States, is an "inhabitant" of any state in which it operates its lines and maintains offices for the transaction of business.

In Equity. Suit by the United States against the Southern Pacific Railroad Company, the Southern Pacific Company, the Atlantic & Pacific Railroad Company, and the Western Union Telegraph Company. Heard on pleas and motion to dismiss. Overruled.

Atty. Gen. Miller and Charles H. Aldrich, for the United States.

Charles H. Tweed, J. Hubley Ashton, and Harvey S. Brown, for the Southern Pacific Railroad Company and the Southern Pacific Company.

Pillsbury, Blanding & Hayne, Wm. C. Hazledine, and John J. McCook, for the Atlantic & Pacific Railroad Company.

Wager Swayne and Rush Taggart, for the Western Union Telegraph Company.

HARLAN, Circuit Justice.¹ This case is under submission on pleas and motions to dismiss, which contest the jurisdiction of this court to proceed *in personam* against such of the defendants, not corporations of California, as are not before the court otherwise than by service of process upon their agents in this district. On this question there is such conflict in the decisions of the circuit courts that it is proper to examine it as if now for the first time presented. It depends upon the interpretation that may be given to the act of March 3, 1887, defining the jurisdiction of the circuit courts of the United States. 24 St. p. 552, c. 373; 25 St. p. 433, c. 866. Before looking at the provisions of that act, it will be well to inquire as to the nature of this suit.

By the act of congress of August 7, 1888, known as the "Telegraph Act," it is provided that all railroad and telegraph companies to which the United States has granted any subsidy in lands, bonds, or loan of credit, for the construction of either railroad or telegraph lines, and which

¹Mr. Justice HARLAN heard this case under special commission issued by Mr. Justice FIELD, pursuant to section 617 of the Revised Statutes, and by consent of the parties.

are required to construct, maintain, or operate telegraph lines, and all companies engaged in operating such railroad telegraph lines—

"Shall forthwith and henceforward, by and through their own respective corporate officers and employes, maintain and operate, for railroad, governmental, commercial, and all other purposes, telegraph lines, and exercise by themselves alone all the telegraph franchises conferred upon them and obligations assumed by them under the acts making the grants, as aforesaid." 25 St. p. 882, c. 772, § 1; 12 St. p. 489, c. 120; 13 St. p. 356, c. 216.

This suit was brought pursuant to that act, its fourth section declaring:

"That in order to secure and preserve to the United States the full value and benefit of its liens upon all the telegraph lines required to be constructed by and lawfully belonging to said railroad and telegraph companies referred to in the first section of this act, and to have the same possessed, used, and operated in conformity with the provisions of this act, and of the several acts to which this act is supplementary, it is hereby made the duty of the attorney general of the United States, by proper proceedings, to prevent any unlawful interference with the rights and equities of the United States under this act, and under the acts hereinbefore mentioned, and under all acts of congress relating to such railroads and telegraph lines, and to have legally ascertained and finally adjudicated all alleged rights of all persons and corporations whatever claiming in any manner any control or interest of any kind in any telegraph lines or property, or exclusive rights of way upon the lands of said railroad companies, or any of them, and to have all contracts and provisions of contracts set aside and annulled which have been unlawfully and beyond their powers entered into by said railroad or telegraph companies, or any of them, with any other person, company, or corporation."

The Southern Pacific Railroad Company is a corporation organized under the laws of California, entitled, it is alleged, in respect to its railroad, to all the rights and privileges granted, and subject to all the conditions prescribed, by the acts of congress relating to the Atlantic & Pacific Railroad Company, and to be treated as if its railroad and telegraph line had been constructed as a part of the main line of that company.

The Southern Pacific Company is a corporation of Kentucky, but it has no property or business in that state, nor any officer or agent there, except an assistant clerk, holding a subordinate position, and maintained for the purpose of preserving the charter of the company under the laws of that commonwealth. The company has a large amount of property in California, and is operating lines of railroad in this district. Its general offices are, and for many years have been, in San Francisco, where its principal executive officers reside. The bill alleges that the Southern Pacific Railroad Company claims to have transferred to this company all its property, real, personal, and mixed.

The Atlantic & Pacific Railroad Company is a corporation organized under an act of congress approved July 27, 1866, with authority to construct a line of railroad and telegraph; and to carry on its business, in this state and elsewhere. 14 St. p. 292. Its general officers reside here, and at the commencement of this suit it was operating its railroad and maintaining offices in California.

The Western Union Telegraph Company is a New York corporation, owning a large amount of property and engaged in operating lines of tel-

egraph in this district, where it maintains general offices for the transaction of business. The bill alleges that it has an agreement with the Southern Pacific Railroad Company, under which the latter corporation has ceased to maintain and operate a telegraph line for public or commercial purposes, and under which the former company has acquired a monopoly of all such business on the lines of railroad in question.

The relief sought is a decree annulling, not only the lease, if such there be, by which the Southern Pacific Railroad Company assigned all its property to the Southern Pacific Company, but certain contracts of lease and sale by the former to the Atlantic & Pacific Railroad Company, as well as the above contract between the Southern Pacific Railroad Company and the Western Union Telegraph Company; and requiring the Southern Pacific Railroad Company henceforth, and through its own officers and employes, to maintain and operate telegraph lines along its entire main road and branches for railroad, governmental, commercial, and all other purposes, itself exercising all the telegraph franchises conferred upon it, and performing all the obligations assumed by it under the grants from congress.

The subpoena in this case was served on the secretaries, respectively, of the Southern Pacific Railroad Company and the Southern Pacific Company, on the general passenger and freight agent of the Atlantic & Pacific Railroad Company, and on the general superintendent of the Western Union Telegraph Company for the Pacific coast. The officers and agents on whom service was made were at the time located in San Francisco.

Among the suits of a civil nature, at common law or in equity, of which the circuit courts of the United States have original jurisdiction, under the act of March 3, 1887, amending that of March 3, 1875, are those involving the sum or value of more than \$2,000, exclusive of interest and costs, and arising under the constitution or laws of the United States, or treaties made under their authority, or in which the United States are plaintiffs or petitioners; those involving the above sum in which there is a controversy between citizens of a state and foreign states, citizens, and subjects, or a controversy between citizens of different states. The same act provides:

"But no person shall be arrested in one district for trial in another in any civil action before a circuit or district court, and no civil suit shall be brought before either of said courts against any person, by any original process or proceeding, in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant. * * *" 25 St. p. 434, c. 866; 24 St. p. 552, c. 873.

The provision in the original act of 1875, in respect to the district in which suits must be brought, was as follows:

"No person shall be arrested in one district for trial in another in any civil action before a circuit or district court. And no civil suit shall be brought before either of said courts against any person, by any original process or

proceeding, in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving such process or commencing such proceeding." 18 St. p. 470, c. 137.

The Judiciary Act of 1789 contained substantially the same provision. 1 St. p. 79, c. 20.

It thus appears that the provision in the act of 1875 permitting suit—the plaintiff and the defendant being citizens of different states—to be brought in the district where the defendant was "found" was stricken out by the act of 1887, and that the right to bring a civil suit by original process in the district of which the defendant is an "inhabitant" is now subject to the condition that, where jurisdiction is acquired only by reason of diverse citizenship, the suit must be brought in the district of the residence of either the plaintiff or the defendant.

The first point made by the defendants is that the circuit courts of the United States possess no powers except such as the constitution and the acts of congress concur in conferring upon them, and that the legal presumption is that every cause is without their jurisdiction until and unless the contrary affirmatively appears. No doubt can exist as to the correctness of this principle. *Sheldon v. Sill*, 8 How. 441, 449; *Steamship Co. v. Tugman*, 106 U. S. 118, 1 Sup. Ct. Rep. 58; *Bors v. Preston*, 111 U. S. 262, 4 Sup. Ct. Rep. 407; *Railway Co. v. Swan*, 111 U. S. 379, 383, 4 Sup. Ct. Rep. 510.

The pleas and motions to dismiss proceed upon the ground that a corporation is an "inhabitant" only of the state which created it, and, although doing business in another state, under its license or with its consent, is not, since the passage of the act of 1887, subject to the jurisdiction and power of a circuit court of the United States held in the latter state, except in suits in which jurisdiction is founded wholly on diverse citizenship, and in which the corporation is sued as a citizen of the state of its creation by a citizen of the state in which the court sits.

The act of 1887, thus construed, would work results not to have been expected from the action of the legislative branch of the government. (1) If, within the meaning of that act, a corporation is an "inhabitant" only of the state creating it, a corporation of a foreign country must be deemed an "inhabitant" only of that country; and, as the words, in the act of 1887,—“where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant,”—refer only to suits in judicial districts established by congress, and therefore only to suits between citizens of different states of the Union, it would follow, from the defendants' construction, that a circuit court of the United States could never acquire jurisdiction over a European corporation, doing business in this country; for the act of 1887 expressly prohibits the bringing of any suit in the circuit or district court “against any person, by any original process or proceeding, in any other district than that whereof he is an inhabitant.” (2) If all the defendants in this suit are indispensable parties to the relief sought by the bill,—and they seem to be,—the government could not proceed against them

in any circuit court of the United States without encountering the objection now urged against the jurisdiction of this court; and it would be compelled, in order to enforce the provisions of the telegraph act, to invoke the jurisdiction of a state court, without the privilege of removing the suit, after it was brought, into the circuit court; the right of removal being given, by the act of 1887, only to defendants. (3) A citizen of California can bring suit in this court against a corporation of another state which does business here by agents located in this state and district, if jurisdiction be founded only on the diverse citizenship of the parties; but, according to the defendants' interpretation of the act of congress, this court cannot entertain jurisdiction of a suit brought by the United States, under the authority of an act of congress, against the same corporation, upon a like cause of action. While it is competent for congress to declare what part of the judicial power of the United States, as defined by the constitution, may be exercised by the courts which it establishes, we should not lightly presume that it was intended to produce the results which confessedly follow from the construction placed upon the act of 1887 by the learned counsel for the defendants.

The court is of the opinion that the clause in the first section of the act of 1887, requiring suits to be brought in the district of the residence either of the plaintiff or of the defendant where jurisdiction is founded only on diversity of citizenship, applies only to suits in which the parties, whether natural or artificial persons, are "citizens of different states," and cannot apply to suits brought by the United States. The general government is present everywhere within the territorial limits of the United States, and, under the existing statutes, may invoke the jurisdiction of any circuit court of the United States in respect to any cause of action it may have against a natural or artificial person, subject only to the condition that its suit must be brought in the district of which the defendant is an "inhabitant." The question, therefore, to be determined is whether a corporation created by the laws of another state, but doing business here, and having its agents located within the territorial jurisdiction of this court, may not, within the meaning of the statute, be deemed an "inhabitant" of this state and district.

Numerous cases have been cited by the counsel of defendants as showing that a corporation of one state is an inhabitant only of the state creating it. Upon a careful examination of those cases, the court is of opinion that no one of them determines the precise question now before it. The cases cited in argument establish these principles:

1. While a corporation is domiciled in the state by whose laws it was created, its legal existence in that state may be recognized elsewhere; so that, within the scope of its limited powers, it may make and enforce contracts in other states which are not forbidden by the laws of such states. *Bank v. Earle*, 13 Pet. 519, 588; 589; *Christian Union v. Yount*, 101 U. S. 352, 356. In the latter case, it was said that—

"In harmony with the general law of comity obtaining among the states composing the Union, the presumption should be indulged that a corporation of one state, not forbidden by the law of its being, may exercise within any

other state the general powers conferred by its own charter, unless it is prohibited from so doing, either in the direct enactments of the latter state, or by its public policy, to be deduced from the general course of legislation, or from the settled adjudications of its highest court."

2. For the purposes of jurisdiction in the courts of the United States, a corporation is to be deemed a citizen of the state creating it, and no averment to the contrary is permitted. *Railroad Co. v. Letson*, 2 How. 497; *Marshall v. Railroad Co.*, 16 How. 314; *Insurance Co. v. French*, 18 How. 404, 408; *Draw-Bridge Co. v. Shepherd*, 20 How. 227; *Railroad Co. v. Wheeler*, 1 Black, 286, 297; *Paul v. Virginia*, 8 Wall. 168; *Railroad Co. v. Harris*, 12 Wall. 65; *Railroad Co. v. Kootz*, 104 U. S. 5, 12; *Goodlett v. Railroad Co.*, 122 U. S. 391, 7 Sup. Ct. Rep. 1254.

3. A corporation of one state, by engaging in business or acquiring property in another state, does not thereby cease to be a citizen of the state creating it, (*Insurance Co. v. Francis*, 11 Wall. 210;) although, while the act of 1875 was in force, it could be "found" in any state where it did business regularly by its agents, process being served upon such agents. *Ex parte Schollenberger*, 96 U. S. 369. In the latter case the court was careful to say that it was unnecessary to inquire whether such a corporation was not also, within the meaning of the act of 1875, an inhabitant of the state in which it did business.

In some of the cases cited there are general expressions upon which much stress is laid by counsel. In *Bank of Augusta v. Earle*, it was said that a corporation must "dwell" in the state of its creation, and cannot "migrate" to another sovereignty; in *Louisville Railroad Co. v. Letson*, that it is an "inhabitant" of the state which brought it into existence; in *Marshall v. B. & O. Railroad Company*, that "its necessary habitat" is there; in *Ex parte Schollenberger*, that a corporation has its "legal home" at the place where it is located by or under its charter; and in *Railroad Co. v. Kootz*, that a corporation, by doing business away from its "legal residence," does not change its citizenship. A case much relied upon is *Insurance Co. v. Francis*. That was a suit brought in a court of Mississippi, by a citizen of Illinois against a New York corporation, doing business, by agents, in the state of Mississippi. The plaintiff sought to remove the case into the circuit court of the United States under the act of 1867, giving jurisdiction where the controversy was "between a citizen of the state in which the suit is brought and a citizen of another state." It was held that the defendant, being a corporation of New York, was a citizen of that state, and consequently the suit could not be removed. "Its place of residence," the court said, "is there, and can be nowhere else. Unlike a natural person, it cannot change its domicile at will; and, although it may be permitted to transact business where its charter does not operate, it cannot on that account acquire a residence there."

Those cases undoubtedly hold that a corporation cannot throw off its allegiance or responsibility to the state which gave it existence, and that its primary, legal domicile or habitation,—that is, its citizenship,—is in such state; consequently, for the purposes of suing and being sued in the courts of the United States, it is to be deemed a citizen of the state

by whose laws it was made an artificial person. But neither those cases, nor any case in the supreme court of the United States, directly decides that a corporation may not, in addition to its primary, legal habitation or home in the state of its creation, acquire a habitation in, or become an inhabitant of, another state, for purposes of business, and of jurisdiction *in personam*.

It is eminently just that the defendants, not corporations of this state, should be regarded as inhabitants of this district for purposes of jurisdiction. Each of them is under a duty, imposed by the constitution of this state, to have and maintain an office or place here for the transaction of its business. By the same instrument it is provided that no foreign corporation shall be allowed to transact business here on more favorable conditions than are prescribed by law to similar corporations organized under the laws of this state; also, that a corporation or association may be sued in the county where the contract is made or is to be performed, or where the obligation or liability arises or the breach occurs, or in the county where the principal place of business of such corporation is situated, subject to the power of the court to change the place of trial as in other cases. Const. Cal. 1879, art. 12, §§ 14-16. The Code of Civil Procedure provides that, in a suit against a corporation formed under the laws of this state, the summons must be served on the president, or other head of the corporation, secretary, cashier, or managing agent thereof; and in a suit against a foreign corporation, doing business and having a managing or business agent, cashier, or secretary within this state, on such agent, cashier, or secretary. Section 411. And by an act approved April 3, 1880, it was provided that every railway corporation, and every corporation organized for the purpose of carrying freight or passengers, which has been or may be created or organized under or by virtue of the laws of any state or territory of the United States, or of any act of congress, may build railways, exercise the right of eminent domain, and do or transact any other business which such corporation might, if it had been created or organized under or by virtue of the laws of this state, having the same rights, privileges, and immunities, and subject to the same penalties, obligations, and burdens, as if they had been created or organized under the laws of California. Laws of 1880, p. 21. It is thus seen that corporations of other states do business here under the license of this state, subject to the implied condition that they may be brought, by service of process upon their agents, before the courts of this jurisdiction; and, in respect to railroad corporations organized under the laws of other states, and doing business here, they become, for most, if not for all, practical purposes, inhabitants of this state.

If it be said that inhabitancy in a state, in its strict legal sense, implies a permanent, fixed residence in that state, the answer is that a corporation of one state, operating, by agents, a railroad or telegraph line in another state, with its consent, or under its license, may be regarded as permanently identified with the business and people of the latter state, and, for the purposes of its business there, to have a fixed residence

within its limits; for it may not unreasonably be assumed that it will exert its powers there during the whole of its corporate existence, or so long as it is profitable to do so. It does there just what it would do if it had received its charter from that state. It seems to the court that a corporation of a state, or a corporation of the United States, holding such close relations with the business and people of another state, may, within a reasonable interpretation of the act of 1887, be deemed an "inhabitant" of the latter state for all purposes of jurisdiction *in personam* by the courts held there; although a corporation is, and, while its corporate existence lasts, must remain, a "citizen" only of the state which gave it life.

It is ordered and adjudged that the pleas and motions to dismiss, so far as they question the jurisdiction of this court to proceed *in personam* against the several defendant corporations, as inhabitants of this district, within the meaning of the above act of congress, be, and the same are hereby, overruled.

UNITED STATES v. CENTRAL PAC. R. CO. et al.

(Circuit Court, N. D. California. February 14, 1892.)

In Equity. Suit by the United States against the Central Pacific Railroad Company, the Southern Pacific Company, and the Western Union Telegraph Company. Heard on pleas and motions to dismiss. Overruled.

Atty. Gen. Miller and Charles H. Aldrich, for the United States.

Charles H. Tweed, J. Hubley Ashton, and Harvey S. Brown, for the Central Pacific Railroad Company and the Southern Pacific Company.

Wager Swayne and Bush Taggart, for the Western Union Telegraph Company.

HARLAN, Circuit Justice. The questions presented in this case do not differ in any material respect from those disposed of in the case of *U. S. v. Railroad Co.*, 49 Fed. Rep. 297. For the reasons given in the opinion in that case, it is ordered and adjudged that the pleas and motions to dismiss, so far as they question the jurisdiction of this court to proceed *in personam* against the several defendant corporations, as inhabitants of this state and district, be, and the same are hereby, overruled.

CHENEY *et al.* v. BACON.

(Circuit Court of Appeals, Eighth Circuit. February 8, 1892.)

APPEAL.—ASSIGNMENTS OF ERROR.

Where the assignment of error is based on an allegation of fact which the record shows to be without foundation, the decree will be affirmed.

Appeal from the Circuit Court of the United States for the District of Nebraska.

Suit by Solon Bacon against Prentiss D. Cheney and Annette Cheney for specific performance. Decree for complainant. Defendants appeal. Affirmed.

Prentiss D. Cheney, for appellants.

Samuel P. Davidson, for appellee.

Before CALDWELL, Circuit Judge, and SHIRAS and THAYER, District Judges.

CALDWELL, Circuit Judge. This is a suit in equity, commenced by the complainant, Bacon, against the respondents, Cheney and wife, to compel the specific performance of a contract to convey a quarter section of land in Johnson county, Neb. The suit was begun in the state court, and removed to the circuit court by the respondents. The contract was executed by Cheney on the 2d day of March, 1880. It recites that he contracts, bargains, and agrees to sell the land (describing it) to the complainant at the price of \$1,120, and that \$200 of that sum has been paid, and the balance is to be paid in 10 annual installments, each for \$92 and interest, for which notes were executed, which are described in the contract. Upon the payment of the purchase money and interest in the time and manner provided, the respondent was to execute a deed conveying the land to the complainant. The contract stipulated "that no assignment of the premises or of this contract shall be valid unless with the written consent of the first party, and by indorsement of the assignment hereon." It was declared that time was the essence of the contract; that "no court shall relieve the said second party from a failure to comply strictly and literally with this contract;" and, upon the failure of the purchaser to comply strictly with his engagements under the contract, all his rights thereunder were to be forfeited. The bill alleges payment of the purchase money in the time and manner required by the contract, and prays that the respondents be required to execute and deliver to complainant a deed for the land. The court below entered a decree in conformity to the prayer of the bill. The proof shows the purchase money was paid, as alleged in the bill, and that the complainant has been in possession of the land for a long time, and has made valuable improvements thereon. The answer set up only this defense:

"This defendant, further answering, avers the fact to be that the complainant sold and transferred the possession and rights of possession to the land named in complainant's bill of complaint on or about the 22d day of February, v.49f.no.5—20

A. D. 1882, to one D. M. Clark; that this complainant did, on the 22d day of February, A. D. 1882, assign, transfer, and deliver to the said D. M. Clark the contract in complainant's bill of complaint described; that the terms and forms of said assignment were made known to this defendant; and his consent was obtained, as provided in said contract."

The only assignment of error requiring any notice rests on this averment of the answer, and is to the effect that Bacon, the complainant, cannot maintain this suit because he assigned the contract relating to the land to Clark. The assignment of error is not well founded in fact. The testimony shows the complainant did, at one time, desire to assign the contract to Clark, and that he put an indorsement on it to that effect, and sent it to the respondent for his approval, as required by the contract, but the respondent refused to approve the assignment, and thereupon the transfer was abandoned, and the indorsement to Clark, with his consent, stricken out, and the contract returned to the complainant. There being no error in the decree of the circuit court, the same is affirmed.

St. Paul, M. & M. Ry. Co. v. Northern Pac. R. Co. (Circuit Court of Appeals, Eighth Circuit. February 1, 1892.)

INJUNCTION—RECEIVERS.

A land-grant railroad company sued to recover a large quantity of lands, divided into three classes, and by agreement of the parties a commissioner was appointed to sell the lands pending the suit, and hold the proceeds subject to its final determination. After the sale the bill was dismissed without prejudice as to one class of the lands. Held that on the bringing of a new suit, it was proper to allow a preliminary injunction restraining the commissioner from paying over the money realized from the lands still in dispute, and appointing him receiver thereof. 47 Fed. Rep. 586, affirmed.

Appeal from the Circuit Court of the United States for the District of Minnesota.

Suit in equity to recover lands, brought by the Northern Pacific Railroad Company against the St. Paul & Pacific Railroad Company, for which the St. Paul, Minneapolis & Manitoba Railway Company was afterwards substituted. Heard below on motion for a preliminary injunction, which was granted. Defendant appeals. Affirmed.

George B. Young, for appellant.

John C. Bullitt, Jr., and F. M. Dudley, for appellee.

Before CALDWELL, Circuit Judge, and SHIRAS and THAYER, District Judges.

SHIRAS, District Judge. This cause is before us on an appeal from an order made by the circuit court for the district of Minnesota, granting a temporary injunction, and appointing a receiver to take charge of certain property until the final decision of the rights of the parties litigant.

Briefly stated, the facts are as follows: Under the act of congress of July 2, 1864, and other acts amendatory and supplemental thereto, the Northern Pacific Railroad Company became entitled to certain lands along the line of its railway, and the St. Paul & Pacific Railway Company became entitled to certain lands under the act of congress of March 3, 1857, and the acts amendatory and supplemental thereto. For the purpose of settling the rights of the respective companies in and to certain lands which are within the limits of both the grants above named, the Northern Pacific Company, by its bill in equity duly filed in the circuit court for the district of Minnesota, asserted its right to the lands in dispute against the said St. Paul & Pacific Company. Before this suit came to a hearing, the St. Paul, Minneapolis & Manitoba Company became a party thereto, having succeeded to all the rights of the St. Paul & Pacific Company.

The lands in dispute in that cause were divided into three classes, to-wit, those within the place or 20-mile limit of the line of the Northern Pacific Company; those within the indemnity limits of the grants to the Northern Pacific, and included within the terms of a withdrawal of lands by order of the United States land department, under date of October 12, 1870; those within the indemnity limits of the grants to the Northern Pacific, but which were not within the terms of the withdrawal order above named. Pending this litigation, and on or about June 13, 1878, by stipulation between the parties, the court appointed Edward Sawyer a special commissioner, with authority to sell the lands in dispute, or so much thereof as might be sold under the order of the court, the proceeds of sale, whether money, the evidence of money, or other securities, with the interest collected thereon, to be held subject to the final decree of the court, which was to operate thereon as if the same were the lands from the sales whereof they were realized. The commissioner accepted this trust, giving security for the performance of his duty in all particulars. On the 24th day of December, 1886, the cause went to decree in the circuit court, it being held that the Northern Pacific Company was entitled to the lands that came within the first and second classes hereinbefore described, and that as to the lands within the third class the bill should be dismissed, "without prejudice to the right of said plaintiff, its successors or assigns, to institute and prosecute such other and further proceedings, either at law or equity; as to it or them may seem necessary or proper for establishing its or their rights and title, if any, to said lands not so awarded to said plaintiff." The cause was carried by appeal to the supreme court of the United States, and the decree rendered was affirmed. *St. Paul & P. R. Co. v. Northern Pac. R. Co.*, 139 U. S. 1, 11 Sup. Ct. Rep. 389.

On the 23d day of June, 1891, the Northern Pacific Company filed the bill in the present cause, for the purpose of finally settling the rights of the parties to the lands falling within the third division of the classification hereinbefore given, and in regard to which no final adjudication was made in the decree of December 24, 1886. It is stated in the bill that Edward Sawyer has in his charge, and subject to the orders of the

court, a large amount of money and securities realized from sales made by him of the lands included within class 3, and a preliminary injunction was prayed for the purpose of restraining said Sawyer, who was made a defendant to the bill, and the St. Paul, Minneapolis & Manitoba Railway Company, from paying over or receiving any of the money or securities derived from a sale of the lands to which the rights of the respective companies were yet unsettled, until by the final decree in this cause it should be determined to which company the lands, and the proceeds representing the lands sold, in fact belonged. Notice of the application for the temporary injunction having been duly given to the defendants, the same was heard, and the court granted the order asked, embracing therein a provision appointing Edward Sawyer a receiver to hold the securities until the further order of this court.

By the present appeal it is sought to reverse the order thus made. From the record submitted to us, the following facts are clearly apparent: The title to the lands falling within the third class, named in the decree of December 24, 1886, is in dispute between the Northern Pacific and St. Paul, Minneapolis & Manitoba Companies, and cannot be finally settled until after a full hearing upon the issues presented by the bill herein filed. The money and securities in the hands of the defendant Sawyer were derived from sales of portions of these lands, under an agreement between the contesting railroad companies that the same should stand for and represent the lands by the sale of which they were realized, and to be paid over to the company ultimately decreed to be the owner thereof. It is the purpose of the present bill to obtain such final decree; the former proceedings between the parties having failed to accomplish that purpose.

The circuit court held that, under the circumstances thus made clear, the interests of all would be advanced by continuing the control of the money and securities realized from the lands where the parties, by their own agreement, had previously placed the same, and to that end granted the injunction restraining the defendant Sawyer from paying over the money or securities until it was finally determined to whom the same belonged; and for the purpose of further protecting the fund for the common benefit of the litigants, the court included in the order the provision appointing Edward Sawyer a receiver of the property, with the requirement that he give bond for the faithful performance of his duties.

We fail to see that exception can be justly taken to the action of the circuit court in granting the order appealed from. On the contrary, we are of the opinion that, upon the facts disclosed in the record, it was the duty of the court below to grant the injunction asked for.

Counsel for appellant has discussed at length the ultimate question necessary to be decided upon the final hearing, to-wit, to which company do the lands belong, which question includes the construction to be placed upon the several acts of congress under which the parties claim, and the effect to be given to the action of the land department, and other like matters. It cannot be expected that upon a hearing of an application for a temporary injunction either the circuit court, or this court

upon appeal, will enter upon a full hearing of the questions upon which the ultimate rights of the opposing parties may be dependent. If it appears from the showing made that the title to the land or property is in dispute, and that the complainant is in good faith seeking to settle such dispute, that is as far as it is necessary for the court to inquire, so far as that particular point is involved, when asked to issue an injunction such as the one issued in the present proceeding; and therefore we do not enter upon a consideration of the questions which were so fully presented in argument of counsel, but which more properly belong to the final hearing of the cause upon the merits.

Finding no error in the order appealed from, the appeal is dismissed at cost of appellant.

COURTNEY *et al.* v. PRESIDENT, ETC., OF INSURANCE CO. OF NORTH AMERICA *et al.*

(Circuit Court of Appeals, Eighth Circuit. February 1, 1892.)

1. CIRCUIT COURT OF APPEALS—JURISDICTION.

On a bill to foreclose a mortgage, a decree of sale was rendered in the circuit court before the creation of the circuit court of appeals. After the creation of that court a decree was entered on a cross-bill setting up a mechanic's lien on the premises. *Held*, that an appeal to the circuit court of appeals would lie from the latter decree, though not from the former.

2. SAME—AMOUNT IN CONTROVERSY.

When the circuit court obtains jurisdiction of a suit to foreclose a mortgage involving more than \$2,000 by reason of diverse citizenship, it has jurisdiction to determine the priority of all liens upon the premises set up by cross-bill, regardless of the amounts claimed; and, as the jurisdiction of the circuit court of appeals is not limited to any amount, it may entertain an appeal from a decree of the circuit court on such a cross-bill, refusing to recognize a lien for less than \$2,000.

3. MECHANICS' LIENS—WHEN ATTACHES.

Comp. St. Neb. c. 54, § 3, provides that on filing the proper account for a mechanic's lien the same shall operate as a lien "for two years from the commencement of the labor or the furnishing such materials." *Held*, that the word "commencement" qualifies both "labor" and "furnishing," and the material-man's lien dates from the time of the first delivery.

4. SAME—ACCOUNT AND AFFIDAVIT.

As against the owner of the building, as well as a mortgagee thereof who received his mortgage before the end of the four months allowed for filing the account, the material-man's lien attaches from the date of the first delivery, although the account and affidavit do not show such date, and only contain the date when the money became due, which was after the last delivery of material.

Appeal from the Circuit Court of the United States for the District of Nebraska. Reversed.

Carroll S. Montgomery, Eugene Montgomery, and Montgomery, Charlton & Hall, for appellants.

John C. Wharton and William Baird, for appellees.

Before CALDWELL, Circuit Judge, and SHIRAS and THAYER, District Judges.

SHIRAS, District Judge. On the 25th of November, 1889, the appellees filed a bill in equity in the circuit court for the district of Ne-

braska, for the purpose of foreclosing a mortgage executed by Minnie L. and Fremont N. Jaynes upon certain realty situated in the city of Omaha, Neb., and given to secure the payment of the note described in the mortgage, the note and mortgage being dated October 9, 1888. To this bill, in addition to the mortgagors, there were made defendants a number of parties holding liens upon the realty, including the firm of Courtney & McBride. The latter answered the bill, and also in due season filed a cross-bill, in which it was averred that on the 12th day of September, 1888, a contract was entered into between said firm and Minnie L. Jaynes, who was the owner of the realty subsequently mortgaged, whereby the firm agreed to furnish certain brick to be used in the erection of a building upon the realty; that in pursuance of such contract the said firm, beginning on the 12th day of September, 1888, delivered 284,000 brick between that date and the 21st of November following, which were used in the construction of a building upon the premises described in the mortgage; that on the 19th day of March, 1889, the said firm filed in the office of the register of deeds in and for Douglas county, Neb., a claim for a mechanic's lien in accordance with the provisions of the statute of the state of Nebraska, the sum claimed as a lien being \$901.25; that this sum and interest remained due and unpaid; and that the lien thus created was prior and superior to the lien of the mortgage. Answering the cross-bill, the mortgagees admitted all the averments thereof except that in which priority of lien was claimed. Upon the hearing the circuit court found and adjudged that the mortgage was a valid lien upon the realty, and adjudged that there was due complainants thereon the sum of \$17,563.25; that there was due the firm of Courtney & McBride the sum of \$986.05, which amount was a valid lien upon the realty; but that the same dated from November 26, 1888, and was therefore subject to the lien of the mortgage. The premises were sold by a master, and the amount realized was not sufficient to pay all the liens, and as a consequence Courtney & McBride have received nothing upon their claim. When the decree establishing the order and priority of the several liens was entered, it was duly excepted to, and the said Courtney & McBride forthwith perfected their appeal to this court, assigning as the principal error relied upon, the holding that the lien of appellants dated only from November 26, 1888, and was therefore inferior to the lien of the mortgage. In this court the appellee filed a motion to dismiss the appeal for want of jurisdiction, which motion, by agreement of counsel, was submitted with the main case. In support of the motion, it is suggested that, as the first argument and submission of the case was had, and the decree of the court ordering a sale of the premises was entered, on the 17th day of June, 1890, before the adoption of the act creating this court, jurisdiction to entertain the appeal does not exist. If the appeal was from that decree, the position would be well taken, but such is not the fact. The order or decree appealed from is based upon the cross-bill filed by appellants, and it was rendered July 27, 1891, at which time the act creating this court was in full force, and the right to an appeal beyond

question. Equally ill-founded is the objection to the jurisdiction based upon the fact that the amount due the appellants is less than \$2,000, the contention being that no appeal or writ of error will lie to this court unless the matter in dispute exceeds \$2,000. The argument is that, as the statute of August 13, 1888, requires that sum to be involved before the circuit court can take jurisdiction originally of a cause, it must be held that the same limitation is applicable to the jurisdiction of this court. No such limitation is found in the act creating this court, and defining the jurisdiction thereof. It may be said, generally, that it is the purpose of the act of March 3, 1891, creating this court, to provide in all civil causes an appeal to an appellate court, the appellate jurisdiction being divided between the supreme court and the circuit courts of appeal, according to the nature of the questions involved. Therefore, if it be true that the circuit court had jurisdiction of the issues presented by the cross-bill and the answer thereto, this court has jurisdiction to review the decree settling such issues. There is and can be no question raised as to the jurisdiction of the circuit court over the bill filed to foreclose the mortgage held by the complainant company, that company being a corporation created under the laws of the state of Pennsylvania, the defendants to the bill being citizens of Nebraska, the amount claimed being largely in excess of \$2,000, and the property included in the mortgage being situated in Nebraska, and therefore within the district wherein the suit was brought. Having full and complete jurisdiction of the parties to the suit and of the property involved therein, the court had the right to hear and determine all questions necessary to be settled in order to enter a proper decree of foreclosure, to secure an advantageous sale of the property, and to distribute the proceeds of the sale. It had the right to entertain all cross-bills filed by any one or more of the defendants for the purpose of establishing any liens held by them upon the mortgaged property, the jurisdiction over the same not being dependent upon the citizenship of the adverse parties thereto, nor upon the amount in dispute therein, but being sustained by the jurisdiction over the original proceedings for the foreclosure of the mortgage. The motion to dismiss the appeal is therefore overruled, and we pass to the consideration of the question of the priority of the mortgage over the lien of the appellants.

This will require, in the first instance, an examination of the sections of the Nebraska statute creating liens in favor of parties furnishing materials to be used in the erection of buildings. Sections 1, 3, c. 54, Comp. St. Neb. p. 423, read as follows:

"Section 1. Any person who shall perform any labor for, or furnish any material or machinery or fixtures for, the erection, reparation, or removal of any house, mill, manufactory, or building, or appurtenance, by virtue of a contract, express or implied, with the owner thereof or his agents, shall have a lien to secure the payment of the same upon such house, mill, manufactory, building, or appurtenance, and the lot of land upon which the same shall stand."

"Sec. 3. Any person entitled to a lien under this chapter shall make an account in writing of the items of labor, skill, machinery, or material furnished,

or either of them, as the case may be, and after making oath thereto shall, within four months of the time of performing such labor or skill, or furnishing such material or machinery, file the same in the office of the register of deeds, * * * which account, so made and filed, shall be recorded, * * * and shall from the commencement of such labor or the furnishing such materials for two years after the filing of such lien operate as a lien. * * *

The evidence in the case shows that the materials furnished by appellants were delivered between the dates of September 11 and November 21, 1888, and that the claim for the lien was filed in the register's office on the 19th day of March, 1889, and the claim of the appellee is that, in the case of materials furnished, the lien does not attach until the completed delivery of the materials, and therefore in this case the lien of appellants did not attach until November 20, 1888, the day when the last delivery of brick was made.

We do not so construe the statute. The provision of section 3 is that the account when duly filed "shall from the commencement of such labor or the furnishing such materials for two years after the filing of such lien operate as a lien," etc. The word "commencement" qualifies both phrases used to describe the constituents of the lien, to-wit, "such labor" and "the furnishing such materials." It is not questioned that in the case of a lien for labor done such lien dates from the commencement of the doing thereof, and we do not believe that it was the intent to change the rule in the case of the furnishing materials. The statute was passed for the express purpose of protecting parties who should perform labor or furnish materials for the erection of buildings, and it would largely defeat the beneficent purpose of the statute if the construction urged on behalf of appellee should be given to the section above quoted. If the lien for materials does not attach until the entire contract of delivery is completed, then it is always within the power of the owner of the building to defeat the attaching of the lien by a sale of the property just before the delivery is completed, or to render it valueless by giving mortgages or other liens thereon after the value of the realty has been largely increased by the use of materials furnished, but before the material-man, by a complete delivery, has become entitled to a lien. The furnishing materials under a contract for use in the erection of a building is a continuing act, beginning with the first delivery, and ending with the last, of the particular articles contracted to be furnished; but the act of furnishing extends from the first day to the last, inclusive, and therefore, under section 3 of the Nebraska statute, the party furnishing the materials, to become entitled to a lien, must, within four months of the time of furnishing said materials,—that is, within four months after the completion of the act of furnishing the materials,—file the necessary account in writing, under oath, and, when this is done, then the lien dates from the commencement of the act of furnishing the materials contracted to be delivered. We understand this to be the construction placed upon the statute by the supreme court of Nebraska in *Ansley v. Pasahro*, 22 Neb. 662, 35 N. W. Rep. 885, and the decision of that court upon the question is, of course, conclusive upon this court, even though we might be

inclined to a different view of the statute, which, however, as already stated, we do not hold, and our conclusion is that the lien for materials furnished under the provisions of the statute of Nebraska dates from the time when the delivery thereof was commenced.

A more doubtful question arises upon the form of the account filed by appellants in the register's office, it being claimed by the appellee that upon its face it claims a lien only from November 26, 1888, and that the appellants cannot be permitted to assert that the lien attached at an earlier day; and it was upon this view, as we understand it, that the circuit court based the conclusion that the lien of appellants was inferior to that of the appellee. The affidavit filed in the register's office states the facts in regard to the furnishing the brick to be used in the erection of the building, and then continues as follows:

"A statement is hereto attached marked 'Exhibit B,' and made a part hereof, showing the number of brick furnished under said contract, and the payments thereon, and the amount due said Courtney & McBride from the said M. L. Jaynes, which amount, after allowing all payments and just credits thereon, is the full sum of \$901.25. The said Courtney & McBride desire to secure, and hereby claim, a lien upon the above-described real estate, buildings, and the appurtenances thereto belonging, for the said sum of \$901.25, with interest thereon at the rate of 7 per cent. per annum from the 26th day of November, 1888, pursuant to the statutes of the state of Nebraska in such cases made and provided."

The statement attached to the affidavit is as follows:

"OMAHA, NEB., Nov. 26, 1888.

"Mrs. M. L. Jaynes, Omaha, Neb., to Courtney & McBride, Dr., Brick Manufacturer; Yard, 16th Street, North of Fair Grounds.

Nov. 26th, 285,000, \$7.00,	-	-	-	-	-	-	\$1,995 00
By cash,	-	-	-	-	-	-	850 00
							<hr/> \$1,145 00
Extra hauling, per T. J. Quick,	-	-	-	-	-	-	6 25
							<hr/> \$1,151 25
By cash, \$250,	-	-	-	-	-	-	250 00
							<hr/> \$901 25

"COURTNEY & MCBRIDE."

The statement filed for the purpose of establishing a lien does not state from what date the lien is claimed, and the account attached does not state when the delivery of the brick was begun. There is, however, no dispute as to the fact that the first delivery under the contract was on September 12th. This is admitted in the pleadings. So far as the owner of the property is concerned, it cannot be claimed that she was misled in this matter, or that she would not know when the lien would attach. She knew the date of the contract and the day when the appellants commenced to deliver the brick contracted for, and, as the statute gives a lien from that date, she could not be in doubt as to the purpose of appellants in making claim for a lien for the balance due them, "pursuant to the statutes of the state of Nebraska in such cases made

and provided." We think, therefore, the statement was sufficient, as between the appellants and the owner of the property, to create a lien from the date of the first delivery of brick under the contract. The fact that the bill attached to the affidavit, as above quoted, bears date November 26th, cannot be held to be a statement that the lien is claimed from that date. That date is given in the bill as a statement of the time when the payment became due, and could not have misled the property owner in any way.

Does the case stand in any different position as between the mortgagee and the lienholders? The record shows that the mortgage was executed October 9, 1888, and was assigned to the appellee March 13, 1889; therefore it cannot be claimed that either the original mortgagee or the appellee was in any way misled by the form of the statement filed for the purpose of securing a lien, because it was not so filed until after the execution and assignment of the mortgage. Knowing the fact that the mortgagor was erecting a building upon the premises, the mortgagee and appellee were bound to take notice that the parties furnishing the materials for the erection of the building were entitled, under the laws of Nebraska, to establish a lien for the sums due them, by taking the steps provided in the statute within four months after the furnishing the material was completed, and they therefore took the mortgage with notice of the rights of the appellants. Thus it is said by the supreme court of Nebraska in *Doolittle v. Plenz*, 16 Neb. 156, 20 N. W. Rep. 116:

"A party purchasing a building within four months from the time of its completion, or after repairs have been made upon it, takes it subject to any legitimate claim against it for erecting or repairing the same. The law is notice to every one that such lien may be filed, and it behooves the party purchasing the premises to see that all such claims are satisfied or secured, and no person can be a *bona fide* purchaser, as against such liens, by simply taking a deed from the owner of the fee."

If, therefore, the appellants have established a lien upon the premises, which, as between them and the owner of the property, dates from September 12, 1888, and if the mortgage was executed and assigned at a time when the law charged the parties taking the same with notice of the right of appellants to claim a lien from that date, it follows that the rights of the lienholders are superior, and not inferior, to the lien of the mortgage.

The decree appealed from is therefore reversed, and the cause is remanded to the circuit court, with instructions to enter a decree awarding priority to the lien held by the appellants over that created by the mortgage, and directing payment of the amount due the appellants from the proceeds of the sale before payment to the mortgagee, and also awarding costs to appellants, including the costs of this appeal.

ST. PAUL, S. & T. F. RY. CO. v. SAGE.

(Circuit Court of Appeals, Eighth Circuit. February 1, 1892.)

1. FEDERAL COURTS—STATE STATUTES OF LIMITATION—RAILROAD GRANT LANDS.

In a suit in equity between two Minnesota corporations, to determine conflicting claims to land under grants from congress, the federal court will recognize and apply the state statute of limitations.

2. LIMITATION OF ACTIONS—LEGAL FRAUD.

Gen. St. Minn. c. 66, § 6, subd. 6, providing a six-years limitation in actions for relief on the ground of fraud, and that the cause of action shall not be deemed to accrue until the discovery of the fraud, applies to an action based upon the legal fraud involved in the refusal of a person who has become invested with the legal title to lands to convey the same to the real owner, or to account to him for the proceeds thereof in case the lands have been sold.

3. SAME—DISCOVERY OF FRAUD.

In such case the bar of the statute cannot be avoided on the ground of delay in discovering the fraud by a land-grant railroad company with respect to lands lying within its place limits which have been selected as indemnity lands by another land-grant company, and have been certified to the state as such, and by it conveyed to the company; since all these proceedings were necessarily matters of public record, which it was inexcusable neglect not to discover.

4. LACHES.

Independently of the statute of limitations it was laches for the complainant company to delay the assertion of its title for 14 years after the conveyance of the lands to the defendant company, during which period the lands were sold by defendant to settlers, whose title is necessarily clouded by the present proceedings.

5. SAME.

The fact that under the bill, instead of a recovery of the lands, a money judgment could be had for the proceeds of their sale, does not affect the question of laches, it appearing that such proceeds have been used in paying defendant's debts, and that a judgment for the amount thereof would greatly depreciate the value of defendant's bonds and stock-shares, many of which have doubtless passed into the hands of innocent holders.

44 Fed. Rep. 817, and 32 Fed. Rep. 821, reversed.

Appeal from Circuit Court of the United States for the District of Minnesota.

Bill originally brought by the Hastings & Dakota Railway Company against the Stillwater & Taylor's Falls Railway Company to recover certain lands, or to have an accounting for the money realized therefrom. Russell Sage, having purchased all the title and interest of complainant since the commencement of the suit, was substituted as plaintiff. Decree for complainant, (32 Fed. Rep. 821,) which was affirmed on rehearing, (44 Fed. Rep. 817.) Defendant appeals. Reversed.

Thomas Wilson and Lloyd W. Bowers, for appellant.

John M. Gilman, Frank B. Kellogg, Owen Morris, and Britton & Gray, for appellee.

Before CALDWELL, Circuit Judge, and SHIRAS and THAYER, District Judges.

SHIRAS, District Judge. By an act of congress, approved March 3, 1857, there was granted to the then territory of Minnesota, for the purpose of aiding in the construction of a line of railway from Stillwater, by way of St. Paul and St. Anthony, to a point between the foot of Big Stone lake and the mouth of Sioux Wood river, with a branch by way of St. Cloud and Crow Wing to the Red River of the North, every

alternate section of land designated by odd numbers for six sections on each side of said named lines of railroad; it being further provided that if it should appear, when said lines of railway were definitely fixed, that the United States had sold any of the granted sections or parts thereof, or that the right of pre-emption had attached thereto, then selections of indemnity lands might be made by agents of the territory, subject to the approval of the secretary of the interior, from the odd-numbered sections lying nearest to the six-mile limit, and within a limit of 15 miles from the line of said railways. By the act of March 3, 1865, the place limits as defined in the act of 1857 were extended to 10 sections per mile, and the indemnity limits to 20 miles on each side of the railroads named in the act.

The territory of Minnesota, by an act of its legislature, approved May 22, 1857, accepted the grant for the purposes named, and authorized the Minnesota & Pacific Railroad Company to construct the designated lines of railway, and by various transfers and other proceedings, not necessary to be detailed, the St. Paul, Stillwater & Taylor's Falls Railway Company has become the beneficiary under said grant, and entitled to all the lands and the proceeds thereof passing by the terms thereof, by reason of the construction of the named line of railway, by way of St. Paul and St. Anthony, to a point between the foot of Big Stone lake and the mouth of Sioux Wood river. By an act of congress, approved July 4, 1866, a further grant of land was made to the state of Minnesota, to aid in the construction of a line of railway from the town of Hastings, through the counties of Dakota, Scott, Carver, and McLeod, to a point on the western boundary of the state to be designated by the legislature; the grant covering the odd-numbered sections for 10 miles on each side of the named line of railway, with the right to select indemnity lands within a limit of 20 miles. The state of Minnesota accepted this grant, by an act of the state legislature, approved March 4, 1867, and authorized the Hastings & Dakota Railway Company to construct the designated line of railway, and to thereby become the beneficiary of the congressional grant contained in the act of 1866, and that company has, by the construction of the road, become entitled to the benefit of the grant in question. On the 19th of December, 1871, the secretary of the interior certified to the state of Minnesota, and the state, on the 19th of February, 1872, conveyed to the St. Paul, Stillwater & Taylor's Falls Railway Company, some 20,807 acres of land as part of the indemnity lands belonging to that company, all of which lands are situated without the primary or place limits of the grants under which that company claims title, but within the indemnity limits thereof as enlarged by the amendatory act of March 3, 1865; or, in other words, the same are more than 15 but less than 20 miles from the line of railway constructed and operated by that company, and they are within 10 miles of the line of railway constructed and operated by the Hastings & Dakota Company.

On the 26th day of January, 1886, there was filed in the United States circuit court for the district of Minnesota by the Hastings & Da-

kota Railway Company a bill in equity, in which it was averred that the complainant was the real owner of the 20,807 acres of land above named; that the same had been wrongfully certified and conveyed to the St. Paul, Stillwater & Taylor's Falls Railway Company; that by the terms of the act of congress of July 4, 1866, and the location of the line of railway, and the filing of the map showing such location, the equitable right and title to said lands had passed to the complainant company before said lands had been selected and certified as indemnity lands for the benefit of the St. Paul, Stillwater & Taylor's Falls Company, which was made the defendant to the bill, and a decree was prayed to the effect that the defendant be decreed to hold all said lands, and the legal title thereof, in trust for complainant, and to convey the same, or that the title thereto be passed to complainant, as provided by the statutes of the state of Minnesota, and for other and further relief. On the 9th day of June, 1887, an amendment was filed to the bill, in which it was averred that the defendant company had sold, mortgaged, and otherwise disposed of certain portions of the lands in question, and it was therefore prayed that, in addition to the relief originally asked, the defendant be required to account for all lands sold, mortgaged, or disposed of, and to pay the proceeds thereof to complainant. The defendant company answered the bill upon the merits, and the cause was duly submitted, upon the pleadings and proofs, and thereupon a decree was entered, adjudging that the complainant company had the equitable title to the lands described in the bill; that the defendant company be perpetually enjoined from asserting any claim or title thereto, and be required to convey such portion thereof as had not been previously sold or disposed of to the complainant within 30 days after the confirmation of the master's report, and the case was ordered to be referred to a master, for him to ascertain and report the number of acres of the lands that had been sold or disposed of by the defendant company, with the amounts realized by such sales, together with a statement of the expenses and outlay made or incurred by the defendant in reference to or on account of said lands. It appearing by a stipulation signed on behalf of each party, and filed on the 17th day of March, 1891, that the Hastings & Dakota Railway Company had, since the commencement of the suit, sold and assigned all its title and interest in the lands in controversy to Russell Sage, it was ordered by the court that he be substituted as complainant in the cause.

The report of the master having been filed, thereupon the defendant company moved for and obtained an order for a rehearing of the cause upon its merits, and also obtained leave to amend the answer in the cause, by pleading, as an additional defense, the statute of limitations enacted by the legislature of the state of Minnesota, averring as the basis thereof that the lands in dispute had been certified by the secretary of the interior to the state for the benefit of defendant, and had been by the state deeded to defendant, and the deeds entered upon the public records, more than six years before the bringing of this suit. Upon the rehearing the court held adversely to the plea of the statute of limita-

tions, and in favor of the complainant upon the other issues; and, it appearing from the report of the master that all the lands named in the bill had been sold or disposed of by the defendant company, and that the amount realized therefrom, including interest, and deducting the expenses and the outlay incurred by defendant in connection with said lands, was the sum of \$211,536.35, a decree ordering the payment thereof by the defendant company was duly entered. To reverse this decree the defendant company perfected an appeal to this court, and counsel for the respective parties have very fully and ably discussed the questions of law and facts involved in the controversy.

We propose to first consider the questions arising upon the plea of the state statute of limitations, the overruling of which is assigned as error. On behalf of the complainant it is argued that when courts of the United States, sitting in equity, are called upon to determine and enforce rights arising under acts of congress, the provisions of a state statute of limitations cannot be made applicable thereto. Where rights to property are created by acts of congress, and the procedure for enforcing or protecting the same is likewise created by congressional action, and the jurisdiction is conferred exclusively upon the federal courts, as in matters pertaining to patents, and the like, then it may well be claimed that state statutes of limitation do not apply thereto; but in cases wherein the jurisdiction over the subject-matter of controversy is concurrent in the state and federal courts, why should not force be given to the state statute in both courts? In England the statute was originally applicable only to actions at law, but courts of equity, in all cases of concurrent jurisdiction, gave full effect to the provisions of the statute, acting, as it was said, by way of analogy; but by the act of 3 and 4 Wm. IV. suits in equity were brought within the express provisions of the statute. In Minnesota the statute in terms is applicable to proceedings at law and in equity, and is therefore binding upon the state courts, without regard to the nature of the jurisdiction that is being exercised in the given case, or, as is said by the supreme court in *Godden v. Kemmell*, 99 U. S. 201:

"Statutes of limitation form part of the legislation of every government, and are everywhere regarded as conducive, and even necessary, to the peace and repose of society. When they are addressed to courts of equity as well as courts of law, as they seem to be in controversies of concurrent jurisdiction, they are equally obligatory in both forums as a means of promoting uniformity of decision."

The general question under consideration is quite fully discussed by Mr. Justice HARLAN in delivering the opinion of the court in *Kirby v. Railroad Co.*, 120 U. S. 130, 7 Sup. Ct. Rep. 430, in which it is held that the jurisdiction in equity conferred upon the courts of the United States cannot be impaired or impeded in execution by state statutes of limitation, and particularly in cases solely of equitable cognizance; that in cases of concurrent legal and equitable jurisdiction, subject to the rule of carefully preserving the equitable jurisdiction of the federal courts unimpaired, the court of equity is bound to enforce the state statute of limitations, and in cases of equitable cognizance solely the court will, by

way of analogy, apply the provisions of the state statute applicable to the subject-matter of the controversy, and thus give effect to the salutary principle underlying these statutes of repose. In applying these principles to the facts of the particular case then under consideration, the court held that it would not, the case being in equity, apply a provision of a state statute that would bar relief in equity against an actual secret fraud in a given number of years from the perpetration of the act of fraud, but would apply the limitation in accordance with the equitable principle recognized in the federal courts; that the bar caused by the lapse of time should not begin to run until the discovery of the fraud by the one aggrieved thereby, or the equivalent of such discovery. It appearing, however, that nearly seven years had elapsed after the discovery of the fraud, the court held that the limitation of six years provided in the statutes of New York, from which state the cause came to the supreme court, was a bar to the proceeding.

In *Wood v. Carpenter*, 101 U. S. 135, will be found a very instructive discussion of what is required in the way of pleading and proof, when it is sought to avoid the bar of the statute on the ground of lack of knowledge of the alleged fraud. It is therein said:

"Statutes of limitation are vital to the welfare of society, and are favored in the law. They are found and approved in all systems of enlightened jurisprudence. They promote repose by giving security and stability to human affairs. An important public policy lies at their foundation. They stimulate to activity, and punish negligence. While time is constantly destroying the evidence of rights, they supply its place by a presumption which renders proof unnecessary. Mere delay extending to the limit prescribed is itself a conclusive bar. The bane and the antidote go together."

The court then proceeds to show that the principle that the bar of the statute, in cases of fraud, is not usually held to begin to run until the discovery of the fraud, is a rule originally established by courts of equity, and thence imported into the statutes; that a party who seeks to avoid the plea of the statute is bound by stringent rules of pleading and evidence; that there must be distinct averments as to the time when the fraud, misrepresentation, or concealment was discovered, and the nature thereof, so that the court may see whether, by ordinary diligence, an earlier discovery might not have been made; that a general allegation of ignorance at one time, and of knowledge at another, are of no effect; that a party seeking to avoid the bar of the statute on account of fraud must aver and show that he used due diligence to detect it, and, if he had the means of knowledge or discovery in his power, he will be deemed to know all that, with ordinary care, he might have obtained knowledge of; that the fraud which will arrest the running of the statute must be one that is secret and concealed, and not one that is open and known.

In *Bicknell v. Comstock*, 113 U. S. 149, 5 Sup. Ct. Rep. 399, it appeared that an action for the breach of the covenants of warranty in a conveyance of lands in Iowa was brought in the United States circuit court for the eastern district of New York; it being claimed that the su-

terior title was in the state of Iowa under a congressional grant to that state. It appeared in the cause that in May, 1869, a patent in due form had been issued, conveying the land to Bicknell, which patent was forwarded to the local land-office at Fort Dodge, Iowa, for delivery to Bicknell. In June, 1878, the commissioner of the general land-office ordered the patent to be returned to his office, and on its reception he tore off the signature of the president, and erased the record of the patent in the general land-office. It was pleaded in the case that Bicknell and his grantees had been in the actual possession of the premises since May 23, 1862, and had made valuable improvements on the land. The supreme court held that, without deciding whether the patent conveyed a valid title or not, Bicknell and his grantees were in possession under claim and color of title; and that the provisions of the Iowa statute, making 10 years' possession a bar, was applicable to the case, regardless of whether the suit was at law or in equity, citing, in support of the ruling, the cases of *Leffingwell v. Warren*, 2 Black, 599; *Croxall v. Shererd*, 5 Wall. 289; *Dickerson v. Colgrove*, 100 U. S. 583. These citations are sufficient to show, as is said in *Leffingwell v. Warren*, *supra*, "that the courts of the United States, in the absence of legislation upon the subject by congress, recognize the statutes of limitation of the several states, and give them the same construction and effect which are given by the local tribunals." There is nothing in the subject-matter of the controversy now before the court that takes the case out of the general rules thus enunciated by the supreme court. The land described in the bill is situated in the state of Minnesota. The original parties to the litigation are both corporations created under the laws of that state. The question in dispute between them is, which party is the owner of the land; and, while the settlement of that question involves, among other matters, the construction of the several acts of congress making grants to the state of Minnesota to aid in the construction of certain lines of railway, that fact does not make the litigation solely and exclusively of federal jurisdiction. This proceeding to settle the rights of the respective parties to these lands could have been brought in the proper court of the state of Minnesota, and its jurisdiction to hear and determine all questions arising in the case would have been beyond dispute. If the suit had been thus brought in the state court, can it be doubted that it would have been the duty of that court to give full force to the state statute of limitations, had the same been pleaded in the case? If any of the provisions of the statute—a statute wisely enacted to give stability to titles, thereby promoting confidence, and encouraging the improvement of the lands of the state, and intended to prevent the evil of parties waiting until by lapse of time valuable evidence may be rendered difficult of procurement or wholly unattainable, and then preferring doubtful and speculative claims—would have barred the suit if brought in the state court, why should not the same bar be effectual when the proceeding is in the federal court? Upon both principle and authority we are of the opinion that the case is one in which the federal court, sitting in equity,

should give the same force and efficacy to the provisions of the state statute that would be given thereto if the cause was pending before a court of the state of Minnesota.

In the state statute are to be found two clauses which it is claimed have relation to a suit of this character, being subdivisions 6 and 7 of section 6, c. 66, tit. 2, of the General Statutes of Minnesota, the limit of time applicable to each being six years. These clauses read as follows:

"*Sixth.* An action for relief on the ground of fraud; the cause of action in such case is not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud.

"*Seventh.* Actions to enforce a trust or to compel an accounting where the trustee has neglected to discharge his trust, or has repudiated the trust relation, or has fully performed the same."

In the absence of an authoritative construction of these clauses of the statute by the supreme court of Minnesota, we should be of the opinion that the proceeding now before the court comes within the sixth subdivision above cited. That subdivision covers actions for relief on the ground of fraud; and, as the statute is undeniably intended to include proceedings at law and in equity, it may well be argued that the clause includes not only such actual frauds as may form the basis for actions at law, but also all such transactions as a court of equity will adjudge to be frauds, actual or constructive; thus including cases wherein a party, having become vested with the title of property rightfully belonging to another, refuses to convey the same to the real owner, or to account to him for the value thereof, in case the same has been sold and the money appropriated by the one not entitled thereto, which withholding of the property or its proceeds would be deemed to be a fraud upon the rights of the real owner. The seventh subdivision, covering actions to enforce a trust or to compel an accounting where a trustee has neglected his duty or has repudiated the trust relation, would seem to be limited to trusts express, implied, or resulting, growing out of the agreements of parties, or out of the duties and obligations pertaining to some relation of trust assumed by the one charged as a trustee, and does not include purely constructive trusts of the character of that charged against the defendant in this proceeding. This is clearly indicated by the terms used to describe the derelictions of the trustee, which may form the basis of the action, intended to be included within this subdivision, to-wit, "where the trustee has neglected to discharge his trust, or has repudiated the trust relation, or has fully performed the same." This phraseology is entirely apt when applied to cases wherein an actual trusteeship exists, and the trustee neglects the duty assumed by him, or, after assuming the position, then repudiates the trust relation, or closes up the trust, but fails to properly account for his stewardship, but it is only by a strained construction of the terms that they can be made applicable to constructive trusts that are imposed by the law, contrary to the will of the one held to account. It is, however, claimed by the defendant that the supreme court of Minnesota, in the case of *Burk v. Association*, 40 v.49F.no.5—21

Minn. 506, 42 N. W. Rep. 479, has expressly ruled that a case similar to that now before the court, wherein it was sought to have the defendant adjudged a trustee of the legal title for the benefit of the plaintiff, was governed by the seventh subdivision above cited, and it is not to be denied that the opinion does so state. The case is very briefly reported, and in view of the language used in other decisions by the same court, including that in the case of *Lewis v. Welch*, decided in April last, and reported in 48 N. W. Rep. 608, it is not entirely clear that the supreme court of Minnesota, whose construction of the statute is, of course, binding upon us, intends to be understood as ruling that cases like the present do not come under the sixth, but only under the seventh, subdivision of section 6 of the statute. If it be held that the seventh subdivision is the clause applicable to the proceeding, then it follows that the bar of the statute is made out, for it is not disputed that the lands were deeded to the defendant company in 1871, and that company has ever since that date claimed to be the owner of the lands, so that more than six years had elapsed since the defendant received the title before the present suit was brought.

The same result follows, if it be held that the case falls within the provisions of subdivision 6 of the statute. In that event, the ruling in *Wood v. Carpenter*, already cited, would be applicable, and it would be incumbent upon complainant, in order to avoid the bar created by the lapse of six years since the vesting of the title in the defendant company, to show clearly when discovery of the fact was made, and that the company was not in fault in not obtaining such knowledge at an earlier day. The fraud sought to be charged upon the defendant is not an actual fraud, nor is it one which was in any way concealed or kept secret. The facts show that both companies were claiming these lands. Every step taken by the defendant was, of necessity, made openly and above board. The lands were selected as indemnity lands, belonging to the defendant, and the governor of the state asked in due form that they be so certified. They were certified to the state, and by the state were deeded to the defendant. These deeds were entered of record in the counties wherein the lands are situated, and in fact every step taken in procuring the same was made part of the public records of the federal and state land departments, which were open to the scrutiny of the public. The lands were offered for sale and sold to various purchasers, who entered into actual and open possession of the premises, and thus notice in every possible way was given to all the world that the defendant claimed the land, with full right to sell and dispose of the same.

In view of the facts disclosed upon this record, it cannot be held that the complainant can escape the bar provided in the sixth subdivision on the ground that it did not discover the facts of the alleged fraud, for, if it was ignorant of the fact of the transfer of the title of these lands to the defendant, it must have been willfully ignorant, in that it had before it the means of knowledge, and it is not claimed that the defendant practiced any concealment in the premises. The plea that was filed on behalf of the defendant was, in effect, that six years and more had elapsed

since the title of the lands had been conveyed to it, and therefore the action was barred by lapse of time. According to the ruling of the United States supreme court in *Wood v. Carpenter*, *supra*, if the complainant desired to escape the bar by reason of the fact that relief was sought against fraud not discovered until a time within the six years, then it was the duty of the complainant, by proper allegations and proof, to show the existence of actual fraud, concealed from the knowledge of complainant, and, without fault on its part, not discovered until within the six years before the bringing of the suit; and under the ruling of the supreme court of Minnesota in *Burk v. Association*, *supra*, if there were any facts excusing the delay, the complainant should have pleaded and proved the same. The bill on its face expressly avers that the lands in dispute were selected by the agents appointed by the governor of the state, with the approval of the secretary of the interior, and were certified to the state in aid of, and for the benefit of, the St. Paul & Pacific Company, the predecessor of the defendant company, on the 11th day of October, 1871, and it is not averred that the complainant or its predecessors had not knowledge of this fact. When the plea of the statute was filed, it was open to complainant to meet it by the averment of any and all facts which would avoid the running of the statute, if any such existed, but no amended or supplemental bill or amendment thereto was filed, and there is, therefore, upon the face of the pleadings nothing to the contrary of the fact that complainant and all its predecessors had full knowledge of all the transfers of the lands in dispute at the time the same were made.

The evidence also shows that the entire line of complainant's road was completed by December, 1879, more than six years before this suit was brought.

Reliance is placed, in argument, upon the testimony of George E. Skinner and W. H. Kelly, who were land commissioners of the complainant company, that they or the company did not have notice of the transfer of these lands to the defendant until in 1883. While these witnesses do in general terms so testify, they wholly fail to explain why they, or the company they represented, did not take interest enough in the matter to make any inquiry about these lands, or to obtain knowledge of their condition in regard to title or occupancy. It does not seem possible that no examination or inquiry in regard to these lands was ever made on behalf of the complainant company for nearly four years after the whole line of road was completed, and for seventeen years after they were granted to the company, according to the present contention. The means of knowledge on part of the complainant were too open and available for it to be credible that the company allowed a period of seventeen years to elapse after the date of the grant under which it claims, and four years after it had earned all it could under the grant, before any inquiry touching these lands was made in the interest of the company, and even the slightest inquiry or examination would have disclosed the fact that the state and United States authorities had selected and conveyed these lands to the defendant company, deeming that company to be en-

titled thereto. If, however, it be true that the complainant did not obtain knowledge of this fact until in 1883, as is now claimed, then such want of knowledge was due solely to the inexcusable negligence of the complainant, and ignorance due to negligence cannot be urged as a ground why the bar of the statute should not prevail.

Furthermore, even if it should appear that through any fault in pleading or otherwise the defense based upon the plea of the statute of limitations had not been technically made out, or if there was no provision in the statute properly applicable to proceedings of this nature, we deem it to be a case wherein the long and unexplained delay in bringing the suit requires the court to hold that the claim has, through the laches of complainant and his assignor, become a stale demand, and one which a court of equity will not enforce. The rule that laches will defeat a claim which, if promptly pressed, would have been recognized and protected by a court of equity, is so well settled that it is hardly necessary to cite authorities in support thereof. See, however, *Wagner v. Baird*, 7 How. 234; *Hume v. Beal's Ex'r*, 17 Wall. 336; *Marsh v. Whitmore*, 21 Wall. 178; *Sullivan v. Railroad Co.*, 94 U. S. 806; *Lansdale v. Smith*, 106 U. S. 391, 1 Sup. Ct. Rep. 350; *Speidel v. Henrici*, 120 U. S. 377, 7 Sup. Ct. Rep. 610; *Mackall v. Casilear*, 137 U. S. 556, 11 Sup. Ct. Rep. 178; *Boone Co. v. Railroad Co.*, 139 U. S. 684, 11 Sup. Ct. Rep. 687.

The admitted facts of the case are these: The grant of the lands under which the complainant claims, was made July 4, 1866, to the state, and on the 7th of March, 1867, the Hastings & Dakota Railway Company was designated as the beneficiary of the grant by action of the state legislature. On the 26th of June, 1867, the company filed its map of definite location of the line of railway in the general land-office, and now asserts that from that date its rights had attached to the lands in dispute, or that the same were from that date withdrawn from the operation of any grant or other disposition under the laws of the United States. The line of railway of the Hastings & Dakota Company was completed by the lands in dispute in 1879. The selection and conveyance of the lands to the defendant company was made in October, 1871, and the present bill was filed January 26, 1886.

Even if it be true, as claimed by complainant, that until the final completion of the road the Hastings & Dakota Company could not maintain a bill to compel the transfer of the legal title to it, yet it is entirely clear that, upon the conveyance of the land to the defendant company in 1871, the Hastings & Dakota Company could have maintained a bill in equity enjoining that company from selling or encumbering the property until the final determination of the question of the rightful ownership of the lands. No such action was taken. The Hastings & Dakota Company, so far as it appears, remained supinely inactive, and permitted the state authorities to select the lands as indemnity lands belonging to the defendant company, and to petition the secretary of the interior to certify them to the state for the benefit of the defendant company, and upon their certification to the state permitted the state to deed them to the defendant company without objection or protest. Grant the conten-

tion of the complainant, that there was no appropriate legal remedy open to the railway company until the lands had been deeded to the defendant, what excuse is there for the delay of over 14 years that intervened between the time the lands were deeded to the defendant company and the bringing of the present suit, during which period the courts of equity were open for the assertion and protection of whatever rights and equities belonged to the complainant company.

It is urged in argument that it does not appear that the lapse of time has put the defendant company or any one else at a disadvantage, and therefore there is no ground for applying the doctrine of laches. The lapse of time is almost certain to affect the evidence upon which the legal rights of the parties are dependent, and this is a sufficient reason for requiring diligence at the hands of a suitor in equity in all cases wherein it appears that delay may have put a party to a disadvantage in the procurement of material evidence. The record of this case discloses the fact that one of the main points in controversy is in regard to the extent of the withdrawal of lands ordered by the commissioner of the general land-office, in letters addressed to the local land-officers in Minnesota, dated July 10, 1865, and containing diagrams of the line of the railway opposite to which the ultimate sections were ordered withdrawn. These diagrams and other like matters are not in evidence, having, it would seem, become lost or mislaid. But, aside from considerations of this nature, it is clearly apparent that the money interest of the defendant, and others holding under it, would be disastrously affected by entertaining the present bill at this late date. In the first instance, it is averred in the amendment to complainant's bill that after the lands had been conveyed to the defendant company it executed a mortgage thereon, and it appears from the evidence that the bonds secured by such mortgage were sold for the purpose of raising money to aid in building the railway owned by the defendant. The bill, as amended, prays the court to adjudge the lands to be the property of complainant, the defendant to be a trustee holding the title for complainant; and certainly, from the moment this bill was filed, the security of the mortgage executed by the defendant company has been affected, and the value of the bonds secured thereby has been depreciated.

Furthermore, if the defendant company is now required to pay the sum adjudged against it, the loss caused thereby will fall upon the present stockholders, none of whom may have been benefited by the sale of the lands made in years past. The court cannot ignore the fact that the stock and bonds of corporations like the defendant are constantly changing hands, and that it is entirely possible that the present stockholders, when they purchased their stock, paid a larger price therefor by reason of the fact that the defendant then appeared to be the owner of the lands in controversy; and certainly, if the large sum now claimed is assessed against the company, the loss caused to the stockholders, and bondholders as well, in the necessary depreciation of the value of their securities, will be certain and great. As is said by the supreme court in *Graham v. Railroad Co.*, 118 U. S. 161, 6 Sup. Ct. Rep. 1009, a case wherein a bill was filed for relief against fraud in the giving and foreclosure of a

railroad mortgage, the bill being filed within fourteen years after the giving of the mortgage and seven years after the foreclosure thereof:

"During all this time the records of the courts, upon which appear all the proceedings by which the alleged fraud is claimed to have been consummated, have been open to inspection and examination, and what has been done under them might have been known to the plaintiff if he had seen fit to make inquiry. In the mean time, it is apparent that many persons must have acquired rights in the stock of the new corporation who were ignorant of the alleged frauds. Under such circumstances, to set aside this mortgage, and to disregard the decree of foreclosure, * * * is a proposition so wild and preposterous as hardly to merit serious consideration."

If, however, the court should give consideration only to the effects of the proceeding upon the defendant company, there is ample ground therein to sustain the defense of laches. The decree appealed from gives judgment for the sum of \$211,536.35, and awards execution for the collection thereof. It appears from the evidence that, as the lands were sold the proceeds realized were used in paying the debts of the company, and no part thereof is now under the control of the company. There is included in the sum awarded complainant a large amount of interest, and if the decree is affirmed the company will be compelled to meet a demand for a sum largely over \$200,000, or by failure to pay the same submit to a levy of execution on its property. It certainly needs no extended argument to show that it is entirely possible that the affirmance of the decree might cause the insolvency of the company, or at least it might greatly cripple and embarrass it. In view of the possible consequence to the company alone, it is certainly the duty of the court to require that the equity of complainant be made clear in all essential points, including that of diligence, before the court will move in its behalf.

But, aside from all considerations of the effect upon the defendant company, its stockholders and bondholders, of entertaining the present bill, there are other and more persuasive grounds for holding that the relief sought should not be granted at this late day. The equitable rule that one who is negligent shall not have relief, and the barring of proceedings after the lapse of stated periods of time by statutory enactments, are alike based upon public policy, as well as upon considerations affecting only individual rights. It is to the public interest that stability in the title to property should exist, and that all uncertainties and disputes as to the ownership of land should be speedily put at rest. No greater evil to the community at large can well be imagined than that caused by attacks upon the title to large bodies of land which have been for years in the actual possession of *bona fide* settlers, thus weakening the public confidence in the recognized and established evidences of title. It is greatly to the welfare of the community that realty shall be improved to the best advantage, and rendered as productive as possible, and yet these results cannot be expected if the parties in possession are in doubt whether if they sow they will be permitted to reap the harvest. Hence, there lies at the foundation of the principle that the lapse of time will become a defense to the title of the one in possession of property not only consideration for his personal rights and equities, but also a recognition of the higher public interests, which can only be subserved

by putting at rest, as speedily as possible, all doubts and uncertainties touching the title of realty, to which end it is the duty of courts to discourage delays in the assertion of conflicting claims thereto.

We conceive this case to belong to a class which imperatively calls for a strict application of the rule that courts of equity will move only in behalf of the diligent. Grants like those under which the parties hereto respectively claim the premises in dispute embrace large quantities of land, and yet the grants do not describe the particular sections that are included therein. The line of the railway must be located to the satisfaction of the secretary of the interior, and the actual limits of the grant are then defined by the officers of the land department, and in case of indemnity lands, the selections are made by the agents of the state, and, upon approval by the secretary of the interior, they are certified to the state for the benefit of the named railroad, and the state then in due time conveys the same to the company. The beneficiaries of such grants well know the steps required to be taken to perfect the evidence of title, and they equally well know that, of necessity, the public must rely upon the acts of the state and United States officials in apportioning the lands covered by different grants, as evidence of the ownership thereof; and, therefore, where there are grants that may conflict, and the state and national authorities undertake, as it is their duty to do, to apportion to each grant the lands covered thereby, and conveyances are made to the state and by the state to the respective railway companies, and the latter then proceed to sell the same to actual settlers, if either company intends to question the correctness of the selections or apportionment thus made, good faith requires that prompt action shall be taken, or it will, in the interests of the public, be held that the apportionment has been acquiesced in.

In the case at bar it cannot be otherwise than that the Hastings & Dakota Company well knew that the prior grants contained in the acts of 1857 and 1865 had been made, and that the line of the defendant company was so located that there might be a conflict between the grants to the defendant company and that to the Hastings & Dakota Company. It cannot be otherwise than that it was well known to the Hastings & Dakota Company that the state and United States officials would, of necessity, be called upon to make the selections of the lands belonging to each company, and to cause them to be certified to the state, and that in fact these officials did make the selections, and that the governor of the state in writing requested the certification of the lands in dispute to the state for the benefit of the defendant company, and when they were so certified the state in due time deeded them to the defendant. It was open to the Hastings & Dakota Company to have preferred its claim, if it deemed it had one, before the officials of the land department and the secretary of the interior to the lands now in dispute, or to the state authorities, after the certification to the state; but it was then silent. When the lands were deeded to the defendant, it could then have asserted its claim thereto, and, if its right and title was denied, it could have invoked the aid of the court of equity to enjoin the sale of the lands until the questions in dispute had been put at rest. It

took no action, but silently stood by, and permitted the lands now the subject of dispute to be sold to actual settlers, and then, after the lapse of 14 years, it filed the present bill, for the purpose of asserting that the selections made by the state officials, and approved by the secretary of the interior, and confirmed by the certification to the state, and by the conveyance of the state to the defendant company, were based upon a wrong construction of the grants in question, and that since 1867, the Hastings & Dakota Company has been the equitable owner of the land, and now seeks the interposition of the court of equity to enforce its long dormant claim to the property. Every consideration for public and private interests alike calls upon the court to refuse its aid to a claimant who, without excuse, has permitted so many adverse interests to grow up in ignorance of the claim now sought to be asserted.

It is said in argument that no injury will be caused to the settlers upon these lands, because the court can award a money judgment against the defendant corporation. The bill prays that the complainant be adjudged to be the owner of the entire 20,807 acres, and the instant it was filed it threw a cloud over the title of every acre, and the settlers thereon have been from that day, and are now, sufferers by reason of the attack thus made upon the validity of the titles under which they hold their farms. The instant this bill became *lis pendens* the title of the settler was attacked, and the value of his property, if he wished to sell, was necessarily depreciated. The fact that the title under which the settlers held their farms was thus attacked and clouded must have greatly discouraged the settlers, and deterred them from making valuable and permanent improvements upon their lands,—a loss to the settlers and the community alike, which can never be made good, for no human power can recall the years that have elapsed.

We are not willing, by entertaining a bill of the nature of the one now before us, to cast doubt and uncertainty upon the title to thousands of acres of land occupied by actual settlers, which title is based upon grants in aid of the construction of lines of railway, and where the state and United States officials have apportioned the lands supposed to be covered by the several grants, and such apportionment has been acquiesced in for years by the railway companies interested in such grants. Every consideration of public and private interests require that repose be quickly assured to rights acquired under such circumstances, and hence, as already said, this case belongs to a class which demands vigilance, diligence, and prompt action on the part of any individual or corporation that purposes to question the rightfulness of the apportionment made by the public officials, under grants of the kind giving rise to the present controversy.

In our judgment, the defenses based upon the statute of limitations and upon the laches of the Hastings & Dakota Company are a complete answer to the bill herein filed, and we are therefore relieved from the consideration of the other questions presented on the record.

The decree appealed from is reversed, and the cause is remanded to the circuit court, with instructions to dismiss the bill for want of equity, at the cost of complainant.

BOMAN *et al.* v. BOMAN.

(Circuit Court of Appeals, Ninth Circuit. January 25, 1892.)

INTESTACY—EFFECT OF WILL.

A clause in a will devising "to each of my heirs at law the sum of one dollar" will not take the will out of the operation of a statute which provides that a testator shall be deemed to die intestate as to such child or children, or, in case of their death, descendants of such child or children, "not named or provided for" in his will. Code Wash. § 1825. 47 Fed. Rep. 849, reversed.

Appeal from the Circuit Court of the United States for the District of Washington.

In Equity. Action by Albert T. Boman and Arrisa L. A. Bilbrey against Mary E. Boman to compel her to render an account as executrix, etc., of George M. Boman, deceased. Plaintiffs appeal from a judgment sustaining defendant's demurrer to the complaint. Reversed.

Andrew F. Burleigh, for appellants.

Junius Rochester, for appellee.

Before DEADY, HAWLEY, and MORROW, District Judges.

HAWLEY, District Judge. This action was instituted to compel respondent to render an account as executrix of the estate of George M. Boman, deceased, and to pay to plaintiffs the amount which they, as children of the deceased, are legally entitled to receive. The complaint, among other things, alleges that plaintiffs are citizens of the state of Tennessee; that defendant is a resident of the state of Washington; that, in 1861, George M. Boman, now deceased, was married to Armilda C. Ramsey, both parties being at that time residents of the state of Tennessee; that plaintiffs are the issue of said marriage, and children of the said George M. Boman, born, respectively, in the years 1862 and 1864; that on the 1st day of December, 1890, in the county of Kings, state of Washington, the said George M. Boman made his last will and testament, a copy of which is annexed to and made a part of this complaint; that on the 19th day of December, in the state of Washington, the said George M. Boman, husband of the said defendant, died, leaving surviving him two children, viz., the plaintiffs herein; that at the time of his death he was possessed of an estate of about \$200,000; that neither the plaintiffs nor their descendants have had any proportion of his estate bestowed upon them, or either of them, in his life-time, by way of advancement or otherwise; that he did not name the plaintiffs, or either of them, in his will, nor did he make any provision for them, or either of them, therein, or otherwise howsoever. The defendant demurred to this bill of complaint upon the ground that it did not state a case entitling plaintiffs to any relief against defendant. This demurrer was sustained, and, plaintiffs declining to amend their bill, judgment was rendered against them for costs, from which judgment plaintiffs appeal.

The questions to be considered upon this appeal call for an interpretation of certain clauses in the will, and a construction of certain provisions of the statute of Washington. The will reads as follows:

"*Item 1st.* I give, bequeath, and devise to each of my heirs at law the sum of one dollar. *Item 2nd.* I give, bequeath, and devise all the rest, residue, and remainder of my estate and property of every kind, real, personal, and mixed, and choses in action, to my beloved wife, Mary E. Boman. *Item 3rd.* I nominate and appoint my said wife, Mary E. Boman, sole executrix of this will, and I will and devise that she execute this will without giving any bond. *Item 4th.* I will and devise that my said executrix execute this will, pay all my just debts and funeral expenses, and settle my estate in her own way, without the intervention of probate court or any court; and I will and devise that the title to all of my said estate and property vest upon the probate of this will, without any judgment or order of the court to that end, in my said wife, Mary E. Boman."

Sections 1325 and 1326 of the Code of Washington, relating to wills, read as follows:

"Sec. 1325. If a person make his last will, and die, leaving a child or children, or descendants of such child or children, in case of their death, not named or provided for in such will, although born after the making of such will or the death of the testator, every such testator, so far as he shall regard such child or children, or their descendants, not provided for, shall be deemed to die intestate, and such child or children, or their descendants, shall be entitled to such proportion of the estate of the testator, real and personal, as if he had died intestate, and the same shall be assigned to them, and all the other heirs, devisees, and legatees shall refund their proportional part. Sec. 1326. If such child or children, or their descendants, shall have an equal proportion of the testator's estate bestowed upon them in the testator's life-time, by way of advancement, they shall take nothing by virtue of the provisions of the preceding sections." Code Wash. 1881, p. 235.

How should section 1325 be construed? This provision is identical with the statutes of Missouri and of Oregon, and we must therefore look to the decisions of these states to ascertain its proper judicial construction. Prior to the adoption of the Washington Code, it had been decided by the supreme courts of Missouri and Oregon that the statute did not require that any actual provision should be made for the children, nor that the children should be necessarily designated by name. The object and intent of the statute was to provide against the children of a testator, or descendants of such child or children, from being overlooked or forgotten. The fact that the children are not named or alluded to in such a manner as to affirmatively show that they were in the testator's mind will furnish conclusive evidence that they were forgotten; and that the testator unintentionally left them unprovided for. *Wetherall v. Harris*, 51 Mo. 68; *Gerrish v. Gerrish*, 8 Or. 351. The statute creates a presumption that the children were forgotten unless they are named or provided for in the will. *Pounds v. Dale*, 48 Mo. 273. RICHARDSON, J., in delivering the opinion of the court in *Hockensmith v. Shusher*, 26 Mo. 237, said that the object of this provision of the statute "is to produce an intestacy only when the child, or the descendants of such child, are unknown or

forgotten, and thus unintentionally omitted; and the presumption that the omission is unintentional may be rebutted when the tenor of the will, or any part of it, indicates that the child or grandchild was not forgotten."

In the light of these decisions, what is the proper construction to be given to the words in item 1 of the will,—“I give, bequeath, and devise to each of my heirs at law the sum of one dollar?” The contention of respondent, briefly stated, is that the term “heirs at law” includes the children of the testator, and that it therefore necessarily follows that the children were sufficiently referred to; that they were provided for, and were not overlooked or forgotten. This contention is sought to be maintained upon the authority of *Allen v. Claybrook*, 58 Mo. 124. The principles decided in that case are unquestionably correct as applied to the facts of that case, which are wholly different from those with which we have to deal. The point involved in that case did not call for any construction of the statute, but related solely to the proper interpretation of the clause in the will which, in speaking of the residue of the estate of the testatrix, directed the executors of the will to “secure the one-half thereof, by trust or otherwise, for the benefit of my niece, Mrs. Jane Allen, daughter of my sister Gatewood, (who is said to be in destitute circumstances,) and her children, and not to be subject to the control of her present husband.” The contention there was that this provision in the will was a bequest for the benefit of Jane Allen alone, and that the mention of the word “children” was only for the purpose of showing that it was intended that Jane Allen should hold the property for her children, free from the control of her husband. The court held that the bequest was made for the benefit of Jane Allen and her children, and that no power was attempted to be vested in Jane to dispose of the whole property; and in coming to this conclusion the court said:

“The children having been designated as a class, without further description, the general rule is that it will include all who answer to the description at the time the will took effect.”

That authority gives no color to the proposition that by the use of the words “heirs at law” in Boman’s will this court should hold that his children were in his mind at the time he made his will; that they are referred to and provided for, and were not overlooked or forgotten. His children were not designated as a class. No children were mentioned or specifically referred to. The words “heirs at law” may, it is true, be read to mean “children,” and should always be so construed if the context distinctly shows that the words were employed in that sense by the testator. The term “heirs at law,” however, in its general definition, includes many others. It is not limited to children. It may be used, and is often used, in cases where there are no children. It includes parents, brothers and sisters, etc. Who can tell by reading this will what particular heirs were in the mind of the testator at the time he signed the will? Does it clearly appear that it was his intention to provide for his children? Is it manifest upon the face of the will that his

children were not overlooked or forgotten? Certainly not. In *Hargadine v. Pulte*, 27 Mo. 423, the testator bequeathed all his estate, real, personal, and mixed, to his wife, to the exclusion of all and every person or persons, be the same relatives or not; and the court held "that the phrase 'relatives' might be very naturally understood as not embracing one's children."

The controlling question to be considered is not whether the children would be entitled to inherit and recover the amount bequeathed to the heirs at law, but whether or not it appears upon the face of the will that the children were in the testator's mind at the time he made the will. The terms of the will, in order to show the intent of the testator to remember his children, or to make provision for them, should, under the statute, be clear, specific, definite, and certain. The presumptions of the law are all in favor of the children. These presumptions, in order to disinherit them, or to cut them off with a shilling or other nominal sum, can only be overcome by the use of words plainly indicating that the testator had his children in his mind at the time he made his will. This must appear either by express mention, or by necessary implication from the face of the will itself. It has been held in states having a different statute from the one under consideration that parol evidence is admissible to show that the children were intentionally omitted from the will. *Wilson v. Fosket*, 6 Metc. (Mass.) 400; *Ramsdill v. Wentworth*, 101 Mass. 125; *Buckley v. Gerard*, 123 Mass. 8; *Whittemore v. Russell*, 80 Me. 297, 14 Atl. Rep. 197; *Lorieux v. Keller*, 5 Iowa, 196. But in states having the same or a similar statute to that under consideration it has been uniformly held that such evidence is inadmissible. *Bradley v. Bradley*, 24 Mo. 311; *Pounds v. Dale*, 48 Mo. 270; *Chace v. Chace*, 6 R. I. 407; *Garraud's Estate*, 35 Cal. 336; *Estate of Stevens*, 83 Cal. 322, 23 Pac. Rep. 379. It was the design of the statute, as was said by BELL, J., in *Gage v. Gage*, 29 N. H. 533,—

"That no testator should be understood to intend to disinherit one of his children or grandchildren, who are by nature the first objects of his bounty, upon any inference, or upon any less clear evidence than his actually naming or distinctly referring to them personally, so as to show that he had them in his mind; it being reasonable to suppose that those about the sick and the aged would not be anxious to remind them of the absent unnecessarily. This is a simple and plain rule, easily understood and remembered by everybody, and is in accordance with the general impression, doubtless derived from the language of the statute."

The judgment of the circuit court is reversed, and the cause remanded.

SALMON v. MILLS *et al.*

(Circuit Court of Appeals, Eighth Circuit. February 1, 1892.)

1. ATTACHMENT—MOTION TO VACATE—WAIVER.

Under Mansf. Dig. Ark. §§ 831, 833, (in force in the Indian Territory,) a motion to vacate an attachment is not waived by filing affidavits controverting the facts stated in the affidavit of attachment, and the motion may be heard and disposed of after the questions raised by the affidavits have been decided by the verdict of a jury, and such verdict has been set aside by the court on motion for a new trial.

2. SAME—DISCLAIMER OF PROPERTY.

Under the provisions of Mansf. Dig. Ark., a defendant in attachment may move to vacate the attachment though he disclaims any interest in the property.

3. SAME—AFFIDAVIT—AMENDMENT.

Mansf. Dig. Ark. § 815, declares that affidavits may be amended so as to embrace any grounds of attachment that may exist up to the time of the first judgment on the same. Section 5082 provides that pleadings may be made definite and certain by amendment, and section 381 declares that the affidavit of attachment and the affidavit controverting the same shall be considered as the pleadings on the issue as to the attachment. *Held* that, under these provisions, an affidavit which is uncertain because the disjunctive is used between the statement of separate grounds may be amended on motion made immediately after it is held insufficient by the court.

4. SAME—DISCRETION OF COURT.

An issue on attachment was tried by a jury, and found for the plaintiff. The court granted a new trial, and afterwards, on motion to vacate the attachment, held the affidavit insufficient, whereupon plaintiff moved to amend it. *Held*, that the court could not refuse the amendment on the ground that from its recollection of the evidence on the jury trial the amendment would not be in furtherance of justice.

In Error to United States Court for Indian Territory. **Reversed.**

George E. Nelson, for plaintiff in error.

Nelson Case and W. B. Glasse, for defendants in error.

Before CALDWELL, Circuit Judge, and SHIRAS and THAYER, District Judges.

SHIRAS, District Judge. On the 2d day of May, 1889, the plaintiff in error filed in the United States court for the Indian Territory a complaint at law, wherein he sought judgment against Abraham and Jackson Mills for the sum of \$9,983, claimed to be due on two promissory notes, and in aid of such action he sued out a writ of attachment against the property of the defendants above named. The grounds alleged for the issuance of the attachment were set forth in the affidavit accompanying the complaint in the following form:

"That said Abraham Mills and Jackson Mills are about to remove, and have removed, their property, or a material part thereof, out of the Indian Territory, not leaving enough therein to satisfy plaintiff's claim or the claim of said defendants' creditors; *second*, have sold, conveyed, and otherwise disposed of their property, and suffered and permitted it to be sold, with the fraudulent intent to cheat, hinder, or delay their creditors; or, *third*, are about to sell and convey or otherwise dispose of their property with such intent."

The writ was issued and served by levying upon certain cattle and horses; and thereupon one C. M. Condon, claiming to be the owner of the property levied on, save one horse, obtained leave to interplead in

the cause and assert his right to the attached property. On the 3d day of June, 1889, the defendants filed a motion to vacate and discharge the order for the attachment and all proceedings had thereunder on the grounds that the affidavit filed for the attachment was insufficient, the bond filed was illegal, and the grounds set forth in the affidavit for the attachment were not true in point of fact. Subsequently the defendants filed answers to the attachment proceedings, in which they traversed the several grounds set forth in the affidavit already quoted, and claimed damages for the injury alleged to have been caused them by reason of the wrongful issuance of the writ. On the 24th day of May, 1890, judgment was entered in favor of the plaintiff for the sum shown to be due on the note sued on, and against the defendants, but expressly reserving for future determination all questions arising on the attachment proceedings and the interplea filed by C. M. Condon. In December, 1890, a trial was had before the court and jury upon the issues arising upon the answer to the attachment proceedings and upon the interplea, and on the 15th of December, 1890, the jury returned a verdict in favor of the plaintiff, Salmon, on all the issues thus submitted. On the 22d of December, 1890, the court, on motion, set aside this verdict, and granted a new trial to the defendants and the interpleader. On the 4th day of June, 1891, the defendants called up their motion to vacate the attachment, and upon the hearing thereof the court sustained the same, the plaintiff duly excepting thereto, and thereupon the plaintiff asked leave to amend the affidavit for attachment by substituting the word "and" for "or" between the second and third grounds of attachment as set forth in the affidavit hereinbefore quoted; but the court refused leave so to do, holding that the affidavit for attachment was not amendable, and that, even if it was permissible to amend same, the court found, from the evidence adduced on the former trial, that to allow the amendment would not be in furtherance of justice, to which ruling the plaintiff excepted, and thereupon the court vacated the attachment and the levy made thereunder. To reverse this ruling and order the plaintiff sued out a writ of error from this court.

The first point made on behalf of the plaintiff in error is that the defendants, by filing affidavits controverting the truth of the allegations of fact contained in the affidavit for the attachment, and going to trial on the issues thus presented, waived their right to be heard on the motion to discharge the writ previously filed. The act of congress of May 2, 1890, put in force in the Indian Territory certain portions of the statutes of Arkansas, including the chapter regulating the issuance of writs of attachment, and the modes of vacating such writs when issued, and of controverting the truth of the facts averred as grounds for the issuance thereof. Section 383, c. 9, of Mansfield's Digest of the Statutes of Arkansas, provides—

"That, at any time before the attachment is sustained, the defendant, upon reasonable notice to the plaintiff or his attorney, may move the court to discharge the attachment, the hearing of which may be postponed by the court, upon sufficient cause, from time to time; and on the hearing, if the court is

of the opinion that the attachment was obtained without sufficient cause, or that the grounds of the attachment, being controverted, are not sustained, the attachment shall be discharged."

Section 381 provides that—

"The defendant may file his affidavit denying all the material statements of the affidavit on which the attachment is issued, and thereupon the attachment shall be considered as controverted, and the affidavits of the plaintiff and defendant shall be regarded as the pleadings in the attachment, and shall have no other effect."

Therefore, to make an issue upon the truth of the facts alleged in the affidavit for the attachment, it is necessary to file an affidavit denying the same, and if, upon the hearing of the issue thus made, it is decided that the attachment is not sustained, then the court can grant the motion to vacate the attachment. Reading these two sections together, it is entirely clear that the defendant may file a motion to vacate, and also may take issue upon the facts, by controverting the affidavit upon which the writ issued, and the court may postpone action on the motion until the issue of fact is determined, and then decide the motion in light of the result reached upon that issue. There was, therefore, no error in the action of the court in postponing consideration of the motion until the trial of the issue of fact, and the filing of the affidavits by defendants controverting that of plaintiff did not waive the motion.

The second point submitted by plaintiff in error is that the defendants had not the right to move for the vacation of the writ of attachment, because they disclaimed any interest in the property upon which the writ was levied. If the motion was merely to discharge the levy of the writ, this objection might have weight, but, under the provisions of the statute in force in the Indian Territory, it is clear that a defendant in an attachment proceeding may move for the vacation of the writ, and may controvert the grounds upon which the attachment was sued out, regardless of the fact whether the writ has or has not been levied upon his property. Counsel for plaintiff in error cite several cases decided by the supreme court of Michigan in support of the position above stated, but these decisions are based upon the provisions of the statute of that state, which limit the right to move for the dissolution of the writ to cases wherein a writ of attachment has been issued and served, whereas the statute of Arkansas, in force in the Indian Territory, contains no such limitation, but, on the contrary, expressly provides that at any time before the attachment is sustained the defendant may move for its discharge, and we cannot read into the statute a limitation not therein expressed or fairly inferable from the language used. See *Doggett v. Bell*, 32 Kan. 298, 4 Pac. Rep. 292; *Boot & Shoe Co. v. Derse*, 41 Kan. 150, 21 Pac. Rep. 167; *Claussen v. Easterling*, 19 S. C. 515; *Bank v. Randall*, 38 Minn. 382, 37 N. W. Rep. 799; *Keith v. Armstrong*, 65 Wis. 225, 26 N. W. Rep. 445.

This brings us to the consideration of the action of the court in holding that the statements in the affidavit for the attachment were insufficient to sustain the writ, and in refusing leave to complainant to amend

the affidavit. As we gather the facts from the record, the court below held the affidavit bad because the disjunctive "or" was used between the second and third grounds for the attachment set forth in the affidavit, and, though not expressed, is implied between the first and second, thus making the affidavit indefinite and uncertain in that, in effect, it charged the defendants with one of three acts without specifying which one was, in fact, relied upon as ground for the issuance of the attachment. It is not necessary to determine whether such construction of the affidavit was correct or not, because we are clearly of the opinion that the court below erred in refusing leave to amend the affidavit so as to render it free from all ambiguity. The record shows that when the court announced its construction of the affidavit, and held it to be insufficient, counsel for plaintiff in error asked leave to amend the same, but the court held that the affidavit was not amendable. Section 315 of Mansfield's Digest of the Laws of Arkansas, being part of the chapter regulating the subject of attachments, declares that "the affidavit or grounds of attachment may be amended so as to embrace any grounds of attachment that may exist up to and until the first judgment upon the same." Section 5082 of the same digest provides that "when the allegations of a pleading are so indefinite and uncertain that the precise nature of the claim or defense is not apparent, the court may require the pleading to be made definite and certain by amendment;" and, as already stated, by section 381 it is declared that the affidavit for the attachment, and that filed by a defendant controverting the same, shall be deemed to be the pleadings of the parties on the issue upon the attachment, so that it is entirely clear that the statute conferred upon the court full and ample authority to permit the amendment of the affidavit in the particulars wherein the court deemed it to be uncertain and insufficient. That this is the correct construction of the statute is put beyond question by the rulings of the supreme court of Arkansas in the following cases: *Rogers v. Cooper*, 33 Ark. 406; *Sherrill v. Bench*, 37 Ark. 560; *Nolen v. Royston*, 36 Ark. 561; *Sannoner v. Jacobson*, 47 Ark. 32, 14 S. W. Rep. 458.

It is, however, claimed by the defendants in error that the court below also ruled that, if the power to permit an amendment of the affidavit existed, leave would be refused, because the court, having heard the evidence adduced on the trial of the issue of fact before the jury, found therefrom that the allowance of the amendment would not be in furtherance of justice, and therefore refused it. It will be recalled that it appears from the record that the issue made upon the truth of the allegations contained in the affidavit for the attachment was tried before a jury, and resulted in a verdict sustaining the truth thereof, or, in other words, in favor of the plaintiff. This verdict was returned December 15, 1890, and was set aside by the court, thereby granting a new trial on this issue. The hearing upon the motion to discharge the writ was had June 3, 1891, and no evidence was then introduced on the issue of fact, but the matter came up for hearing upon the face of the papers. The plaintiff was clearly entitled to a trial in the usual form upon this issue of fact, which had once been decided in his favor, and it was clearly

erroneous to hold that the plaintiff ought not to be allowed to amend the affidavit, because, if that was put into proper and sufficient form, the court, from its recollection of the evidence adduced on the trial before the jury, was of the opinion that the plaintiff would be beaten on the issue of fact. Such a mode of disposing of the case effectually cut off the plaintiff from adducing any additional evidence he might have at hand on the issue of fact, and debarred him from saving any exceptions he might have to the rulings of the court; or, to state the case shortly, it gave judgment against the plaintiff without a hearing, and without the opportunity to preserve his right to be heard before the appellate court.

For the reasons assigned, the order and judgment appealed from are reversed, and the cause is remanded, with instructions to permit the plaintiff to amend the attachment proceedings by amending the affidavit within the limit allowed by the statute, and by substituting a sufficient bond if objection is made on that ground; the plaintiff to recover the costs of this writ of error.

YARDLEY v. CLOTHIER.*

(Circuit Court, E. D. Pennsylvania. January 5, 1892.)

INSOLVENT BANK—RIGHTS OF DEPOSITORS—SET-OFF.

A depositor in an insolvent bank, who had indorsed a note that was subsequently discounted by said bank, can, in a suit by the bank to recover the amount of the note, set off his deposit against this amount, when the note matured after the insolvency of the bank. Refusing to follow *Armstrong v. Scott*, 36 Fed. Rep. 63, and *Stephens v. Schuchmann*, 82 Mo. App. 333. *Bank v. Price*, 22 Fed. Rep. 697, distinguished.

At Law. Motion for judgment on case stated.

Assumpsit by Richard Yardley, receiver of the Keystone National Bank, against George W. Clothier, to recover the amount of a note indorsed by said defendant and discounted by said bank. Rule discharged.

John R. Read and *Silas W. Pettit*, for plaintiff.

Geo. W. Harkins, for defendant.

Before ACHESON, Circuit Judge, and BUTLER, District Judge.

BUTLER, District Judge. The facts, (presented in a case stated,) so far as material, are that the plaintiff is receiver of the Keystone National Bank; that, at the time of its insolvency, it was indebted to the defendant in the sum of \$1,127.96; that, at the same time, it held three notes indorsed by him, not then due, aggregating in amount \$390; that the notes were not paid by the maker, and were duly protested, of which notice was given; that the plaintiff sues on these notes, and the defendant sets up the indebtedness to him as a defense.

* Reported by Mark Wilks Collet, Esq., of the Philadelphia bar.
V.49F.no.5—22

The doctrine of set-off is founded on the principles of equity, and, within certain limits, is universally recognized and applied. Where parties dealing together become mutually indebted, the balance appearing on their accounts is, generally, alone recoverable. Well-defined and easy of comprehension as the doctrine is, however, its application to the varying state of facts which arise, is attended with the same degree of difficulty that attends the administration of other plain legal principles, under unusual circumstances. In the distribution of insolvents' assets—whether under voluntary trusts for creditors, insolvent laws, in bankruptcy, or proceedings on decedents' estates—its application has frequently been resisted on the ground that its allowance would create preference among creditors. To enter upon an examination of the questions thus raised and the distinctions drawn would be unprofitable. It is sufficient to say that in every instance in which this objection has been made, (in the absence of controlling statutory provision,) where the proposed set-off was due when the creditors' rights attached, the courts have overruled it—whether the defendant's debt, in suit, was due at the time or matured subsequently. In *Skiles v. Huston*, 110 Pa. St. 254, [2 Atl. Rep. 30,] which was a suit by the administrator of an insolvent estate, on a note which matured after the insolvent's death, the defendant set up a debt due him in the insolvent's life-time; and the defense was resisted on the ground that its allowance would create preference. The court, in a well-considered opinion, sustained the defense. In *Van Wagoner v. Paterson Co.*, 23 N. J. Law, 283, the court of appeals applied the principle under precisely similar circumstances, except that the suit there was by the receiver of an insolvent state bank. The language of the court in that case is so pertinent and forcible as to be worthy of repetition. Said the chief justice:

"I am of opinion, both upon principle and authority, that the debtor of an insolvent corporation loses none of his rights by the act of insolvency; that he has the same equitable right of set-off against the receiver that he had against the corporation at the time of insolvency, and, consequently, that the debtor of a bank, whether his indebtedness has actually accrued or not at the time of insolvency, may in equity set off against his debt, either a deposit in the bank, or the bills of the bank *bona fide* received by him before the failure occurred. It is said the object of the act is to do equal justice to the creditors, and that equality is equity. But equality of what, and among whom? Clearly of the assets of the bank, among the creditors of the bank. In cases of cross-indebtedness the assets of the bank consist only of the balance of the accounts; that is, all the fund which the bank itself would have to satisfy its creditors, in case no receiver had been appointed. And there is no equality, and no equity, in putting a debtor of the bank, who has a just and legal set-off against the corporation, in a worse position, and the creditors in a better position, by the bank's failure and the appointment of a receiver."

In re Receiver of District Bank, 1 Paige, 585, and *Clarke v. Hawkins*, 5 R. L. 224, are to the same effect.

The suggestion that the rule in bankruptcy is referable to the language of the statute governing such cases is not, we think, well founded. This language is general, referring in terms to mutual debts and credits,

whether due or not. It cannot be doubted, we think, that the provision is simply a declaration of the previously existing rule, universally applicable to the settlement of insolvent estates; and that it would as certainly have been applied in bankruptcy proceedings without the provision as with. In *Van Wagoner v. Paterson Co.* the court well says:

"It seems to be assumed by the plaintiff's counsel that the equitable doctrine of set-off as applied in bankruptcy is founded on the express provisions of the statute; and it is true that all modern bankrupt laws contain a provision that in cases of mutual debts and credits the balance only shall be deemed the true debt; and the fact that all well-considered bankrupt laws do contain such a provision in favor of set-off, is of itself a strong authority in support of the natural equity and justice of the provision. It is equally true, however, that the jurisdiction of equity over set-off in cases of bankruptcy, and the practice of allowing them, was not derived from the statute, but was exercised by the courts long prior to the introduction of the provision into the statute."

The plaintiff contends, however—and this seems to be his chief reliance—that the language of sections 5234, 5236, and 5242, of the Revised Statutes, relating to national banks, forbids the application of the principle here. He invites our attention to the following quotations from, and summary of, these sections. The receiver shall "take possession of the books, records and assets of every description of said association, collect all debts, demands and claims belonging to them, and may if necessary, to pay the debts of such association, enforce the individual liability of stockholders." Section 5242 provides that "all transfers of notes, bonds or other evidences of debt," etc., "and payments of money to its shareholders or creditors, made after the commission of an act of insolvency, or in contemplation thereof, with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor over another * * * shall be void." These sections further provide, in effect, that the receiver shall pay over all money made to the treasurer of the United States, subject to the order of the comptroller of the currency, to whom he is directed to make report of his acts and proceedings. And the comptroller is directed, after making full provision for the redemption of the notes of the insolvent banking association, to make a ratable dividend on all claims against said association, which may be proved to his satisfaction. The foregoing quotations and summary are the plaintiff's. Except in the quotation from section 5242 we do not find anything relating directly to the subject of preferences. And this in terms only applies to transfers of assets after insolvency "with intent" to prefer. The language is not applicable to the facts before us. They show no transfer nor proposition to transfer assets with intent to create preference. There is, of course, no room to doubt that congress contemplated the equal distribution of assets, without preference, among creditors, just as the assets of all insolvent concerns and individuals, are distributed. If, therefore, allowance of the set-off proposed here would result in such preference, it is prohibited; not more especially, however, by the statute than by the general rule of law applicable to all similar

cases. But as we have already seen, it will not. The defendant will receive only what he is legally entitled to. His right of set-off was perfect before the creditors' rights attached. The latter stand on no higher plane than the bank occupied. Even an assignee for value would have taken the note subject to this defense. That the bank might have defeated it by indorsement, is immaterial. That results from considerations not involved here. If the note had matured when the insolvency occurred it would not be pretended that the set-off would confer a preference—that the defendant should pay his debt, as other debtors are required to do, and take a dividend on his credit, as other creditors must. And yet the circumstance that it was not due is obviously immaterial to the equities involved.

The plaintiff finds support, however, for his position that the statute forbids the set-off in *Armstrong v. Scott*, 36 Fed. Rep. 63, decided by the United States circuit court in Ohio. The question was there decided as he asks us to decide it. Ordinarily the circuit courts should, and do, follow each other's rulings; they do so always when they can, conscientiously; and we would cheerfully follow this case if our sense of duty permitted. That it does not is manifest from what we have already said. It is proper, however, that the case should receive further notice. The judge who delivered the opinion, bases his conclusion on the language of the statute, and the cases of *Hade v. McVay*, 31 Ohio St. 231, and *Bank v. Taylor*, 56 Pa. St. 14. Our views of the statute have been sufficiently stated. *Hade v. McVay*, is not, as we understand it, pertinent to the question. *Hade*, receiver of a national bank, brought suit on the defendant's note. The latter set up a claim for the penalty inflicted by the statute, for taking illegal interest,—the bank having incurred the penalty in discounting the note, in suit. The set-off was disallowed, solely, because the Civil Code of Ohio confines set-off to claims arising out of contract,—the court saying:

"A right of set-off perfect and available against the bank when the receiver was appointed is not affected by the bank's insolvency. The receiver succeeds only to the rights of the bank at the time it goes into liquidation."

The fact that the proposed set-off does not arise out of contract is then pointed out, and the court proceeds:

"A set-off can only be pleaded here in actions founded on contract, and must be of a cause of action arising upon contract."

Bank v. Taylor seems equally inapplicable. The set-off proposed was a claim acquired after the bank had become insolvent, and closed its doors. This was plainly forbidden, not more especially by the statute than by the general rule governing the administration of all insolvent estates. Its allowance would have worked an obvious preference.—The report of *Armstrong v. Scott*, says:

"The circuit judge concurs in the conclusions of the opinion, which is in accordance with his opinion in *Bung Co. v. Armstrong*, 34 Fed. Rep. 94."

Turning to this case we find it to be a proceeding in equity to obtain set-off, in which the facts are stated as follows:

"The Bung Company, as maker, paid Armstrong, receiver of the bank, a certain promissory note, and afterwards filed their bill in equity to secure the right of set-off to which bill the defendant demurred."

The syllabus is as follows:

"The voluntary payment by the maker of a promissory note with full knowledge of all the facts, operates as an abandonment and waiver of all right to set off cross-demands, or independent debts; and a bill disclosing such facts presents no case for equitable relief by way of set-off."

This case does not seem to bear any resemblance to *Armstrong v. Scott*.

The plaintiff also cites *Stephens v. Schuchmann*, 32 Mo. App. 333, as sustaining his view of the statute. This case adopts the ruling in *Armstrong v. Scott*. The court, however, refers to numerous authorities, not cited in the latter case. A careful examination has failed to satisfy us that they support the conclusion reached. They appear to be readily distinguishable from the case before the court. In *Bank v. Colby*, 21 Wall. 609, a creditor of the bank attached its assets after it became insolvent and closed its doors. That this was a violation of the statute is clear; but the facts bear no resemblance to those before the court. *Jordan v. Bank*, 74 N. Y. 467; *Balch v. Wilson*, 25 Minn. 299; *Trust Co. v. Hains*, 2 Bosw. 75,—decide simply that the debtor of an insolvent bank, or estate, whose obligation matures before the insolvency cannot set off a counter-claim maturing subsequently. These cases are analogous to *Bosler's Adm'rs v. Bank*, 4 Pa. St. 32; and rest on the same foundation—that the rights of other creditors attached and became fixed before the right of set-off arose; that the defendant, having no such right at the time his obligation matured, could not acquire it by disregarding his duty to make prompt payment. As said in *Balch v. Wilson*, *supra*:

"If the defendant had paid his note when due, the money would have passed into the receiver's hands for the benefit of all the creditors; and the failure to pay as he ought, should not place him in a better position than he would have occupied if he had discharged his duty."

That these cases are inapplicable to the facts before the court in *Stephens v. Schuchmann*, and here,—where the defendant's right was perfect when the creditor's right attached, has, as we have already seen, been repeatedly decided. In *Jordan v. Sharlock*, 84 Pa. St. 366, and *Skiles v. Huston*, 110 Pa. St. 254, [2 Atl. Rep. 30,] the supreme court of Pennsylvania, by which *Bosler's Adm'rs v. Bank*, 4 Pa. St. 32, was decided, held that set-off is allowable in all cases, where the defendant's right is perfect when the insolvency occurs—reviewing the subject, generally, and pointing out the difference between such cases and that of *Bosler's Adm'rs v. Bank*. It may be remarked, in passing, that what is said in *Jordan v. Sharlock*, respecting the nature and effect of voluntary assignments in trust for creditors is immaterial to the question involved, as fully appears by the subsequent decision of the same court, in *Skiles v. Henderson*. The insolvent deed, in the former case, fixed the rights of creditors as effectually as did the insolvent's death in the latter. The two cases rest on the same foundation—that the right of set-off was perfect before the creditors' rights attached. *Bank v. Wall*, 56 Me. 167; *Colt*

v. *Brown*, 12 Gray, 233; *Clark v. Brockway*, *42 N. Y. 13,—decide no more than that a defendant cannot set off a claim acquired since the insolvency, against his debt which matured before. *Merritt v. Seaman*, 6 N. Y. 168, and *Fry v. Evans*, 8 Wend. 530, decide simply, that a defendant cannot set off his claim against an insolvent, in suit against him for a debt contracted, not with the insolvent, but his legal representative. This review of the cases cited in *Stephens v. Schuchmann*, seems to justify a belief that they do not support the decision in that case.

The plaintiff also appeals to *Bank v. Price*, 22 Fed. Rep. 697, and *Smith, Fleming & Co.'s Case—In re Commercial Bank—L. R. 1 Ch. App. 538*. In the first of these cases the suit was by the receiver of a national bank to recover money paid a creditor after it had become insolvent. The court held the payment to be a violation of the terms of the statute—a transfer of assets “with intent” to prefer, saying:

“One is presumed to intend the necessary consequences of his own acts, and after the directors vote to close the bank and go into liquidation, any transfer of assets to a creditor, whereby he secures a preference, must be presumed to be made with intent to prefer.”

The case does not seem to shed any light on the question before us. *Smith, Fleming & Co.'s Case*, if applicable here, seems to be against the plaintiff, rather than for him. The bank having failed, a liquidator was appointed, under the British statute governing such cases. Among the assets were drafts accepted by Smith, Fleming & Co., not yet due. This firm, having a claim presently due, proceeded by bill to restrain the liquidator from negotiating the drafts,—and thus defeating their right of set-off. The master of the rolls held that complainants had a valid right of set-off,—provided the drafts remained with the liquidator until maturity. That it would be inequitable to allow him to negotiate them,—as the statute authorized, under certain circumstances,—and therefore restrained him. On appeal, the court agreed with the master that the right of set-off existed, and might be exercised if the drafts remained with the liquidator, but held that, as they carried the right of negotiation, and the statute authorized its exercise, there was nothing in the circumstances to justify the restraint. This case, as before stated, seems to be against the plaintiff. Here the defendant's obligation remained with the receiver, and is the subject of his suit.

The question before us was considered by the circuit court, sitting in New Jersey, in *Balbach v. Frelinghuysen*, 15 Fed. Rep. 685, where it is said by Judge NIXON, (after considering other questions which arose):

“I have much less difficulty with regard to the other questions raised by the pleadings and the evidence, to-wit: the right of the complainants to offset the amount of their credit on the books of the bank at the time of the failure, against the two promissory notes for \$15,000 each, which the bank had received from them for discount in the months of July and August preceding the failure [and not due at the date of insolvency.] It is unquestionably true that if the Newark National Bank held these notes at the time of failure, and was entitled to receive the amounts due thereon, when they matured, such offset might be made.”

It appeared, however, that the bank had indorsed and parted with the notes before maturity.

We do not consider it important that the defendant's obligation is that of an indorser simply. His undertaking was complete and his obligation absolute when he placed his name on the note. Nothing remained for him to do. His situation was similar to that of a drawer of a bill of exchange. The fact that he might be discharged by act of the maker, or failure to protest and give notice, is unimportant. The supreme court of Pennsylvania so decided under similar circumstances, in *Arnold v. Neiss*, 36 Leg. Int. 436. Whatever character, however, may be ascribed to the defendant's obligation the receiver took it such as it was, subject to the right of set-off which the defendant then had. Judgment must, therefore, be entered for the defendant, as provided for in the case stated.

ACHESON, Circuit Judge, concurs.

UNION PAC. RY. CO. v. JONES.

(Circuit Court of Appeals, Eighth Circuit. February 1, 1892.)

1. CARRIERS OF PASSENGERS—PERSONAL INJURIES—CONSOLIDATION OF ACTIONS—ESTOPPEL.

Where a railway company moves that three actions pending against it by members of the same family, for personal injuries received in the derailing of a car, shall be consolidated, and that if a verdict is found there shall be but one verdict, it cannot afterwards complain of the consolidation, although the court, against its objection, ruled that there should be a separate verdict for each plaintiff.

2. SAME.

In such a case, there is no error in requiring separate verdicts.

3. DAMAGES—PERSONAL INJURIES—FUTURE SUFFERING.

In an action tried in March for personal injuries sustained the previous September, it appeared that plaintiff was still suffering to some extent, but would probably recover. *Held*, that compensation could be given for reasonably certain future suffering and disability, though there was no evidence as to the length of time the same would probably continue.

In Error to the Circuit Court of the United States for the District of Colorado.

Action by Gladys Jones against the Union Pacific Railway Company for personal injuries. Verdict and judgment for plaintiff. Defendant brings error. Affirmed.

John M. Thurston, Willard Teller, and H. M. Orahood, for plaintiff in error.

E. T. Wells, R. T. McNeal, and John G. Taylor, for defendant in error.

Before CALDWELL, Circuit Judge, and SHIRAS and THAYER, District Judges.

SHIRAS, District Judge. This action was brought in the circuit court of the district of Colorado for the purpose of recovering damages for personal injuries alleged to have been caused to plaintiff while she was a

passenger upon a train upon the defendant's road, the car in which the plaintiff was riding, with her mother and sister, being derailed. The error mainly insisted upon by the plaintiff in error is that the trial court consolidated this cause, for the purposes of the trial, with two other cases pending against the company in behalf of the mother and sister of the plaintiff. The following extract from the bill of exceptions will show the action of the court in the particular complained of, to-wit:

"Be it remembered that on this 27th day of June, 1891, this cause coming on for trial, * * * and it appearing that there was on the docket of said court at that time, ready for trial, and duly assigned for trial on that day, two other suits against the same defendant, to-wit, one by Katherine Jones and one by Winifred Jones, and it appearing that the causes of action arose out of one accident and one alleged negligence on part of the defendant, the defendant insisted that the three cases should be consolidated and tried as one cause, and that, if a verdict was found, there should be but one verdict and one judgment; but, the plaintiff objecting thereto, the court decided to try all three of said causes on one trial, but to take a verdict in each case and render judgment in each of the three causes, to which ruling the defendant, by its attorneys, then and there excepted."

From this statement it is evident that two propositions were brought to the attention of the court below: (1) Might not the three cases, then pending, be consolidated and tried together? (2) If tried together, in what form should the jury return their verdict? The argument on behalf of the railway company before this court has been directed to the point that the company was put to a great disadvantage in being compelled to try the three cases at one time and before one jury. Granting all that is thus urged to be true, the difficulty is that the action of the court below, in directing the cases to be tried before the one jury, was brought about by the railway company itself, and it cannot be heard to say that there was error committed in this particular.

It is attempted to be maintained in argument that the motion of the company for the consolidation of the causes for trial was so connected with its suggestion that only one verdict should be returned, and one judgment be entered, that the refusal of the court to direct a single verdict relieves the company from the responsibility of having insisted that the causes should be tried as one. This contention is inadmissible. By the action of the railway company two questions were presented to the trial court for decision: (1) Shall the causes be heard as one before the same jury? (2) If so, in what form shall the verdict be returned? The court granted the request of the company that the three cases should be heard at the same time before the one jury, and the company is now estopped from questioning the correctness of a ruling which it asked to have made, and for which it is primarily responsible. Having granted the request of the defendant that there should be but one trial for the three causes, the court then decided that the jury should be required to return three verdicts, and not one, as asked by defendant. It is open to the defendant to aver that the court erred in its decision on this question, but no argument is needed to show that the court decided correctly. If a single verdict had been returned, and a single judgment

had been based thereon, exceeding in amount \$5,000, the defendant company would have secured the right of appeal to the supreme court of the United States, with all its attendant delays; but no other possible advantages could have accrued to the defendant company. On the other hand, the rights of the plaintiffs in the several actions would have been seriously affected if the trial court had ordered the return of a single verdict, and had rendered a single judgment, because it would have been impossible to determine what part or proportion of the sum awarded as damages belonged to each of the several plaintiffs. The court was therefore clearly right in directing that the jury should return a verdict applicable to each case; thus showing the damages awarded to each one of the several plaintiffs.

The next error assigned that will be noticed is that wherein the defendant company complains that under the evidence in the case the jury should not have been allowed to consider the future suffering of the plaintiffs as an element of damage. The accident happened on the 4th of September, 1890, and the trial was begun on the 26th day of May, 1891, and the evidence showed that at the time of trial the plaintiff was still suffering to some extent from the injuries received; that the probabilities were that she would ultimately recover, but no testimony was introduced directly upon the point of time when complete recovery might be expected. In the charge to the jury the court very clearly limited the right of recovery to such disabilities or injuries as were proven to be real, complete and entire; and thereupon the bill of exceptions shows that the following proceedings took place:

"Plaintiff's Counsel. I noticed the court directs the attention of the jury to the fact of the disabilities, but said nothing of their suffering. I apprehend these parties are entitled to compensation for suffering.

"The Court. Yes; suffering, it is true, is a proper element for compensation.

"Defendant's Counsel. That cannot go beyond the present time, under this evidence. They cannot allow on account of the future suffering.

"The Court. I am not able to say that, gentlemen. It was said these ladies would recover. The time in which they may recover was not stated. Physicians expressed no opinion upon that. Probably they ought to have been asked by counsel their opinion on that subject, but it was not done; and, in the absence of such testimony, you are at liberty to go upon your own judgment in respect to that matter. The plaintiffs can have no right of action hereafter for any part of the disability, and you can include in your verdict the disability which may continue from this time onward, in so far as you may believe it may continue, if you find for them."

To this instruction exception was taken, and it is now argued that it was error to permit the jury to determine whether there was a probability of future disability or suffering, and award damages therefor. As already stated, the evidence showed that the disabilities caused by the accident had lasted up to the date of trial; and, still existing, it was the necessary inference that they would continue, with the attendant suffering, for some time in the future; and for such future disability and suffering the plaintiff was entitled to recover. The objection made by

defendant is that it was incumbent upon the plaintiff to have introduced evidence proving the length of time the disability and suffering would continue. If by this is meant that the plaintiff was bound to submit in evidence the opinion of physicians upon this point, and that the jury would be bound to accept such opinions, we cannot agree to the proposition. It would have been entirely proper for either or both parties to have introduced such expert testimony upon this point, but it was not done, and therefore the jury was rightly instructed that they must consider this matter of future disability, and decide it to the best of their judgment, which was the equivalent of saying that they had before them no expert opinions, and must therefore decide it upon such facts as were in evidence. There was some evidence bearing upon the question before the jury,—such as the nature of the injuries received, their effect upon the physical condition of the plaintiff, and the length of time that the disabilities had already continued; and, upon due consideration of these facts, it was the duty of the jury to determine whether there was a reasonable certainty of future disability and suffering, and, if so, to award compensation therefor. No expert testimony could have shown just how long such disability would exist in the future, as the matter is one beyond absolute knowledge, and therefore experts could only have given their opinions based upon the facts appearing in evidence; and, while such opinions might have aided the jury in reaching a conclusion upon the question, yet they were not indispensable to its consideration and determination by the jury.

Exception was also taken to the refusal of the court to give certain instructions asked by defendant; but, with the exception of the fourth, which covers in another form the point just discussed, no special reliance is placed in the argument upon the refusal to give the second and third requests of defendant, doubtless for the reason that the charge of the court fully covered the points made in these requests. In the instructions given the jury, the trial court very carefully and fully guarded the interests of the defendant in all matters pertaining to the injuries complained of, and to the extent of the recovery therefor; and the defendant is wholly without ground for just exception to any instruction, given or not given, upon these matters.

Finding no error in the record, the judgment below is affirmed, at the cost of plaintiff in error.

GULF, C. & S. F. R. Co. v. WASHINGTON.

(Circuit Court of Appeals, Eighth Circuit. February 1, 1892.

1. **INDIAN TERRITORY—JURISDICTION OF FEDERAL COURT—AMOUNT IN CONTROVERSY.**
Under Act Cong. March 1, 1889, § 8, providing that the United States courts in the Indian Territory shall have jurisdiction in civil cases "when the value of the thing in controversy or damages or money claimed shall amount to \$100 or more," such courts have jurisdiction of an action for killing stock when the total amount claimed exceeds \$100, though the value of each animal is less than that sum.
2. **RAILROAD COMPANIES—KILLING STOCK—PLEADING.**
In the Indian Territory, a complaint alleging simply that defendant, while operating its railway through plaintiff's pasture, negligently killed his stock, and that the stock was killed solely through defendant's inexcusable neglect, is sufficient to withstand a general demurrer, since, under Mansf. Dig. Ark. § 5065, (in force in the territory,) a complaint will be treated as alleging every fact which can be implied from its averments by the most liberal intendment.
3. **SAME.**
In an action for the killing of stock, where plaintiff relies upon the failure of the railroad company to fence its track according to a contract, that fact must be alleged in the complaint.
4. **SAME—FENCING TRACK.**
A contract by a railroad company to fence its track through certain lands imposes upon it the same duties and liabilities with respect to the killing of stock as would be imposed by a statute requiring it to fence.
5. **SAME—DUTY OF COMPANY.**
In the Indian Territory, where neither the owners of animals nor railroad companies are required to fence, it is the duty of engineers to use reasonable care to discover stock upon the track, and to avoid injuring them when discovered.
6. **SAME.**
The fact that stock is in the Indian Territory in violation of law in no way affects the duty of a railroad company to exercise care to avoid injuring them by the running of its trains.
7. **SAME—COMPETENCY OF WITNESS.**
A witness familiar with a railroad track at a place where cattle were killed is competent to testify as to the distance at which cattle on the track could be seen by the engineer. Such testimony is not objectionable as being the statement of an opinion.
8. **SAME—CIRCUMSTANTIAL EVIDENCE.**
It is competent to prove by circumstantial evidence that cattle found dead along a railway track were killed by the company's trains.
9. **SAME—SPECIAL FINDINGS.**
In an action against a railroad company for killing stock it is within the discretion of the court to refuse to require a separate finding as to each animal sued for.
10. **IMPANELING JURY—INDIAN TERRITORY.**
In a civil case in the Indian Territory defendant is entitled to have the jury drawn and impaneled in the mode prescribed by Mansf. Dig. Ark. §§ 4013-4015. *Railway Co. v. James*, 48 Fed. Rep. 148, followed.
11. **APPEAL—BILL OF EXCEPTIONS.**
The court cannot consider the sufficiency of the evidence to support the verdict when the "substance" only of the evidence is contained in the bill of exceptions. To present that question all the evidence must be certified up.
12. **NEGLIGENCE—PLEADING.**
A general allegation of negligence, without stating the acts constituting negligence, is good as against a general demurrer.
13. **PLEADING—WAIVER.**
Under the settled doctrine of the United States supreme court, as well as under the Code of Arkansas, the filing of a plea to the merits after a demurrer is overruled is a waiver of the demurrer.

n Error to the United States Court in the Indian Territory.

Action by J. R. Washington against the Gulf, Colorado & Santa Fe Railroad Company to recover damages for the killing of stock. Verdict and judgment for plaintiff. Defendant brings error. Reversed.

E. D. Kenna, J. W. Terry, and C. L. Jackson, for plaintiff in error.
S. S. Merrill, for defendant in error.

Before CALDWELL, Circuit Judge, and SHIRAS and THAYER, District Judges.

CALDWELL, Circuit Judge. This was an action commenced in the United States court for the third judicial division of the Indian Territory by the plaintiff against the Gulf, Colorado & Santa Fe Railway Company for the recovery of damages for stock alleged to have been injured and killed by the negligent operation of the defendant's locomotive engines and trains. The plaintiff recovered judgment for \$375.72, and the defendant sued out this writ of error. The summons was in proper form, and the court rightly overruled the motion to quash it, because it did not state the nature and amount of the plaintiff's demand. Mansf. Dig. § 4968; Id. Form No. 1, p. 1251; *Railway Co. v. James*, 48 Fed. Rep. 148.

There was a demurrer to the complaint upon two grounds: *First*, that the court had no jurisdiction of the subject-matter of the suit; and, *second*, that it did not state sufficient facts to constitute a cause of action. The damages laid in the complaint are \$468 for injuring and killing several head of stock at different times. The complaint states the value of each head of stock killed, and the value of each one is less than \$100. The first act of congress regulating the civil jurisdiction of the court in the Indian Territory provides that the court shall have jurisdiction in civil cases "when the value of the thing in controversy or damages or money claimed shall amount to one hundred dollars or more." Act March 1, 1889, (25 St. U. S. p. 783, c. 333, § 6.) When the aggregate of the damages or money claimed amounts to \$100, the court has jurisdiction under this section. The fact that each animal for which the plaintiff sues was worth less than \$100 makes no difference, if the damages claimed for all of them amount to that sum. The last act of congress regulating the jurisdiction of the court—Act May 2, 1890, (26 St. U. S. p. 94, c. 182, § 29,)—declares that the court shall have "jurisdiction in all civil cases in the Indian Territory," with exceptions which do not affect this question. Whether this act repeals by implication the limitation on the jurisdiction contained in the act of 1889 we do not decide.

The complaint alleges that the defendant, while operating its line of railway through the plaintiff's pasture, negligently killed the stock sued for, and that the stock was killed solely through the inexcusable negligence of the defendant. It is said this statement of the cause of action is fatally defective in substance, because it merely states that the cattle were killed by the defendant while operating its road through the plaintiff's pasture, and does not state how the defendant killed them,—whether it was by running its engines and trains over or against them, or in some other manner,—and that it does not state in what the alleged negligence of the defendant consisted. The complaint is inartificially drawn. But against the assault of a general demurrer it is good under

the Code in force in that territory. Under that Code a complaint is good on demurrer if it contains the substantial elements of a cause of action, however indefinitely or inartificially they may be stated. Indefiniteness or uncertainty of statements in a complaint which, when construed in the most liberal manner, states the substance of a cause of action, is not a ground of demurrer, but is a defect to be corrected by motion for a more specific statement. The complaint will be treated as alleging by implication every fact which can be implied from its averments by the most liberal intendment. *Mansf. Dig.* § 5065; *Fordyce v. Merrill*, 49 Ark. 277, 5 S. W. Rep. 329; *Green v. Mayor*, 8 Abb. Pr. 27; *Meyer v. Railway Co.*, 7 N. Y. St. Rep. 245. It is very well settled that a general allegation of negligence, without stating the particular acts which constituted the negligence, is good against a general demurrer. *Harper v. Railroad Co.*, 36 Fed. Rep. 102; *Railroad Co. v. Crenshaw*, 65 Ala. 566; *City of Anderson v. East*, 117 Ind. 126, 19 N. E. Rep. 726; *Scott v. Hogan*, 72 Iowa, 614, 34 N. W. Rep. 444; *McFadden v. Railway Co.*, 92 Mo. 343, 4 S. W. Rep. 689. Moreover, it is the settled doctrine of the supreme court of the United States that filing a plea to the merits after a demurrer is overruled is a waiver of the demurrer. *Stanton v. Embry*, 93 U. S. 548; *Campbell v. Wilcox*, 10 Wall. 421. And this is the rule under the Code of Arkansas, in force in the Indian Territory. *Jones v. Terry*, 43 Ark. 230.

The court refused the request of the defendant to have the jury drawn and impaneled in the mode required by sections 4013-4015 of Mansfield's Digest. This was error. *Railway Co. v. James*, 48 Fed. Rep. 148.

A witness familiar with the track of the defendant's road at the place where the cattle were killed was asked how far cattle on the track could be seen in each direction by the engineer or other person on the track from the point where they were killed. The objection to this question—that it called for the opinion of the witness—was rightly overruled. The question related to a fact about which any one acquainted with the track, and possessed of ordinary intelligence and eye-sight, might give his opinion or judgment. It is every-day practice in the courts for witnesses to be asked similar questions, such as the size of a room, the width of a street, the distance between two objects, and the distance a given object can be seen from a particular stand-point. In these and like cases it is competent for a witness acquainted with the places or localities to state his best judgment, based on his personal knowledge and observation, of the localities and places. These are matters of common knowledge, about which experts have no advantage over laymen; and to hold that a witness could not testify to the distance between objects, or the distance a given object could be seen from a particular stand-point familiar to him, unless he had actually measured the distance, would entail intolerable expense and delay in the administration of the law, and frequently result in a total failure of criminal as well as civil justice.

It was not error to refuse to instruct the jury to return a verdict for the defendant upon the ground that there was not sufficient evidence to support the plaintiff's action. There was abundant evidence to warrant the jury in finding a verdict for some of the stock killed. Besides, there was evidence tending to show that the defendant had agreed to fence its track through the plaintiff's pasture, and that the cattle strayed on the track and were killed by reason of the neglect of the defendant to fence its track according to its agreement. Nor was it error for the court to refuse to charge the jury to return a verdict for the defendant as to all stock "the witnesses did not see killed." One who kills another in secret, when no eye sees the deadly potion administered or the fatal blow struck, may be convicted of murder, and hanged on circumstantial evidence; and no reason is perceived why the same character of evidence may not be sufficient to prove that a railroad company killed a cow or a mule; and that the killing was the result of the company's negligence. Some of the cattle sued for were found, very soon after they were killed, on or near the railroad track, and the injuries and marks of violence appearing upon their bodies were such as would be inflicted by coming in contact with a moving engine or train of cars. A jury might well find from these circumstances that the cattle were killed by the defendant's trains. Whether the killing occurred through the negligence of the railroad company is not so easily proved; but that fact, like any other, may be proved by circumstances. It is competent for the plaintiff in such cases to show that the track where the cattle were killed is straight, and free from any obstruction which would obscure the view of the engineer of a train going in either direction, and that by the exercise of ordinary care and diligence the engineer could have seen cattle on the track, not only in daylight, but, by the aid of the headlight of the locomotive, in the night-time also, in time to have avoided the killing. These and any other circumstances calculated to throw light on the issue may be considered by the jury. It is the province of the jury to say whether the circumstances in any given case are sufficient to warrant a finding that the cattle which no witness saw killed were killed through the negligence of the railroad company, when there is any evidence tending to show that fact. It does not appear, as shown elsewhere in the opinion, that all the testimony in this case that was heard by the jury is before us, and we can therefore form no opinion as to its sufficiency; and the presumption that the verdict was founded on sufficient evidence must prevail.

It was not error to refuse to instruct the jury that they must make a special finding as to each animal sued for. That was a matter within the discretion of the court, and its refusal to give such a direction cannot be assigned for error.

But two exceptions are argued to the charge of the court, and these we will consider. The court instructed the jury that—

"The question of negligence is a question to be determined by all the facts and circumstances introduced before you. In cases of negligence, each case

should be determined upon its own peculiar circumstances. The railroad company owes it to the owner of stock that the agents or engineers operating the train or trains shall use care, when stock is discovered by him, to prevent injury to it; yet there is an obligation due to others from railroad companies in running their trains, which is that the agents or engineers shall keep a lookout for stock on the track; and the jury will determine from this whether the agents or engineers have used ordinary or reasonable care to prevent injuring these animals."

This instruction was probably suggested by the opinion of the court in *Railroad Co. v. Kerr*, 52 Ark. 162, 12 S. W. Rep. 329. It is there said:

"The extent of the duty which a railroad company owes to the owner of stock upon its track is that the engineer in charge of the train at the time shall use ordinary or reasonable care, after the stock is discovered by him, to prevent injury to it; and this negatives the idea that the engineer is bound to keep a lookout for stock. * * * There is an obligation due to others from railroad companies to preserve a strict lookout while running their trains; and, as the agents of the company, in the absence of circumstances leading to a different conclusion, are presumed to keep such lookout, it is a fair inference of fact for the jury that a watchful agent will see stock on or near the track, and that they will then determine whether he has used ordinary or reasonable care to prevent injury to it."

The court does not state who the "others" are to whom the company owes the duty to keep "a strict lookout while running its trains," and of which duty the owners of stock may avail themselves by an inference of fact to be drawn by the jury. There is no intimation of the relation those other persons sustain to the company to whom it owes this special duty. Passengers and passenger trains are doubtless within the rule enunciated; but are freight, gravel, or construction trains, or a single locomotive? In our judgment, a more satisfactory statement of the law on this point is found in other decisions of that court. In a case not referred to in the opinion last cited the court said:

"Although the mule was wrongfully on the defendant's track when he received the injury of which he died, and was not seen by the engineer, yet if, by the exercise of ordinary care and watchfulness, he might have seen him in time to have averted the danger, the defendant was liable for the injury that resulted from the accident. It was certainly the duty of the engineer to keep a constant and careful lookout for stock which might be upon the track." *Railway Co. v. Finley*, 37 Ark. 562-570.

In a later case the court said:

"Railway companies are not insurers of the lives and safety of all the domestic animals in the country through which their lines run. Ordinary care in the management of their trains is the measure of vigilance which the law exacts of them in their relations to the owners of such animals; and this means practically that the company's servants are to use all reasonable efforts to avoid harming the animal after it is discovered, or might, by proper watchfulness, have been discovered, to be on or near the track." *Railway v. Holland*, 40 Ark. 836.

It is a matter of common knowledge that the Indian Territory is a grazing country, where cattle in great numbers run at large. In the Indian Territory the owners of cattle are not bound to fence them up,

and the railroad company is not bound to fence them out. A railroad operated in a country where these conditions obtain, without exercising reasonable care to prevent injury to stock, would become an intolerable engine of destruction to animal life. The railroad company knows that animals are liable to be found upon its track at any place and at all times of day, and that, unless reasonable care is exercised to discover them, and the same degree of care used to prevent injury to them after they are discovered, they will probably be injured or killed by the powerful engines it runs upon its road. Under these conditions it cannot be maintained that the company is not bound to use any care to discover cattle on its track. We cannot yield our assent to the doctrine that an engineer who refuses to look, or is blind or near-sighted, may run his engine over and kill domestic animals *ad libitum*, and without imposing any liability on his company therefor, because he did not see them. It is the duty of the company, under the conditions which exist in this territory, to exercise ordinary care and watchfulness to discover domestic animals upon its track, and, when they are discovered, to use reasonable efforts to avoid harming them. And this is its duty independently of any higher duty it may owe to others. There is no relation between the duty it owes to its passengers and the duty it owes to the owners of stock on its track, and the duty it owes to the former cannot be made the measure of its duty to the latter, either directly or by circumlocution.

The form of the instruction is objectionable. It is framed on the erroneous supposition that the railway company is not required to use ordinary care and watchfulness to discover cattle on the track, but, in reality, it imposes this duty by indirection, by telling the jury that the company owes a duty to "others * * * to preserve a strict lookout while running" its trains, and that, as it is "presumed to keep such lookout, it is a fair inference of fact for the jury that a watchful agent will see stock on or near the track." But as the measure of the duty the company owed to others, as defined in the instruction, was no greater than the duty it owed the plaintiff in the particular case, it was not erroneous, but only a roundabout way of stating the law.

The other instruction, the exception to which is insisted upon in argument, was to the effect that, if the defendant agreed to fence its track though the plaintiff's pasture, and did not do so, and the cattle strayed on the track and were killed by the defendant's engines or trains by reason of the neglect of the defendant to fence its road, then the killing of the cattle was negligence on the part of the defendant. If the law had imposed on the defendant the duty to fence its road, and it had not done so, and the cattle had strayed upon the track and been killed as a result of the negligence of the company to perform its legal duty in this regard, it would have been liable for the cattle killed, without reference to the question of negligence in the operation of its trains. And when a railroad company enters into a contract with a land-owner to fence its track through his premises for the protection of his stock, such a contract is as obligatory on the railroad company as a statute

requiring it to fence its track; and, so far as relates to the question of the liability of the railroad company for stock killed by reason of its breach of such duty, it is precisely what it is when the obligation to fence is imposed by statute. The court told the jury that if they found the defendant had made such a contract, and that the cattle were killed by the defendant as the result of its breach of that duty, then the killing of the animals was negligence. It might have told them that in such case the defendant was liable for the cattle killed without reference to the question of negligence in the management and operation of its engines or trains which did the killing.

There was no objection to the admission of the evidence to prove this alleged contract. The only question was its sufficiency, and that was properly left to the jury. Whether it was sufficient to warrant a verdict on this issue for the plaintiff this court cannot say, because the "substance" only of the testimony is embraced in the bill of exceptions, and we would not be willing to disturb the verdict of the jury, or hold that there was not sufficient evidence to support any given issue in a cause, upon the statement contained in the bill of exceptions in this case,—that the witnesses testified in "substance" to what is therein stated. The opinion of the jury and of this court might differ widely from that of the parties or the court below as to what was the "substance" of the witnesses' testimony. The parties and the court may and should omit from the bill of exceptions all irrelevant and redundant matter; and the testimony of witnesses may be stated in a narrative form when it was delivered in answer to questions; but what is sent up as the evidence in the case must be certified to be all the evidence, and not the "substance" of it, before this court can be asked to pass on the question of its sufficiency to support the verdict. As the case must go back for a new trial, we deem it proper to say that if the plaintiff relies, as a ground of recovery, upon the fact that the cattle were killed by reason of the neglect of the defendant to fence its track according to its contract, we think that under the Code in force in the territory that fact should be stated in the complaint. He may, of course, allege as grounds of recovery both negligence in the management and operation of the defendant's trains and its neglect to fence its track according to its contract, as a result of which the cattle were killed, and as many other grounds of recovery as he may have. If an objection had been interposed to the introduction of testimony on this point it must have been sustained, unless the plaintiff had amended his complaint.

It is assigned for error that the court refused to give certain instructions to the jury asked by the defendant. The first, fourth, sixth, and seventh prayers of the defendant were embraced in the charge in chief, and the court did right in not incumbering the record and confusing the jury by repeating them. By the second, third, and fifth prayers the court was asked to charge the jury as follows:

"The court instructs the jury that the engineers and servants in charge of defendant's railway trains are not bound to keep a lookout for stock upon or near the defendant's railway track, and that the extent of the duties which a

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railroad company owes to the owner of stock upon its track and right of way is that the engineer in charge of the train shall use ordinary or reasonable care, after the stock is discovered by such engineer, to prevent injury to such stock."

We have seen that this is not a full and accurate expression of the law on this subject.

The eighth prayer asked the court to charge the jury as follows:

"The court instructs the jury that the stock of the plaintiff in this case, mentioned in plaintiff's complaint, were in the Indian Territory in violation of law, and the defendant is not liable to plaintiff for any of such cattle as were killed by defendant's engineers and trains only because of gross negligence on the part of the defendant's servants in killing such stock."

Whether the cattle were in the Indian Territory in violation of law was a mixed question of law and fact; and, if its consideration was deemed material to the case, its determination should have been left to the jury, under proper instructions as to the law. But if the cattle were in the territory in violation of law, that was no concern of the defendant, and gives it no right to exercise any less care to prevent injury to them than it was bound to exercise to prevent injury to cattle rightfully in the territory.

The judgment is reversed, and the cause remanded, with directions to grant a new trial.

GULF, C. & S. F. R. Co. v. CAMPBELL.

(Circuit Court of Appeals, Eighth Circuit. February 1, 1892.)

1. INDIAN TERRITORY—IMPANELING JURY.

In a civil case in the Indian Territory defendant is entitled to have a panel of 18 competent jurors from which to make his peremptory challenges, as provided by Mansf. Dig. Ark. § 4036, which is in force in the territory. *Railway Co. v. Washington*, 49 Fed. Rep. 347, followed.

2. SAME—INSTRUCTIONS—REDUCTION TO WRITING.

In civil actions in the Indian Territory the court cannot be required to reduce its general charge to writing, since Mansf. Dig. Ark. § 5131, subd. 5, only requires that requested instructions shall be reduced to writing.

In Error to the United States Court in the Indian Territory.

Action by W. R. Campbell against the Gulf, Colorado & Santa Fe Railroad Company to recover damages for killing stock. Verdict and judgment for plaintiff. Defendant brings error. Reversed.

E. D. Kenna, J. W. Terry, and C. L. Jackson, for plaintiff in error.

Before CALDWELL, Circuit Judge, and SHIRAS and THAYER, District Judges.

CALDWELL, Circuit Judge. This was an action commenced before a United States commissioner in the Indian Territory (those officers in that territory being invested by act of congress with the jurisdiction com-

monly exercised by justices of the peace) to recover damages for the alleged negligent killing of two sheep by the plaintiff in error. The plaintiff below recovered judgment for \$30 before the commissioner. The railroad company appealed from the judgment of the commissioner to the United States court, where the case was tried *de novo* before a jury, and there was a verdict and judgment in that court in favor of the plaintiff for \$30, and the company sued out this writ of error.

The following errors are assigned:

"*First.* The court erred in refusing to furnish counsel with a list of eighteen qualified and competent jurors, as requested by defendant's attorneys, from which to make peremptory challenges. *Second.* The court erred in overruling defendant's objection to the introduction of any evidence, because the complaint failed to state a cause of action. *Third.* The court erred in permitting plaintiff, Campbell, as a witness in his own behalf, to testify that he could see one-half mile each way from where the sheep in question were found dead. *Fourth.* The court erred in declining to instruct the jury to render a verdict in favor of the defendant in this case. *Fifth.* The court erred in refusing to charge the jury in writing. *Sixth.* This court erred in charging the jury as follows: 'The burden of proof is upon plaintiff, and he must have proved all the facts by a fair preponderance of the evidence, and that he was the owner of the sheep that were killed by defendant railway company. Defendant denies each and every allegation in plaintiff's complaint contained. Plaintiff must also prove that the sheep were killed by the neglect of the defendant company.'"

These assignments of error will be considered in their order.

First. The court should have granted the defendant's request for a panel of 18 competent jurors from which to make its peremptory challenges. *Railway Co. v. Washington*, 49 Fed. Rep. 347, (at the present term.)

Second. The complaint filed with the commissioner was sufficient. It stated the cause of action with more detail and technical accuracy than the act regulating pleadings in commissioners' courts requires. Mansf. Dig. § 4036.

Third. This court rightly overruled the objection to this evidence. *Railway Co. v. Washington*, *supra*.

Fourth. As the case must go back for a new trial, we refrain from discussing the evidence, or expressing any opinion as to its sufficiency to support the verdict of the jury.

Fifth. The provision of the Code in force in the territory relating to the mode of charging juries reads as follows:

"When the evidence is concluded, either party may request instructions to the jury on points of law, which shall be given or refused by the court, which instructions shall be reduced to writing if either party require it." Mansf. Dig. § 5131, subd. 5.

This provision has relation to the instructions specially requested by the parties. Such instructions must be in writing if either party requires it. But the charge of the court, in chief, which it gives on its own motion, is not, by this section, required to be reduced to writing. There is such a requirement in the constitution of Arkansas, but that is not in force in the Indian Territory. In this case neither party preferred

any requests for instructions. The court charged in chief, and it was not error for the court to decline to reduce that charge to writing.

Sixth. The exception to this instruction is that it does not state the law. We think as much of the law as it assumes to state is stated correctly. If the defendant desired additional or specific instructions on any point or issue in the case, it should have preferred its requests at the time. For the first error assigned the judgment is reversed, and the cause remanded, with directions to grant a new trial.

GULF, C. & S. F. R. Co. v. ELLIDGE.

(Circuit Court of Appeals, Eighth Circuit. February 1, 1892.)

1. RAILROAD COMPANIES—KILLING STOCK.

In an action for killing stock in the Indian Territory it was error to refuse an instruction that the company owed the owner no duty except to use ordinary care to avoid injuring the stock after the engineer discovered it upon the track, or after he might have discovered it by the use of ordinary and reasonable care.

2. SAME—INSTRUCTIONS—DUTY TO FENCE.

As there is no statute requiring railroad companies to fence their tracks in the Indian Territory, the court, when requested, should give a charge to this effect, in order to prevent misconception.

In Error to the United States Court in the Indian Territory.

Action by W. I. Ellidge against the Gulf, Colorado & Santa Fe Railroad Company to recover damages for the killing of stock. Verdict and judgment for plaintiff. Defendant brings error. Reversed.

E. D. Kenna, J. W. Terry, and C. L. Jackson, for plaintiff in error.

A. Eddleman and W. A. Ledbetter, for defendant in error.

Before CALDWELL, Circuit Judge, and SHIRAS and THAYER, District Judges.

CALDWELL, Circuit Judge. This was an action commenced in the United States court in the Indian Territory by Ellidge against the railway company to recover damages for cattle alleged to have been killed by the negligence of the company. The plaintiff below recovered judgment for \$150.50, and the company sued out this writ of error. This case is identical in many of its aspects with the case of the same plaintiff in error against Washington, 49 Fed. Rep. 347, and the case of the same plaintiff in error against Campbell, Id. 354, in which opinions have just been filed.

The first four errors assigned are as follows:

"First. The court erred in overruling defendant's demurrer. *Second.* The court erred in overruling the motion to quash the writ of summons in this case. *Third.* The court erred in refusing to furnish counsel with a list of eighteen qualified and competent jurors from which to make peremptory challenges. *Fourth.* The court erred in permitting witnesses Ellidge and Blake to testify as to the distance which they could see up and down the track from the place where the stock was claimed to have been killed."

The first, second, and fourth of these assignments were overruled, and the third sustained, in the case of the plaintiff in error against Washington, *supra*. The defendant requested the court to instruct the jury to return a verdict for the defendant as to all the cattle sued for, and to return a verdict for the defendant as to all the cattle sued for, except one cow. There was sufficient evidence as to the killing of several head of cattle to let the case go to the jury, and these requests were properly refused. There are several assignments of error based on the instructions given and instructions refused. The first, fourth, and sixth requests of the defendant were embraced in the charge in chief, and it was not error to refuse to repeat them. The second and third requests declare that—

“The extent of the duty which the railroad company owes to the owner of stock upon its track and right of way is that the engineer in the charge of the train shall use ordinary and reasonable care after the stock is discovered by such engineer to prevent injury to such stock.”

These requests fell short of expressing the whole duty of the company in such cases. It is the duty of the company to exercise reasonable care and watchfulness to discover cattle upon its track, and, when they are discovered, to use reasonable diligence to avoid injuring them. *Railway Co. v. Washington, supra*.

The defendant's fifth request was as follows:

“The court instructs the jury that the defendant railway company owed no duty to the plaintiff when plaintiff's stock strayed upon defendant's track, except to use ordinary or reasonable care to avoid injury to said stock after the engineer in charge of said train had, or by the use of reasonable and ordinary diligence might have, discovered said stock upon or near the said railway track.”

This request expresses the law, and should have been given.

The seventh request asked the court to say to the jury that the law did not make it the duty of the railway company to fence its track. This is undoubtedly true, and, to prevent any misconception on the part of the jury as to the duty of the company in this regard, the court should have given the instruction asked.

The eighth request was as follows:

“The court instructs the jury that the stock of the plaintiff in this case mentioned in plaintiff's complaint were in the Indian Territory in violation of law, and the defendant is liable to plaintiff for any such cattle as killed by defendant's engines and trains only because of gross negligence on the part of defendant's servants in killing such stock.”

There was no error in refusing to give this request. *Railway Co. v. Washington, supra*.

The ninth request was in substance a repetition of the eighth.

Error is assigned upon the following instruction given by the court:

“The question of negligence is a question to be determined by the jury from all the circumstances adduced before you. In cases of alleged negligence each case should be determined by its own peculiar circumstances, while in ordinary cases the duty that the railroad company owes the owner of stock upon its track is that the engineer in charge of said train at the time should use ordinary and reasonable care after stock is discovered by him to prevent in-

jury to it. Yet there is an obligation due to others from railroad companies, and that is to observe a strict lookout, while running their trains, for stock; and their agents, servants, and employes are presumed to keep such lookout, and it is a fair presumption that a watchful agent will see stock on the track; and the jury will then determine, from all the circumstances adduced before you, whether the agents, servants, or engineers used ordinary care to prevent injury to the cattle."

This instruction bears some resemblance to that given in the case of *Railway Co. v. Washington*, *supra*. We condemned the form of the instruction in that case, and it is much worse in this. As given in this case, it would be likely to confuse and mislead the jury. They might very well infer, and probably would infer, that the company owed the same duty to owners of stock on the track that it owes to its passengers.

We have stated the measure of the company's duty in respect of cattle on its track, and the rule is stated in the fifth request of the plaintiff in error in this case, and which we have held it was error not to give. The judgment is reversed, and the cause remanded, with directions to grant a new trial.

GULF, C. & S. F. R. Co. v. CHILDS.

(Circuit Court of Appeals, Eighth Circuit. February 8, 1892.)

In Error to the United States Court in the Indian Territory.

Action by Henry Childs against the Gulf, Colorado & Santa Fe Railroad Company to recover for the killing of a horse. Verdict and judgment for plaintiff. Defendant brings error. Reversed.

E. D. Kenna, J. W. Terry, and C. L. Jackson, for plaintiff in error.

Before CALDWELL, Circuit Judge, and SHIRAS and THAYER, District Judges.

CALDWELL, Circuit Judge. This action was commenced before a United States commissioner in the Indian Territory by Childs against the railway company to recover damages for a horse alleged to have been killed through the negligence of the company. There was a trial in the commissioner's court before a jury, and a verdict and judgment against the company for \$100, from which judgment the company appealed to the United States court, where the case was tried *de novo* before a jury, and there was a verdict and judgment in that court in favor of the plaintiff for \$87.50, and the company sued out this writ of error. The following are the errors assigned:

"*First*. The court erred in refusing to furnish counsel with a list of eighteen qualified and competent jurors, as required by defendant's attorneys, from which to make the peremptory challenges. *Second*. The court erred in permitting plaintiff, Childs, as a witness in his own behalf, to testify that he could see two or three hundred yards either way from where the horse in controversy was found dead. *Third*. The court erred in allowing the witness Loftus to testify that he could see two or three hundred yards either way from where the horse in controversy was found dead. *Fourth*. The court erred in allowing the witness Robinson to testify to the value of the horse. *Fifth*.

The court erred in declining to instruct the jury to return a verdict in favor of defendant, as was requested by defendant at the close of the testimony. *Sixth*. Said court erred in refusing to charge the jury in writing, and before the argument of counsel, as to the law in this case. *Seventh*. The court erred in charging the jury as follows: "The engineer should be on the lookout for stock when running his train, and should use due care and vigilance in keeping such lookout."

The first assignment is well taken, and for that error the case must be reversed. The second, third, and fourth assignments are frivolous. As the case must go back for a new trial, we refrain from expressing any opinion on the question of the sufficiency of the evidence to support the verdict of the jury. It was not error for the court to refuse to put its charge in chief to the jury in writing. *Railway Co. v. Campbell*, 49 Fed. Rep. 354, (at the present term.) The court did not err in giving the instructions set out in the seventh assignment. *Railway Co. v. Washington*, 49 Fed. Rep. 347, (at the present term.) The judgment is reversed, and the cause remanded, with directions to grant a new trial.

GULF, C. & S. F. R. CO. v. MARTIN.

(Circuit Court of Appeals, Eighth Circuit. February 8, 1892.)

In Error to the United States Court in the Indian Territory,

Action by T. A. Martin against the Gulf, Colorado & Santa Fe Railroad Company to recover for the killing of stock. Verdict and judgment for plaintiff. Defendant brings error. Reversed.

E. D. Kenna, J. W. Terry, and C. L. Jackson, for plaintiff in error.

Before CALDWELL, Circuit Judge, and SHIRAS and THAYER, District Judges.

CALDWELL, Circuit Judge. This action was commenced before a United States commissioner in the Indian Territory by Martin against the railway company to recover damages for a sorrel mare alleged to have been killed through the negligence of the company. The plaintiff below recovered judgment before the commissioner for \$75, from which judgment the company appealed to the United States court, where the case was tried *de novo* before a jury, and there was a verdict and judgment in that court in favor of the plaintiff for \$75, and the company sued out this writ of error. Every error assigned has been decided in the cases of this plaintiff in error against Washington, the same against Campbell, and the same against Ellidge, in which the opinions were filed at this term. Reference is made to the opinions in those cases. It is needless to go over the ground again. The only error in this case was in refusing the defendant's request for a panel of 18 jurors. For this error the judgment is reversed, and the cause remanded, with directions to grant a new trial.

In re McDONOUGH.

(District Court, D. Montana. February 5, 1892.)

1. INDIANS—"SPIRITUOUS LIQUORS"—BEER.

Beer is not a "spirituous liquor," within the meaning of Rev. St. U. S. § 2139, denouncing the offense of selling spirituous liquors and wine to Indians.

2. SAME—STATUTES—LEGISLATIVE CONSTRUCTION.

Act Cong. July 4, 1884, declaring (p. 94) that section 2139 shall not be a bar to the prosecution of any officer, soldier, or employe of the United States who shall furnish "liquors, wines, beer, or any intoxicating beverage whatever" to any Indian, is not a legislative construction of such section.

3. SAME—PENAL STATUTES—CONSTRUCTION.

A penal statute must be strictly construed, and cannot be enlarged beyond the ordinary meaning of its terms, in order to carry into effect the general purpose for which it was enacted.

Petition by W. J. McDonough for a writ of *habeas corpus* to release him from imprisonment on a complaint before a United States commissioner for selling beer to an Indian. Prisoner discharged.

Rufus C. Garland, for petitioner.

J. M. McDonald, Asst. U. S. Atty.

KNOWLES, District Judge. The petitioner was arrested on complaint made before a United States circuit court commissioner for selling to an Indian in charge of an Indian agent spirituous liquor, to-wit, one bottle of beer. Section 2139 of the Revised Statutes of the United States provides:

"Every person (except an Indian in the Indian country) who sells, exchanges, gives, barter, or disposes of any spirituous liquors or wine to an Indian under the charge of any Indian superintendent or agent * * * shall be punished by imprisonment for not more than two years, and by a fine of not more than three hundred dollars."

It is claimed on the part of petitioner that the term "spirituous liquor," does not include beer. "The popular or received import of words furnishes the general rule for the interpretation of public laws as well as private and social transactions." *Maillard v. Lawrence*, 16 How. 261; *Arthur v. Morrison*, 96 U. S. 108; *Martin v. Hunter's Lessees*, 1 Wheat. 326; Sedg. St. & Const. Law, § 220. What is the general definition of "spirituous liquors?" The definition of the word "spirituous," as given by Webster's Dictionary, is: "Containing spirit; consisting of refined spirit; ardent; as, spirituous liquors." If we turn to the word "spirit," we find this as a definition of that word: "Hence a liquid produced by distillation, especially alcohol; the spirits of wine from which it was first distilled. Hence rum, whisky, brandy, and other distilled liquors having much alcohol, in distinction from wine and malt liquors." Turning from the definition given in the dictionary to legal authors, we find: "Spirituous liquor is composed, wholly or in part, of alcohol extracted by distillation. It need not be rectified,—that is, it is within the terms, though it has passed through the still once. Fermented liquors are not included." Bish. St. Crimes, § 1009. "In common parlance, 'spiritu-

ous liquor' means 'distilled liquor.' * * * Fermented liquor, though intoxicating, is not spirituous." In *Com. v. Grey*, 2 Gray, 502: "Wine is a fermented liquor; spirits are distilled liquors. We therefore think that the words 'spirituous liquors' embrace all those procured by distillation, but not those procured by fermentation." *Fritz v. State*, 1 Baxt. 17. In the case of *People v. Crilley*, 20 Barb. 246, STRONG, J., said in speaking of ale: "Neither is it a spirituous liquor, as spirits are manufactured by distillation; whereas, ale is produced by fermentation." "Fermented liquors are not, in common parlance, spirituous liquors. The latter term is properly used to designate distilled liquors, as distinguished from fermented liquors." *State v. Adams*, 51 N. H. 568. In this case it was held that ale, porter, and cider are not spirituous liquors. In the case of *State v. Oliver*, 26 W. Va. 422, the court said: "From these definitions it will be perceived that ale, porter, and beer are drinks of a like nature, differing from, but similar to, each other, but wholly differing from spirituous liquors or wine."

There are two cases which define "spirituous liquor" so as to include "beer." These are *Nevin v. Ladue*, 3 Denio, 43, and *State v. Giersch*, 98 N. C. 720.¹ In the first of these cases the court say: "'Beer' is defined by Webster to be a spirituous liquor made from any farinaceous grain, but generally from barley, which is first malted and ground, and its fermentable substance extracted by hot water. This extract or effusion is evaporated by boiling in caldrons, and hops or some other plant of an agreeable bitterness added. The liquor is then suffered to ferment in vats." I have been unable to find this definition in Webster's Dictionary. In the unabridged Webster's Dictionary of our time "beer" is defined to be "a fermented liquor, made from any malted grain, with hops and other bitter flavoring matter; a fermented extract from the roots and other parts of various plants,—as spruce, ginger, sassafras," etc. Undoubtedly this decision was based upon a different definition of beer from any we now have in common use. It was reviewed in the court of errors of the state of New York. (Reported in 3 Denio, 437.) Chancellor WALWORTH, in his opinion in the case, enters into an exhaustive and curious history of the manufacture and use of fermented liquors. I do not think any one can read the discussion of that distinguished chancellor in that case without coming to the conclusion that he thought there was a difference between spirituous liquors and fermented liquors. He holds that beer would come within the meaning of "strong liquors," as used under the statute in consideration. In the case of *People v. Crilley*, *supra*, the court did not think these cases determined the question at issue, and felt justified in giving a definition to spirituous liquor which did not include beer. In the case of *State v. Giersch*, *supra*, the court maintains that all liquors which have alcohol in them are spirituous liquors. It says: "Hence, also, distilled liquors, fermented liquors, and various liquors are all alike spirituous liquors." In the light of the definition which "spirituous liquors" have generally received, I do not think

this definition can be maintained. To maintain it would be to say that the term "wine," as used in the very statute under consideration in this case, was a redundant and useless word. Yet the general rule is that, if possible, in the construction of a statute, every word should be considered of use, and given a proper meaning. The same point is urged in this case as was urged in that of *State v. Giersch*, namely, that the object of the statute was to prevent intoxication. In that, intoxication generally; in this, the evil is limited to intoxication among the Indians under the charge of the national government. Undoubtedly this is true. But this is denominated a "penal" statute, and should be strictly construed, and with a view of carrying out the object aimed at by such a statute, or on the grounds of public policy, a court has no right to interpolate words into it, or to give a different meaning to words used from what are their natural import as commonly used. There is no better presentation of this point than that by Chief Justice MARSHALL, in *U. S. v. Wiltberger*, 5 Wheat. 76. And I do not see that I can better present this question than by using his language. He said:

"The rule that penal laws are to be construed strictly is perhaps not less old than construction itself. It is founded on the tenderness of the law for the rights of individuals, and on the plain principle that the power of punishment is vested in the legislative, not in the judicial, department. It is the legislature, not the court, which is to define a crime, and ordain its punishment. It is said that, notwithstanding this rule, the intention of the law-maker must govern in the construction of penal as well as other statutes. This is true, but this is not a new, independent rule which subverts the old. It is a modification of the ancient maxim, and amounts to this: that, though penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature. The maxim is not to be so applied as to narrow the words of the statute to the exclusion of cases which these words in their ordinary acceptation, or in that sense in which the legislature has obviously used them, would comprehend. The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words, there is no room for construction. The case must be a strong one, indeed, which would justify a court in departing from the plain meaning of words; especially in a penal act, in search of an intention which the words themselves did not suggest. To determine that a case is within the intention of a statute its language must authorize us to say so. It would be dangerous, indeed, to carry the principle that a case which is within the reason or mischief of a statute is within its provisions so far as to punish a crime not enumerated in the statute because it is of equal atrocity, or of a kindred character, with those which are enumerated."

These remarks of that distinguished jurist I quote as an answer to the remarks of the able counsel for the government, who are most energetic and persistent in looking after offenses against national law within this jurisdiction. And I also would place them in contrast with some of the views of the learned court as expressed in the case of *State v. Giersch*, *supra*.

I do not think the provisions of the statute of July 4, 1884, (23 U. S. St. p. 94,) can be called a legislative construction of section 2139, under consideration. It does not purport to be such a construction, and is in no true sense a construction of the same. For the reasons assigned I

am satisfied beer is not within the meaning of spirituous liquors or wine; and it is hereby ordered that the defendant be discharged from further custody.

GRIER v. BAYNES *et al.*

(Circuit Court, N. D. New York. February 10, 1892.)

PATENTS FOR INVENTIONS—CONDITIONAL ASSIGNMENT.

A patentee granted to a company a license to make, use, and sell the patented articles throughout the United States, and an exclusive license for certain western states, except that he reserved to himself the right to sell in those states, and to transfer that right to one other. Thereafter he executed an assignment to other parties of one-third of his interest in the patent, in which he, in terms, excepted the rights granted to the company, and also reserved to himself the right to sell in all the remaining states, and to transfer that right to one other; and further reserved to himself the exclusive control "of and over all sales of the right to manufacture, use, and sell" the patented articles, which right he agreed should not be granted or sold at less than a specified price; and he agreed to account to the assignees for one-third of the proceeds of such sales; and that, should he neglect so to account or to pay them their share thereof, his exclusive control over such sales should cease, and the assignment should "thereupon become and be absolute forever." *Held* that, until such default, the assignment was merely conditional, in the nature of a security for the performance by the patentee of his agreement.

In Equity. Suit by William Watson Grier against James B. Baynes and others for royalties under letters patent. On settlement of final decree. See former report, 46 Fed. Rep. 523.

STATEMENT OF FACTS.

On the 5th of June, 1891, a decision was rendered in favor of the complainant for an accounting. 46 Fed. Rep. 523. On the 24th of June, 1891, an interlocutory decree was entered referring it to Mr. Charles B. Germain, of Buffalo, N. Y., as master to take the accounting and directing him to state "separately the number of sets of springs made and sold by said defendants prior to December 6, 1887, and the number made and sold subsequent to that date." On the 11th day of December, 1891, the master filed his report in which he finds: *First*, that the complainant is entitled to recover \$138.60 on account of royalties and \$47.50 interest thereon, in all \$186.14, against the defendant Baynes for springs made and sold by him. *Second*, that the complainant is entitled to recover \$1,896.30 on account of royalties and \$527.79 interest thereon, in all \$2,424.09, against defendants Baynes and the Buffalo Spring & Gear Company for springs made and sold by them subsequent to and including March 12, 1886, and prior to December 6, 1887. *Third*, that complainant is entitled to recover \$12,012.70 on account of royalties and \$1,057.36 interest thereon, in all \$13,070.06, against the defendants Baynes and the Buffalo Spring & Gear Company for springs made and sold by them from December 5, 1887, to October 1, 1891.

The defendants have filed six exceptions to this report; three disputing the master's findings as to the principal sums found due for royalties and three disputing his allowance of interest thereon. The master was directed to state separately the number of springs sold before and after December 6, 1887, for the reason that on that date the defendants acquired an interest in the patent which it was thought might give them a right to manufacture and sell free from the obligation to pay royalties. At the time the interlocutory decree was settled the court was not fully satisfied upon this point. The question was not discussed at the argument and the defendants' views regarding it have not, until now, been presented to the court. The master was directed to separate the account, so that this court, or an appellate court, might at any time be able to fix the recovery, according to the view taken of the rights acquired by the defendants on December 6, 1887, without the necessity of a new reference.

The contention that the accounting should be limited to a time prior to December 6, 1887, is based upon the assignment to the defendant, the Buffalo Spring & Gear Company, by Victor P. Richardson and Hamilton P. Richardson, on that date, of an alleged one-third interest in the Thomas patent. The Richardson title is founded upon the following instrument:

"Whereas, I, Charles L. Thomas, did obtain letters patent of the United States, for certain improvements in springs for vehicles, which letters patent bear date the 15th day of January, A. D. 1884, and are numbered 292,144; and whereas, Victor P. Richardson and Hamilton P. Richardson, of the city of Janesville, in the state of Wisconsin, are desirous of acquiring an interest therein: Now, therefore, this indenture witnesseth that for and in consideration of the sum of one dollar to me in hand paid, the receipt of which is hereby acknowledged, I have assigned, sold and set over, and do hereby assign, sell and set over unto the said Victor P. Richardson and Hamilton P. Richardson, their representatives and assigns, all of the one-third right, title and interest which I have in the said letters patent, except as to the rights and privileges therein and thereunder this day granted by me to the Thomas Spring and Gear Company, Limited, of the city of Janesville, in the state of Wisconsin, and the money agreed to be paid to me by said corporation, as a consideration for such grant, and also reserving to myself the individual right to manufacture, and to sell, such improved springs for vehicles in all states and territories of the United States where said Thomas Spring and Gear Company, Limited, have not, by virtue of such grant to it, above referred to, the exclusive right so to do; and to assign and transfer such individual right so reserved to myself, to any one individual partnership, company, or corporation only, and no more, and to take, receive and have for my own use and benefit all money paid or agreed to be paid to me as a consideration for such assignment and transfer of such individual right, the same to be held by said Victor P. Richardson and Hamilton P. Richardson for their own use and behoof, and for the use of their and each of their legal representatives and assigns, to the full end and term for which said letters patent are granted as fully and entirely as the same would have been held and enjoyed by me had this assignment and sale not been made, provided, nevertheless, that said Charles L. Thomas shall have and do hereby also retain and reserve to myself the sole and exclusive power and control of and over all sales of the right to manufacture, use or sell such improved springs for vehicles by any and all

persons, individuals, companies and corporations whatsoever; which said right it is hereby understood and agreed shall not be granted or sold at a less price than that of one dollar for each set of such improved springs for vehicles manufactured and sold by the grantee of such right.—And for the consideration aforesaid it is hereby further understood and agreed by me but subject to the exceptions and reservations in my behalf and favor, that I shall and will account to and pay over to them, their legal representatives or assigns for their sole use and benefit all of the one-third part of all money arising from such sales to others of the right to manufacture, use or sell such improved springs for vehicles not hereinbefore excepted or reserved to myself. . And at the times and on the days following, namely, on the first day of January, A. D. 1885, and on the first day of April, July, October and January thereafter in each and every year during the term for which such letters patent are granted, but should I at any time refuse or neglect to render such account or to pay to them the money so agreed to be paid for a term of thirty days after the time hereby fixed for such accounting and payment, then, and in such case the aforementioned sole and exclusive power and control over such sales, as well those theretofore made as those thereafter to be made shall cease, and the sale and assignment aforementioned of said one-third right, title and interest in said letters patent to said Richardson and shall thereupon become and be absolute forever thereafter, and the said assignees thereof, their representatives and assigns, be authorized and empowered by action or otherwise to collect and receive any and all sums of money then due or to become due to them on account of any and all sales of rights to manufacture, use or sell such improved springs for vehicles theretofore and thereafter made. In witness whereof I have hereunto set my hand and seal this 16th day of August, A. D. 1884.

CHARLES L. THOMAS. [Seal.]

In its former decision the court said regarding this subject:

"Whether the decree should extend beyond December 6, 1887, is a question which can be determined upon the settlement of the decree. I do not decide it now for the reason that considerations, which seem to me important, were not alluded to upon the argument and are but casually mentioned in the briefs. On the 16th of August, 1884, Thomas, the patentee, assigned to Victor and Hamilton Richardson a one-third interest in the patent in question. The assignment was restricted by many conditions, but it provided that upon the assignor's default in certain particulars, it should become absolute. There is plausibility in the suggestion that it did become absolute and that the Richardsons, in December, 1887, held an unincumbered one-third interest in the patent. On the 6th of December, 1887, they assigned their interest to the Buffalo Company. If the Richardsons had the right to make and sell the patented spring free from all obligations to pay royalty to the complainant, it is clear that when the defendant company purchased their title it acquired the same right."

James A. Allen, for complainant.

Albert H. Walker, for defendants.

COXE, District Judge. The exceptions to the allowance of royalties accruing prior to December 6, 1887, are not pressed at this time. The exceptions to the master's decision allowing interest on these amounts are overruled for the reasons stated at the argument. The only question to be decided is whether the complainant is entitled to royalties after the defendant, the Buffalo Spring & Gear Company, became invested with the title previously held by the Richardsons. It be-

comes necessary, therefore, to analyze and construe the Richardson agreement. In order to do this properly the situation at the time of its execution must be considered.

The patent to Thomas was granted January 15, 1884. On the 16th of August, 1884, Thomas granted to the Thomas Spring & Gear Company a license to make, use and sell the patented springs throughout the United States and territories and an exclusive license for certain western states; except that he reserved to himself the right to sell in the states covered by the exclusive license and to transfer that right to one individual, partnership or corporation. After this paper was executed and delivered Thomas still owned the patent and all the rights thereunder for that part of the United States lying east of Michigan, Indiana, Illinois, Missouri, Arkansas and Louisiana. On the same day, August 16, 1884, the assignment to the Richardsons was executed. By the terms of this instrument Thomas assigned, sold and set over to the Richardsons, their representatives and assigns, all of the one-third right, title and interest which he had in the patent, the same to be held by them for their own use and behoof and for the use of their representatives and assigns, to the full end and term for which the patent was granted, as fully and entirely as the same would have been held and enjoyed by Thomas had the assignment and sale to the Richardsons not been made. But this grant was subject to certain exceptions, provisos and conditions which qualify language otherwise absolute in its effects.

First. The provisions directly following the granting clause were, probably, unnecessary, for they simply do what was already done by operation of law,—make the conveyance to the Richardsons subject to the prior conveyance to the spring and gear company. The Richardsons could not practice the invention in the western states, for that territory was covered by the exclusive license previously granted, and they had no interest in the royalties agreed to be paid to Thomas by the spring and gear company. In other respects, had there been no further exception, they would have possessed the same rights that Thomas possessed; namely, they would have owned one-third of the patent and all the rights thereunder for the eastern states. As to that territory they would have been on equal terms with Thomas.

Second. The next qualifying clause is as follows:

“And also reserving to myself the individual right to manufacture, and to sell, such improved springs for vehicles in all states and territories of the United States where said Thomas Spring & Gear Company, Limited, have not, by virtue of such grant to it, above referred to, the exclusive right so to do; and to assign and transfer such individual right so reserved to myself, to any one individual, partnership, company or corporation only, and no more, and to take, receive and have for my own use and benefit all money paid or agreed to be paid to me as a consideration for such assignment and transfer of such individual right.”

The learned counsel for the complainant construes this language to mean that there was reserved to Thomas not the individual right, but the exclusive right to manufacture and sell. He insists that “the reserved right to license for the assignor’s individual benefit is carved out

of the whole title to the patent." It seems, if this construction is correct, that the instrument becomes a mere *nudum pactum*. If Thomas had the exclusive right for the east and the spring and gear company the same right for the west, it is difficult to see what privilege or advantage the Richardsons could ever obtain. They paid for and received a paper which conveyed nothing of value. Thomas reserved to himself the right to manufacture and sell in the eastern states and to assign that right to one other person, partnership or corporation. Of course this reservation was unnecessary. As owner of two-thirds of the patent he possessed the right already. So did the Richardsons if not deprived of it by subsequent reservations. The reservation to Thomas of one of the rights already his did not deprive the Richardsons of rights already theirs. By reference to the license to the spring and gear company, executed on the same day, it would seem, from the identity of language, that Thomas was apprehensive lest he might have conveyed to the Richardsons the same privilege for the eastern states which he had conveyed to the spring and gear company for the western states and that he desired to reserve the same individual right for the former section that he already possessed for the latter. If this were his intention the language employed was apt and proper. If the object was to deprive the Richardsons of all right to practice the invention it was most inapt. It cannot be construed into a reservation of all valuable rights under the patent in the assignor and a consequent exclusion of the assignees from such rights. Suppose, as complainant's counsel suggests, that the reservation had been by a separate instrument; suppose that on the 15th of August Thomas had conveyed to John Doe "the individual right to manufacture and to sell," etc., employing the exact language quoted; will it be argued that the owner of the patent was precluded from practicing the invention because of the restricted license to John Doe? The owner of the individual right in question, whether he held it by reservation or direct conveyance, was wholly powerless, by virtue of that right alone, to prevent the owner of the patent or of an undivided interest therein, from exercising the full privileges of the monopoly granted by the government. The right retained by Thomas was no more efficacious than the same right would be were it outstanding in John Doe. In each case it was a reserved right, in each case the privileges possessed by its holder were identical. Moreover complainant's construction is at variance with other portions of the instrument which evidently contemplates sales by many licensees. Considerable light may be thrown upon the language in question by comparing it with the language quoted under the next (third) subdivision of this opinion. May it not have been the sole intention of the assignor, in view of his agreement to account to the Richardsons for one-third of the royalties collected, to reserve to himself and to one assignee the right to manufacture and sell free of this obligation? It is, for these reasons, thought that the language quoted leaves the rights of the Richardsons precisely as they were at the conclusion of the granting clause. Had the instrument stopped with the *habendum* it would, then, have been simply an assignment of a one-third interest in

the patent subject to the existing license, the assignor reserving to himself an individual right to manufacture and sell, or to dispose of that right to one other person, keeping the avails of such right as his own individual property.

Third. The next paragraph to be considered is the one immediately following the *habendum*. It is as follows:

"Provided nevertheless, that said Charles L. Thomas shall have and do hereby also retain and reserve to myself the sole and exclusive power and control of and over all sales of the right to manufacture, use or sell such improved springs for vehicles by any and all persons, individuals, companies and corporations whatsoever; which said right it is hereby understood and agreed shall not be granted or sold at a less price than that of one dollar for each set of such springs for vehicles manufactured and sold by the grantee of such right.—And for the consideration aforesaid, it is hereby further understood and agreed by me, but subject to the exceptions and reservations in my behalf and favor that I shall and will account to and pay over to them, their legal representatives or assigns for their sole use and benefit all of the one-third part of all money arising from such sales to others of the right to manufacture, use or sell such improved springs for vehicles not hereinbefore excepted or reserved to myself."

This language is certainly perplexing. Precisely what the intention of the parties was it is difficult to conjecture, unaided by other provisions of the instrument. The paragraph, when stripped of verbiage, seems to provide that Thomas should retain the exclusive control over licenses, which were not to be granted for less than one dollar royalty, and that he should pay the Richardsons one-third of the amounts collected. He was not, however, to divide the royalties upon springs manufactured under the individual rights before reserved to him. It is thought that in construing this paragraph sufficient force has not been given to the language following it. It is there expressly provided that should Thomas neglect to pay their share of the royalties to the Richardsons and remain in default for 30 days "then and in such case the aforementioned sole and exclusive power and control over such sales shall cease and the sale and assignment aforementioned of said one-third right, title and interest in said letters patent to said Richardsons shall thereupon become and be absolute forever thereafter." This language cannot be ignored; some construction must be given to it. Is it not fair to assert that if a default for 30 days was necessary to make the assignment absolute, it was not absolute before the default occurred?

The learned counsel for the defendants concedes that there is nothing to show that the default occurred and assumes that it did not occur. It is not disputed either that in order to succeed the defendants must make it appear that there was a complete ownership by the Richardsons of an undivided third of the patent. A reservation of any one of the elements of ownership "would have subtracted from the essential elements of that ownership a part of those elements, and would, by thus excluding the paper from the category of assignments, have consigned it to the category of licenses." Was one-third of the whole estate of the patent conveyed unconditionally to the Richardsons? In

answering the question in the negative I am not unmindful of the ingenious and persuasive argument of the defendants' counsel that Thomas reserved not the ownership of the right to sell licenses but "the power and control" over such sales. This construction would be more plausible if the paragraph stood alone, but when read in connection with other clauses of the same agreement and with the provisions of the contemporaneous agreement with the spring and gear company it is thought that it does not express the true intention of the parties. The paper is not artistically drawn. It is conceded on all sides to be the work of a neophyte in patent law. But if one idea stands out more prominently than another it is the intent of Thomas to retain full power and control over his patent. He might have used language more technical and concise, but when he says that he reserves to himself "the sole and exclusive power and control of and over all sales of the right to manufacture," etc., it is not difficult to perceive that what he intended to do was to prevent the Richardsons from exercising any rights in that regard. He thought that as he had the sole and exclusive power, they had no power at all; that they could not grant licenses without assuming control over them; therefore the granting of licenses would be an invasion of his exclusive right. This construction is borne out by the subsequent provision making the assignment absolute if Thomas failed to pay. Until that default occurred the conveyance was conditional; it was not a full and complete grant; something necessary to make it a complete grant was reserved in the assignor. Is it not clear that what the assignor intended to reserve was the exclusive right to make sales of the right to manufacture, use and sell? So long as he paid the Richardsons he retained that right; when he defaulted the right passed to them. Then the assignment became absolute, but not till then. Until then it was a contingent assignment. As soon as the default occurred Thomas lost his exclusive power over sales and thereafter the Richardsons could sue for and collect the royalties. It is fair to presume that it was the intention of both parties that the Richardsons should not acquire a title which enabled them to maintain such suits prior to a default. I am, therefore, constrained, in the light of all the circumstances surrounding the execution of the instrument in question to hold that it was intended not as an unconditional assignment of a one-third interest in the patent, but more in the nature of security for the performance by Thomas of his agreement; to remain inchoate so long as he performed his duty and to be used the moment he failed in that duty. It follows that the exceptions must be overruled and that the complainant should have a decree for the amount reported by the master, with interest thereon from the date of the master's report, together with costs and disbursements.

NATHAN MANUF'G Co. *et al.* v. CRAIG *et al.*

(Circuit Court, D. Massachusetts. February 12, 1892.)

PATENTS FOR INVENTIONS—RELIEF IN EQUITY CASES OF INTERFERING PATENTS.

A bill in equity, under Rev. St. U. S. § 4918, for relief against a patent alleged to interfere with patents owned by complainant, cannot be sustained where the answer denies such interference, if it appears that the claims of the respective patents do not cover the same invention. The court cannot go beyond the claims, and consider generally the two inventions as a whole.

In Equity. Bill by the Nathan Manufacturing Company and others against Warren H. Craig and others, for relief against a patent alleged to interfere with complainants' patent. Bill dismissed.

T. W. Clarke, for complainants.

Fish, Richardson & Storrow, for defendants.

COLT, Circuit Judge. This bill is brought under section 4918 of the Revised Statutes, which provides that, where there are interfering patents, any person interested may have relief against the interfering patentee, and all parties interested under him, by suit in equity against the owner of the interfering patent, and the court may adjudge either of the patents void in whole or in part. The bill alleges the issue of letters patent 337,500, dated March 9, 1886, to Kaczander and Ruddy, and of the letters patent No. 357,931, dated February 15, 1887, to Kaczander, and that the patents are vested by assignment in complainants. It further alleges the issue of letters patent No. 398,583, dated February 26, 1889, to the defendant Warren H. Craig, and that said patents are interfering patents. The answer denies that said patents are interfering patents, and avers that, if there is an interference, Craig is the prior inventor.

Upon a bill of this character, the first question to determine is whether the patents are interfering patents; and, if this is shown, the next question is, who is the first inventor? The invention which a man patents is that which he claims, and patents do not interfere, unless they claim the same invention in whole or in part. Upon suits brought under this section, it has, therefore, been repeatedly held, until it has become well-settled law, that two patents interfere, within the meaning of this section, only when they claim, in whole or in part, the same invention. *Gold & Silver Ore Separating Co. v. United States Disintegrating Ore Co.*, 6 Blatchf. 307-310; *Reed v. Landman*, 55 O. G. 1275; *Morris v. Manufacturing Co.*, 20 Fed. Rep. 121, 122; *Pentlarge v. Bushing Co.*, Id. 314; *Electrical Accumulator Co. v. Brush Electric Co.*, 44 Fed. Rep. 602-605; *Mowry v. Whitney*, 14 Wall. 434-440. It is apparent upon examination that the claims of the Craig patent do not cover the mechanism described in the claims of the two patents owned by the complainants; in other words, there are no "interfering claims" here, and this position is substantially admitted by the complainants. Under these circumstances, I do not deem it necessary to enter into a comparison of the claims of these different patents. The complainants' position seems to be that, in a bill of

this character, the court may go outside and beyond the claims of the interfering patents, and consider generally the two inventions or structures, taken as a whole; and complainants cite, as an authority upon this point, the case of *Garratt v. Seibert*, 98 U. S. 75. In that case, however, the answer did not deny, but rather admitted, an interference of the patents, and it is therefore not an authority against the general doctrine which the courts have laid down upon this point.

Bill dismissed.

BRICKILL *et al.* v. CITY OF BUFFALO *et al.*

(Circuit Court, N. D. New York. February 27, 1892.)

PATENTS FOR INVENTIONS—INFRINGEMENT—STATE STATUTES OF LIMITATIONS.

State statutes of limitation do not apply to actions at law for the infringement of patents.

At Law. Action by William A. Brickill and others against the city of Buffalo and others to recover damages for infringement of a patent.

Raphael J. Moses, Jr., James A. Hudson, and Samuel W. Smith, for plaintiffs.

George M. Broune and Philip A. Laing, for defendants.

Albert H. Walker, *amicus curiæ*.

COXE, District Judge. The only question argued is whether the state statute of limitations applies to actions for the infringement of patents. This question has been examined now, as well as on former occasions, with the result that, in my judgment, the weight of precedent and reason is in favor of the proposition that the state statutes do not apply. I shall so rule if I preside at the trial of this action. The question, however, has never been decided by the supreme court or by any of the circuit courts of appeals, so far as I am aware, and there is great contrariety of opinion in the circuit courts. *May v. County of Logan*, 30 Fed. Rep. 250, and cases cited on page 257. The defendants should, therefore, be permitted to save the point. It is thought that the rights of both parties can best be protected if the formal ruling is postponed until the trial. *Adams v. Stamping Co.*, 25 Fed. Rep. 270. A decision of the circuit court of appeals will, so far, at least, as the second circuit is concerned, settle the question, which should be presented to that tribunal unembarrassed by any technicalities of pleading. To sustain the demurrer now might tend to complicate the situation should a review become necessary.

BRICKILL *et al.* v. CITY OF HARTFORD *et al.*

(Circuit Court, D. Connecticut. February 22, 1892.)

1. PATENTS FOR INVENTIONS—UNCERTAINTY OF CLAIM—WATER HEATER FOR FIRE-ENGINES.

Letters patent No. 81,132, issued August 8, 1868, to William A. Brickill, consist of a water heater connected with the boiler of a steam fire-engine by two detachable pipes, one carrying the cold water to the heater and the other returning it, heated, to the boiler, thus "maintaining a free circulation between the boiler and heater," and keeping the water in the boiler always hot, so as to expedite the generation of steam on a fire-call. Pipes controlled by cocks connect the heater with a water-tank, and when the engine is away the same circulation is established and maintained between the heater and the tank, "the object being to preserve the coil or heater." The claim is for the "combination, with a steam fire-engine, of a heating apparatus, constructed substantially as described, for the purposes fully set forth." *Held*, that it sufficiently appears that the tank is a part of the heater, and not a separate element of the combination, and the patent is not void on its face for uncertainty.

2. SAME—COMBINATION.

Construing the tank as part of the heating apparatus, the claim cannot be said to show on its face only an unpatentable aggregation of parts, since there is a joint and co-operating action between the heater and the boiler, and the action of each influences the action of the other.

3. SAME—LIMITATIONS—STATE STATUTES.

State statutes of limitation are not applicable, even in the absence of a federal statute, to actions at law in the federal courts to recover damages for infringement of patents.

At Law. Action by William A. Brickill and others against the city of Hartford and others to recover damages for the infringement of a patent. Heard on demurrer to the complaint. Overruled.

Raphael J. Moses, Jr., and James A. Hudson, for plaintiffs.

Timothy E. Steele, City Atty., and *Albert H. Walker*, for defendants.

SHIPMAN, District Judge. This is an action at law to recover damages for the alleged infringement of letters patent No. 81,132, dated August 18, 1868, to William A. Brickill, for an improved feed water heater for steam fire-engines. The present hearing is upon a demurrer to the plaintiffs' complaint. Before the date of the alleged invention, or of any similar device, the only method of keeping the water in a steam fire-engine in readiness to be immediately converted into steam when the summons came to extinguish a fire was by placing and keeping fire in the engine. That it was desirable to have the engine in readiness for immediate service is self-evident. That keeping a continuous fire in the engine was expensive, and might also be otherwise injurious, is also manifest. The object of Brickill's improvement was to have a detachable heater, which would continuously be in use, and supply the engine with hot water while it was in the engine-house, and could be detached when the engine was summoned to extinguish a fire. The specification says:

"The nature of the present invention consists in combining with a steam fire-engine a water heater, so constructed and connected to the boiler of a steam fire-engine that the water in the same is made to pass through the heater, and become heated, so that steam may be more rapidly generated than if my invention were not used in connection with the engine. The object of

the invention is to expedite, in a great measure, the extinguishing of fires, by supplying water, heated to very nearly the boiling point, to the boilers of steam fire-engines."

The heater is connected with the boiler of the engine by two detachable tubes, one of which receives the cold water and conveys it to the coil of the heater, and the other receives and conducts the water, when heated, from the heater to the boiler; "thus establishing and maintaining a free circulation between the heater and the boiler." Pipes, which are opened and closed by cocks, connect the heater and a water-tank. When an alarm of fire has been given, and the engine is away, communication between the water-tank and the heater is established by opening the cocks, and the heater is supplied with water from the tank, which, when heated, is returned to it, as in the case of the boiler, "the object being to preserve the coil or heater." The claim is for "the combination, with a steam fire-engine, of a heating apparatus, constructed substantially as described, for the purposes fully set forth." The demurrer specified five particulars in which the complaint was defective or showed no cause of action. The first was removed by an amendment, and need not be considered.

The complaint did not set out in words a description of the invention, but stated it by reference to and a profert of the patent. The ground of the second and third causes of demurrer is that the letters patent are on their face void, because they do not point out and distinctly claim the part, improvement, or combination which the patentee claimed as his invention; the particular fault being, as alleged, that it cannot be ascertained whether the tank or its equivalent is a part of the invention, as claimed. There are not three members of the combination,—the heater, the tank, and the engine. There are only two members,—the heating apparatus, of which the tank is a part, and the engine. The tank is particularly described as a part of the heating apparatus, and is to be used in the absence of the fire-engine, and is not to be used when and so long as the engine is again in the house. It is included in, and is pointed out with sufficient distinctness as a part of, that apparatus. Whether the omission of the tank and the use of the rest of the apparatus would constitute infringement is a question which does not arise on this demurrer. The omission to state in the specification the effect which the non-user of the tank would have upon the apparatus, or that the tank is a vital part of it, does not create an ambiguous statement of what the patentee claims to have invented.

The fourth ground of demurrer is that the patent is void, because it appears on its face to claim only an unpatentable aggregation of a steam fire-engine and of a heating apparatus. If the claim should be construed to consist of a combination of three distinct elements, heater, tank, and engine, the defect upon the face of the patent, which is pointed out in the demurrer, would exist, because there is no joint and co-operating action between such three separate elements. The services of the tank are only called into requisition during the absence of the engine, and cease upon its return. The joint action of heater and tank did not and could not affect the action of the boiler. The situation would be

similar to that which, in the view of the supreme court, existed in *Beecher Manuf'g Co. v. Atwater Manuf'g Co.*, 114 U. S. 523, 5 Sup. Ct. Rep. 1007. But, construing the claim to be a combination of heating apparatus, of which the tank is merely a part, and steam-engine, the vice does not, in my opinion, exist, because there is a joint and co-operating action between the heating apparatus and boiler, and the action of each influences and affects the action of the other.

It will be observed that the question of patentable invention, as affected by the use of mere mechanical skill, does not arise upon this demurrer. It will also be observed that the invention consists merely in an economical and efficient method of preparing the engine for immediate use at a fire. The conversion of hot water into steam, and the discharge of cold water upon a fire, are effected by a different set of instrumentalities. This preparation of the engine does not consist simply in the injection of hot water into the boiler, but cold water is constantly received from the boiler and conveyed to the heater, while another pipe conveys the water, when heated, from heater to boiler, and a free circulation between the two is thus maintained. Boiler and heater are jointly acting, each to receive and each to discharge; the result being that the engine is constantly prepared for immediate efficiency.

The fifth cause of demurrer is that so much of the plaintiffs' alleged right of action as arose between June 22, 1874, the date of the repeal of the federal statute of limitations, and July 22, 1885, six years before the date of the commencement of the suit, is barred by the statute of limitations of the state of Connecticut, which provides that no action founded upon a tort, unaccompanied with force, and where the injury is consequential, shall be brought but within six years next after the right of action shall accrue. The patent expired August 18, 1885. The complaint alleges a continuous infringement from the date of the patent during its life. This cause of demurrer raises the frequently discussed question of the effect of a state statute of limitations upon actions at law for the infringement of a patent during the period not covered or provided for by a federal statute of limitations. It is well known that this question has never been directly passed upon by the supreme court, and that it has been frequently discussed and decided, or left undecided, by the circuit courts, and that at the present time the number of decisions in favor of the position that a state statute of limitations has no effect upon the limitation of suits in the federal courts for the infringement of patents, largely exceeds the number of those which take the opposite view. In considering the decisions upon this question, the line of thought and reasoning which was adopted by Judge SHIRAS in *May v. Buchanan Co.*, 29 Fed. Rep. 469, as well as by other judges who preceded him, seems to me to lead the mind to the more satisfactory conclusion. It is plain that congress has the power to enact its own statute of limitations for actions upon patents, and it may also be considered as reasonably certain that it could, if it chose, adopt the state statutes, and declare that they expressed its own legislative will. The question is whether section 34 of the original judiciary act, now reproduced in section 721 of the Revised Statutes, which provides that "the

laws of the several states, except where the constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decisions in trials at common law, in the courts of the United States, in cases where they apply," was intended to make state statutes of limitations, which might be passed from time to time, applicable to rights of property which are exclusively within federal control, and are apart from the jurisdiction of a state legislature. If congress intended this result, it follows that the states could, during the time when no federal statute exists, attempt to limit very seriously, by amendments to their own statutes, the duration of the right of action for injuries to patents, and thus indirectly accomplish that which they had no power to legislate upon directly. Inasmuch as the states cannot legislate upon matters which are without state jurisdiction, a construction of section 721, which declares that congress has placed the subjects of exclusive federal control within the control of state legislation, is not to be presumed unless it is imperatively required by the terms of the section. That it is not absolutely required is implied in the clause which limits the effect of laws of the states to "cases where they apply." A natural and reasonable construction of the section is that, when actions are brought in the United States courts with respect to rights of property of which the states have control, the statutes which had been enacted in the respective states with respect to such rights should also be controlling; otherwise legislation in respect to such rights in the United States courts would be in a chaotic state, but that such statutes are not applicable to rights over which the state legislatures have no control, except as they relate to procedure, practice, or rules of evidence. *Schreiber v. Sharpless*, 17 Fed. Rep. 589. It has been sufficiently decided that in actions at law upon letters patent the rules of evidence which are created by statute in the respective states apply, (*Vance v. Campbell*, 1 Black, 427;) and this appears to be necessary, for otherwise rules of evidence in patent cases would be in a state of great uncertainty. While this exception must be made in order to create exactitude in the law so far as is possible, the conclusion by no means follows that the important right of protection to property in letters patent, so far as the protection is afforded by the ability to bring an action at law or in equity, was intended to be or has been controlled by state legislation. Such a conclusion seems to me to be at variance with the entire dual system of state and federal control under which we live. The conclusions upon this part of the demurrer are stated by Judge SHIRAS as follows: That section 721 declares that the laws of the state shall be followed as rules of decision "in cases where they apply;" that is, in cases which involve matters or rights within the legislative jurisdiction of the state. That, as the subject of letters patent and authorizing actions to be brought for the protection of rights thus created is wholly without state control, the general statute of limitations of the state does not, *ex proprio vigore*, apply thereto, and, not applying, is not made a rule of decision governing the United States court by the provisions of section 721. The demurrer is overruled.

MIGNANO *et al.* v. MACANDREWS *et al.*CALIFANO *et al.* v. SAME.

(District Court, S. D. New York. February 1, 1892.)

1. CHARTER-PARTY—TO "REPORT AT CUSTOM-HOUSE" DOES NOT INCLUDE RIGHT TO SHIP'S INWARD BUSINESS.

A clause of a charter providing that the vessel is to be "reported at the custom-house" by the charterers or their appointee does not give the charterers the right to do the inward business of the ship.

2. SAME—"INWARD BUSINESS" OF SHIP—STATEMENT OF CASE.

A charter provided that the vessel should be reported at the custom-house by the charterers or their appointee, or pay £20 liquidated damages. The master reported to the charterers on the day of arrival, but the latter and their appointee declined to enter the ship unless they should be allowed to do the ship's inward business, which the ship refused. On libel filed by the ship-owner to recover freight, charterers claimed to deduct the £20. *Held*, that the right to do the inward business of the ship could not be allowed the charterer unless plainly indicated in the charter, and that the phrase "to report at the custom-house" did not include the handling of such inward business; hence the ship, in reporting to the charterers, had fulfilled her part of the charter, and the charterers could not be permitted to deduct the £20 from the freight.

In Admiralty. Libels *in personam* by Andrea Mignano and others against Robert MacAndrews and others, and Gaspare Califano and others against the same, to recover a balance of charter hire of two vessels. Decree for libelants.

Wing, Shoudy & Putnam, for libelants.

Wilcox, Adams & Green, for respondents.

BROWN, District Judge. In June, 1891, two vessels of 506 and 607 tons respectively were chartered by the owners to the respondents at Smyrna for a voyage thence to New York. Both charter-parties were in the same form, the concluding paragraph of which provided that the vessels were "to be reported at the custom-house by MacAndrews & Forbes, 55 Water street, or their appointee, or pay £20 liquidated damages." The vessels were loaded with the charterers' own goods, and bills of lading issued for cargo deliverable to themselves at New York. As the respondents did not do shipping business themselves, they appointed John C. Seager, a ship-broker, to attend to this business. On the day of arrival, the master of each vessel reported to Funch, Edye & Co., who had long acted as agents of the owners in this city, and who were understood to be the consignees of the ship. Their clerk at once went with the masters to confer with Mr. Seager in reference to reporting the vessel, and on the same afternoon and the next morning they had several conversations with Mr. Seager and with Mr. Cuthbertson, one of the respondents' firm, the result of which was that Mr. Seager, under respondents' direction, refused to enter the vessel at the custom-house, either upon the ordinary custom-house brokerage fee of three dollars, or upon the compensation of five cents per ton, unless he was also to have what is called "the inward business of the ship;" that is to say,

the collecting of the freights and any other business in connection with the inward voyage. The nominal charge for doing such inward business is five cents per ton; though sometimes the master collects the bills, and sometimes this nominal charge of five cents per ton is remitted. The reason why the inward business is desired by the ship-broker is, that it practically secures to him the chartering and fitting of the ship for the outward voyage, upon which there is a much more substantial and more profitable compensation.

The evidence leaves no doubt that the respondents and Mr. Seager were unwilling to enter the ship, and at the same time to allow Funch, Edye & Co. to do the ship's inward business; and that the former refused to report the ship at the custom-house upon such conditions. Ships are required to report within 48 hours after arrival. After the above refusals, the ships' captains, accompanied by a clerk of Funch, Edye & Co., went to the custom-house, and, selecting a custom-house broker, had the ships reported and entered at the custom-house in the names of the respondents; and on the following day they received from the latter a "hauling order," that is, an order where to go to discharge the cargoes, under which the vessels were discharged. Upon a demand for the freight provided by the charter, the respondents claimed to deduct the £20 liquidated damages, which the libelants refused to allow. The above libels were thereupon filed, and the amount of freight less those sums has been deposited in the registry of the court.

In the case of *Gallo v. MacAndrews*, 29 Fed. Rep. 715, this court sustained a claim to a similar amount of £20 as liquidated damages, as a reasonable provision against the inconvenience and losses which the charterer might sustain in his business through a failure to report the ship promptly at the custom-house. In that case, there was no attempt by the vessel to comply with the stipulation. The master reported to his own ship-brokers, by whom the vessel was entered, and no report was made to the charterers till the following day. In the present cases, the masters reported with reasonable promptness to the charterers on the day of arrival; and the only reason why the entry in the custom-house was not made by the charterers' appointee was, as above stated, because he claimed to annex additional conditions, to which the masters refused their assent. The present cases turn wholly on the question whether these conditions, namely, the right to charge five cents per ton and to do the inward business of the ship, could be properly demanded by the charterers under the provision of the charter above quoted.

On this point my opinion is adverse to the respondents.

There is no ambiguity in the phrase "to report at the custom-house;" it is equivalent to the words "to be entered at the custom-house." Both import an ordinary and familiar act required of the vessel by the Revised Statutes, and by practical necessity done through the action of some custom-house broker. For this simple act, three dollars is the ordinary fee. There is no ambiguity in the words or the phrase used. The evidence does not show any ambiguity, nor any fixed custom or practice in business, either general, or brought home to the knowledge

of the ship-owners, which could add to the phrase so important a clause as doing "the inward business of the ship." The evidence shows on the contrary that upon charters of precisely the same form as the present the practice has long been for the vessels to be entered by the consignee of the ship, and not by the brokers named, and upon no other expression of assent thereto than the signing of a mere "hauling order," telling where the ship should discharge. Mr. Seager's testimony is wholly insufficient to establish the usage alleged, even if in any view competent to change so greatly the meaning of a written instrument.

If the charterers of the ship were to do its inward business, they would be in effect consignees of the ship at this port. This involves a fiduciary relation of great importance between them and the owners. They virtually control all claims in favor of the ship-owner, collect and hold all funds on her account, and adjust and settle all disputes. Presumptively the charterers who load the ship themselves, whose goods are brought in the ship, and in whose favor any counter-claims for damages upon any dispute with the captain would arise, would be the last persons who should be appointed to represent the owners in such relations; since the charterers would thereby be acting in a double and opposite capacity, in which the owners would be deprived of all the ordinary securities for the enforcement of their rights.

The present charter also provided that the "report to the custom-house" might be made by the charterers, or by "their appointees." There is nothing which makes the charterers answerable for the responsibility of such appointees. This would be very harmless as respects the act of reporting at the custom-house, which in itself is an insignificant matter, though promptness in it may be very important to the charterers, and warrant the stipulation for the small sum of £20 damages if neglected. There is no reason why such an act might not be done by any one whom the charterers should appoint. But to enable the charterers, without responsibility of their own, to appoint persons unknown to the owner to collect and handle the ship's funds, is a power that, if not expressly conferred, should not be upheld by mere presumption, except upon the plainest necessity or very plain implication. In the present case there is nothing in the language of the charter importing any such added powers, and the previous course of business between the parties forbids the supposition of any such intention by the owners. An additional circumstance against the construction contended for is the fact that these charters were on blanks of the respondents' own forms, prepared presumptively by themselves; and they are, therefore, not to be taken as giving important powers not expressed. Other charters executed between the respondents and other parties before this controversy arose, contain an express stipulation for doing the inward business. This is evidence of the practice of the defendants themselves in accordance with the legal presumption, viz., to provide expressly for the inward business where that is intended. I cannot hold such a charter as the present to be of the same force, without such a stipulation, as with it. Decrees for the libelants for the full amount of freight, and costs.

THE SHADWAN.

DONKIN *et al.* v. HERBST *et al.*HERBST *et al.* v. DONKIN *et al.*

(District Court, S. D. New York. February 9, 1892.)

CHARTER-PARTY—VESSEL OUTSIDE CHARTER LIMITS—MASTER, CHARTERER'S AGENT—HEALTH LAWS—CHARTERER'S DUTY TO PROCURE CLEAN BILL OF HEALTH.

The charterer of a vessel, running under a time charter from the river Platte to the United States or the United Kingdom or Europe, made a subcharter, which provided that the ship should go outside her charter limits, and take a cargo from Progreso, Mexico. The charter provided that the master, though appointed by the owner, should be under the orders of the charterer. The ship went from Buenos Ayres, an infected port, to Progreso, where the health officer refused her admittance. The ship then went to Key West, where the master telegraphed the charterer that he could not return to Progreso without a clean bill of health from some other place. The vessel on same day was put in quarantine at Key West for 80 days. After some further telegrams, the charterer ordered the ship to return to Progreso immediately. After the vessel was ready for sea, with steam up and anchor chain short, the charterer telegraphed to have the papers *viséed* by the Spanish consul, to which the master replied, "Too late" and went to Progreso, where he was again refused admittance, and, after much consequent delay, the charter was terminated. The charterers declined to pay the charter hire, averring that they had suffered damage by reason of the master's failure to obtain the *visé*, and, on being sued for the charter money, brought a cross-suit to recover such damages. *Held*, that the owners were under no obligation to obtain clean health papers for Progreso, since they never authorized the ship to go there; that the master was the charterer's agent in respect thereto; and that the master's defaults, if any, did not become the faults of the owners. And, it appearing also that the final refusal to permit the ship to enter at Progreso was not due to the lack of the *visé*, but because she came from an infected port, and without a clean bill of health, for which the owners were not responsible, *held*, that the charterer's claim of damages should be dismissed, and the ship recover her charter money.

In Admiralty. Libel by Richard S. Donkin *et al.* against Robert Herbst and others to recover charter hire of the steamer Shadwan, and cross-libel by respondents against libelants for damages in failing to obey charterer's orders. Decree for libelants.

Butler, Stillman & Hubbard and *Mr. Mynderse*, for R. S. Donkin.

Owen, Gray & Sturges, for Robert Herbst.

BROWN, District Judge. The original libel was filed to recover the charter hire of the British steamer Shadwan, which was chartered to the defendant Robert Herbst, under a time charter from December 8, 1886, to run within specified limits, from "New York to port or ports in the river Platte and back to port or ports in the United States, or in the United Kingdom, and in the continent of Europe between Bordeaux and Hamburg."

As a counter-claim the answer and cross-libel set up a small item of damage through the misdelivery of a part of the cargo at Buenos Ayres and Montevideo, and a much larger claim for damages from alleged disobedience by the master of the charterer's orders in leaving Key West for Progreso without proper papers to entitle the vessel to enter the latter port, in consequence of which a great deal of time was lost, and the

loading of cargo at Progresso under a subcharter prevented, to the further great damage of the charterer. The facts bearing upon the counterclaim, and the defense to it, run into much complication of detail; but after a careful examination the view that I take of the case does not require any extended mention of the particulars to make intelligible the grounds of my decision.

The whole trouble grew primarily out of the charterer's diversion of the ship from the charter limits by a subcharter executed by him to Thebaud Bros., which provided that the steamer should go to Progresso, Mexico, for a cargo. Progresso was outside of the charter limits. The vessel went thither from Buenos Ayres, an infected port, and was refused admittance by the board of health. She then went to Key West, whence after much correspondence with the charterer in New York by telegram and by letters, and after coaling, she went again to Progresso, and was again positively refused admittance. Thereupon the charter was terminated, and these suits instituted between the parties.

The particular order which the master is charged with disobeying was contained in a telegram from the charterer to the master at Key West on the 28th of March, 1887, which directed the master, in the absence of any Mexican consul at Key West, to get the ship's papers *viséed* by the Spanish consul there. At that time the ship had already cleared for Progresso and was getting under way; and the master telegraphed in reply: "Shadwan sailed. Last dispatch too late. Papers right."

Under all the circumstances of the case as disclosed in the correspondence, I am of the opinion that the master's failure to try to get his papers *viséed* by the Spanish consul does not make the owners answerable for the subsequent refusal of an entrance permit at Progresso, nor for loss of freight under the subcharter. The circumstances show that the master was but little, if at all, to blame for not seeking to get the *visé* of the Spanish consul at Key West; that there is little, if any, possibility that such a *visé* would have made any difference in the result; and that the master, as regards what he did or omitted to do in reference to getting clean papers for Progresso, was the agent of the charterers only, and not the agent of the owners of the ship, who had never authorized him to go to Progresso, and took none of the risks of the ship's having proper papers for entrance there.

The master had arrived at Key West from Progresso on the 12th of March, 1887. On the 13th he telegraphed to Mr. Herbst, the charterer, that he could not return to Progresso for 13 days; and in a letter of the 14th he wrote that he had omitted to say that the officers said he might "*return in 13 days, if we get clean bill of health from some other place in the mean time.*" The vessel on the same day was put in quarantine at Key West for 30 days; and on the same day Herbst replied—"Obtain clean papers for Progresso quick as possible. Report there again, and persevere." On the 16th the master telegraphed that he could not get clean bill of health at Key West, but would try a substitute; and on the same day wrote that it was impossible to obtain a clean bill of health,

because the health-officer refused to give it; but that they would fumigate and give a strong certificate as a substitute, which, it was hoped, would prove sufficient as a *constructive pratique*. The charterer on the same day telegraphed the master: "Hold you responsible under all circumstances. Advise putting yourself as quick as possible in same position as when arrived there." On the 18th the master telegraphed: "When coaled will proceed according your instruction, but *fear more detention there unless clean papers from here.*" On the next day, the 19th, Mr. Herbst telegraphed the master: "Coal and proceed *immediately* Progresso. Persist in reporting there." Mr. Philbrick on the same day wrote to Mr. Herbst in full to the same effect as the master's letter of the 18th; and Mr. Philbrick's letter was received by the charterer on March 23d. On the 25th of March the charterer urged immediate sailing, and apparently complained to Mr. Barber here, that he "had not authorized the ship to wait for clean papers."

The ship having obtained coals in quarantine from Mr. Philbrick after considerable delay, caused by the charterer's interference with the master's first efforts to coal speedily, it was arranged that the Shadwan should sail on the 29th, after receiving the custom-house documents and bill of health. The vessel was then in the roads with steam up, anchor chain shortened, and ready to get under way. Mr. Philbrick's clerk had brought the clearance papers on board; and with them a telegram from Mr. Herbst directing the master to have the papers *viséed* by the Spanish consul; to which the master replied, as above stated, "Too late, ship sailed." The master had been at no time able to communicate directly with persons on shore; he could only do so through others. The charterer had not expressly appointed any agents for the ship there, but he had been corresponding with Mr. Philbrick in reference to coals, and knew of his efforts in behalf of the ship and of the master; and the charterer suggested no other way to transact shore business than through Mr. Philbrick. The clerk of Philbrick assured the master that the certificate in regard to the vessel's bill of health in its existing form, was such as they used with their own ships and in the usual form, and was sufficient, there being no Mexican consul at Key West. The master relied on this assurance, and answered, "Papers right."

If under the circumstances Mr. Philbrick was not by recognition and adoption the charterer's agent and representative for expediting the ship's departure and getting proper papers for admission to Progresso, then the charterer had no agent for that purpose at all, except the master, who thus became himself the charterer's agent for that purpose. The charterer had been repeatedly informed that the vessel was in quarantine, at a distance from shore, and that the captain was not allowed to go ashore in person. He could do nothing. The charter, moreover, provided expressly "that the captain, although appointed by the owners, shall be under the orders and directions of the charterer, as regards employment, *agency*, or other arrangements." This stipulation bound the master to observe any such arrangement as might be made by the charterer's agents or representatives; and by necessary implication it also

bound the charterer to provide all such agencies as were necessary for the captain's guidance and aid where he could not act personally. In undertaking to send the ship to ports outside of the charter limits, it was the charterer's business, not the owners' business, to get suitable papers, and the persons employed in doing that business were the charterer's agents, whether the master or other persons. And considering that the ship's inshore business had been conducted by Mr. Philbrick for more than two weeks before the ship sailed, and that the charterer knew of this fact by the various telegrams and letters, I think the captain was fully justified in regarding Mr. Philbrick as the representative of the charterer there, and justified under the circumstances in acting upon Mr. Philbrick's advice, rather than to delay sailing and to incur new complications which would have been likely to arise, by remaining longer at Key West after having cleared and received her clearance papers. In diverting the ship to ports not allowed by the charter, the charterer took all risks of securing to the ship the proper entrance permits, and is not entitled to charge any error of the master in that respect, if there was any, upon the owners, or against the stipulated charter hire. The owners were under no duty to obtain papers for *Progreso*, since they never authorized the ship to go there; and the master's defaults if any in dealing with the charterer in that regard, did not become the defaults of the owners.

Aside from the above considerations, I am by no means satisfied that the subsequent refusal of entry of the *Shadwan* at *Progreso* is attributable to the failure to obtain the *visé* of the Spanish consul at Key West. It is possible that if the matter had remained subject to the action of the local health board at *Progreso* alone, the substitute for a clean bill of health might have been accepted by the local authorities. The evidence of Aguirre upon the trial gives this some support; but the different statements of this witness at different times on this subject, and his frequent statement on the hearing that the ship must have proper papers to get a "*free pratique*," satisfy me that the ship would not have been legally entitled to entry, whether the doctor might or might not have overlooked the radical defects in her papers. But in truth the matter was taken wholly out of the authority of the local health board at *Progreso* by the action of the National Marine Board, whose order was positive that the vessel should not be admitted. The evident intention of this was not that the vessel should be forever excluded, but that entry should not be permitted from Buenos Ayres, an infected port; nor until the ship obtained a clean bill of health from some other port. This is precisely what the master wrote the charterer on March 14th that he had been told by the officers on her first exclusion from *Progreso*.

There is nothing in the testimony that satisfies me that there was any hope that the order of the National Marine Board would be rescinded, except upon the procurement of thoroughly clean papers. The papers which the *Shadwan* took to *Progreso* the second time, even had they been *viséed* by the Spanish consul at Key West, were not clean papers. On the contrary they expressly stated that the ship had come from Buenos

Ayres, an infected port, and it was not stated that she had passed quarantine. Here was express written notice of her still continuing liability to spread contagious disease. The *visé* of the Spanish consul could not in the slightest degree have changed the essential character of this certificate, or given it the effect of a clean bill of health. Key West, moreover, was but 36 hours distant by steamer from Progreso. Three or four days, therefore, would have been sufficient to obtain the *visé*, had that been all that was necessary to enable the ship to enter at Progreso. She remained at Progreso for 26 days, and during this time the charterer's agents there were in correspondence with the master and the local and national board of health. No suggestion was made by any of them that the *visé* by the Spanish consul at Key West would remove the objection to her entry, or be of any use. The master testifies that no objection to the lack of a consular *visé* was ever made; but that the objection was that she had come from Buenos Ayres, an infected port, as her Key West papers stated. I am satisfied this is the truth, and that the absence of the *visé* was not the real objection to her entry, but the fact of her infectious character, and because she had not obtained, and had not been willing to wait in quarantine at Key West long enough to obtain, a clean bill of health. For this the charterer was directly responsible.

For the small item of damage through the misdelivery or miscarriage of goods, the vessel is liable, no sufficient ground being shown to absolve her from that risk. If the amount of that item is not agreed on, a reference may be taken to ascertain it. The other claims are dismissed. Decrees may be drawn accordingly.

THE LIME ROCK.

SAML. L. MOORE & SONS Co. v. THE LIME ROCK.

(District Court, D. New Jersey. February 24, 1892.)

1. MARITIME LIENS—REPAIRS—AUTHORITY OF CHARTERER.

An owner who allows another to have full possession and management of a vessel, and thus to become the owner for the voyage, *pro hac vice*, must be presumed to consent that the vessel shall be liable for all repairs necessary to enable her to pursue the voyage, and that the special owner may bind the vessel for this purpose.

2. SAME—ADVANCEMENTS AT OWNER'S REQUEST.

A third person, who, at the owner's request, pays for necessary repairs upon a vessel, is entitled to a lien for repayment.

3. SAME—WAIVER—DELIVERY OF VESSEL.

A maritime lien for repairs is in the nature of a proprietary right, and is not lost by merely delivering the vessel to the owner before payment.

4. SAME—WAIVER—EVIDENCE.

Repairs made upon a foreign vessel were admittedly necessary to enable her to prosecute her voyage. The owner was not a resident of the state, and in making the contract stated that he was then without funds to pay for the repairs. The vessel was to be delivered to him on completion, and he was to pay half the bill 80 days thereafter, and the remainder as the vessel earned the money. The vessel

was delivered, but no part of the bill was paid at the expiration of the 30 days. Held that, although the evidence indicated that the repairs were made partly upon the credit of the owner, there was nothing to show an intention to waive the lien.

B. SAME—CONTRACT—EVIDENCE.

Where the evidence is conflicting as to whether an oral contract to repair a vessel limited the charge to \$700 or \$800, the fact that the owner, on receiving a bill for \$2,100, although criticising it severely, does not repudiate it, but only asks for delay of payment, will be deemed sufficient to show that no such limitation was agreed upon.

In Admiralty. Libel by the Saml. L. Moore & Sons Company against the steam-lighter Lime Rock for repairs. Decree for libelant.

Thomas F. Murtha and Owen, Gray & Sturges, for libelant.

Henry W. Bates, for claimant.

GREEN, District Judge. This is an action *in rem* brought by the libelant corporation, to recover the sum of \$2,148.91 for materials furnished, labor performed, and moneys laid out and expended during July and August, 1891, in repairing and equipping the steam-lighter Lime Rock. It appears from the testimony taken in the cause that the lighter was owned by Louise E. Bates; that on or about the 16th of July, 1891, Henry W. Bates, who described himself as "bailee for hire" of the lighter, and who was in fact the husband of the owner, came to the shipyard of the libelant corporation at Elizabethport, in this state, to make arrangements for the repairing and equipping of the vessel, so that she might "earn her living." Mr. Bates was accompanied by his wife, but he did not disclose to the officers of the libelant corporation that she was the real owner. In her presence, and with her tacit consent, he began and carried on a conversation with the officers of the libelant corporation, who were there present, which finally resulted in an agreement for the repairing and equipping of the vessel. This agreement, unfortunately, was not reduced to writing, and the contradictory recollection of it, and the diverse constructions put upon the conversation, give rise to the real, and practically the only serious, dispute in this controversy. As has been stated, Mr. Bates describes himself as "bailee for hire" of the vessel. He admitted upon cross-examination that he hired and paid the crew, took charge of the running of the boat, making her contracts for carrying cargoes, and paying all the bills, including those for repairs, which might be incurred upon a voyage.

It is well settled that when a general owner allows the charterer to have the control, management, and possession of the vessel, and thus become the owner for the voyage, *pro hac vice*, he must be assumed to consent that the vessel shall be answerable for all necessary repairs and supplies to enable her to pursue her voyage, and that the special owner may lawfully bind the interest of the general owner in the vessel in this behalf.

Mr. Bates, bearing, then, this character of "owner for the voyage," caused the lighter to be brought to the libelant's yard to be repaired, in pursuance of and under the terms agreed upon in the conversation heretofore referred to. But he insists, and in fact testifies, that there was made, at the time alluded to, a special contract, entered into with the

libelant corporation, to repair and equip the vessel for a sum not to exceed \$700 or \$800, of which sum, he further insists it was agreed between the parties contracting, he was to pay one-half within 30 days after the repairs had been completed, and the balance as the lighter should earn it thereafter. On the other hand the libelant corporation, by all its officers and agents, who know of the agreement at its inception, or who became acquainted with its terms as the work upon the lighter progressed, basing their knowledge upon statements and admissions of Bates, give testimony tending to show that no certain sum was named by Bates or the libelant corporation as the price of the repairs which were to be put upon the lighter, but that the real agreement entered into was this: that all such repairs should be done as were necessary, in the judgment of the officers or agents of the libelant corporation, to put the vessel in fair condition for the voyage she was about to undertake,—“to earn her living,” to quote Mr. Bates’ own language. The bill for the repairs, when done, amounted to \$2,032.04, to which was added the amount of a bill for certain repairs put upon the vessel about the same time at the ship-yard of a Mr. Starin, amounting to \$57.47, which was paid by the libelant corporation to Mr. Starin, and which repairs were made with the consent and at the request of Mr. Bates, as the bailee of the lighter in possession, or as agent for his wife, the claimant in this case. The lighter, after the completion of the repairs, was delivered into the possession of Mr. Bates. When the bill was presented, Mr. Bates refusing or neglecting to pay the one-half of it, or any part thereof, although the time for which credit was given had elapsed, this libel was filed by the libelant corporation to enforce its collection.

It seems quite clear from the testimony that, at the first interview between the officers of the libelant corporation and Mr. Bates, it was the opinion of the latter that the proposed repairs, of which he had made a memorandum in writing, would not exceed the sum of \$700 or \$800 in his judgment; but I am equally clear that the weight of testimony shows that no such, or indeed any, limit, in cost of proposed repairs, was insisted upon by Mr. Bates as a part of the contract, or was assented to by the libelant corporation. All the witnesses for the libelant unequivocally testify that no such limit was fixed, and that no contract to repair the vessel either for \$700 or \$800, or any other definite sum, was entered into. The officers who so testify are the officers with whom the conversation was had in which Mr. Bates declares that such contract was made. They do not deny that Mr. Bates, who, by the way, is a counselor at law, and not a practical ship-master, did say that he thought such repairs as were necessary would cost no more than \$700 or \$800, but they themselves declined to give any judgment as to cost until they inspected the vessel. While, on the other hand, nowhere do the witnesses for the claimant, other than Mr. Bates himself, testify to any definite contract with the libelant corporation for the sum named. It is true that there is some testimony—chiefly that given by Mr. Bates himself—which inferentially tends to substantiate the contention of the claimant; but I think, when it is carefully scanned, it must be regarded

as very loose and indefinite, and cannot be held to overbalance the much weightier testimony offered on the part of the libellant. Besides this failure of direct evidence to sustain this claim, some minor circumstances, not denied by Mr. Bates, clearly show that no definite sum was agreed upon as the contract price of the proposed repairs. For example, when the bill of expenses had run up to quite \$800, the alleged limit, and the repairs scarcely begun, the captain of the lighter, who had been left in charge of her, gave to the libellant corporation orders for equipment and repairs which its officers judged unnecessary and extraordinary. Mr. Bates was thereupon requested to come to the shipyard of the libellant, and, upon inspecting what had been done, judge for himself of the necessity and wisdom of ratifying the orders of his captain. Mr. Bates came, and, disapproving of some of the captain's orders, repudiated them; but, as to others, affirmed them, and then made a special request of the libellant that as to all other repairs thereafter to be done to the vessel, the libellant corporation should take direction from him alone. At this very time the limit of the alleged contract price had been reached. Only a small portion of the repairs which, by his memorandum, Mr. Bates had ordered to be done, had been completed, and the major part was still to be put upon the vessel. If the whole price for all the repairs was to be only \$700 or \$800, what difference could it possibly make to Bates if the orders of the captain were extravagant? If fairly included in the repairs or equipments that were to be made and furnished, they were already valued by the libellant corporation, according to his account, at \$700 or \$800; and, no matter what they cost, that sum fixed the limit of Bates' responsibility. But he does not act upon this theory. He repudiates orders of his captain, and limits the libellant corporation to the acceptance of his own orders alone, solely to limit his pecuniary responsibility. In any other view, his action cannot be understood. It is not seriously controverted that all the repairs done, and all the materials furnished, were done and furnished, not only with the knowledge and approval of Mr. Bates, but upon his direct order. He must have assumed, therefore, the pecuniary responsibility consequent upon their furnishing.

Again, when the bill for the whole amount of repairs was presented to Mr. Bates for payment, he, indeed, criticised it severely, as much larger than it ought to have been; but at no time did he repudiate it, but again and again promised to pay it as speedily as he could obtain the money, declaring at the time the bill was presented that he had no means whatever to pay it, and he could only obtain the necessary funds from the earnings of the lighter. Had the claim so presented been unrighteously and unlawfully increased by the libellant corporation from \$700 to \$2,100, would it be likely that Mr. Bates would have considered the question of its payment for a single moment? Would he not instantly have repudiated the account, tendered to the libellants, according to his alleged contract, one-half of \$700, or \$800, as covering the whole of his liability at that time, and as all the moneys which he was then bound to pay, and set his boat to earning the other half of the

contract price? Yet he does not pretend that he offered to pay or that he tendered any part of the account as presented, in cash, at the end of 30 days after the repairs were made, as he says he agreed to do originally, nor at any other time; nor did he ever tender or offer to pay the one-half of the \$700 or \$800 at any time, but failed and neglected or refused wholly so to do. His whole plea was for delay,—for further credit. He desired the libelants to wait for their money until the lighter should earn the amount of their bill. Can such conduct be reconciled with the contention of the claimant? Other circumstances could be referred to in justification of the conclusion that no specific sum was ever agreed upon as the price or consideration of the repairs that were to be made to the lighter by the libelant corporation, but it is not deemed necessary to refer to them in detail. I content myself with repeating that the weight of the evidence is opposed to the allegation of the claimant, that the contract price was a fixed, definite amount, and, as it seems to me, sustains clearly the allegation in this respect made by the libelant corporation.

The claimant further insists that the special contract entered into by the libelant corporation and Bates makes it clear that credit for the repairs was given to Bates personally, and that such repairs were not to constitute a lien upon the lighter, and, further, that, if they were to constitute such lien, that lien was lost by the delivery of the vessel into the possession of the claimant before it was enforced. If this were a common-law lien for repairs or for the furnishing of supplies to the vessel, the delivery of the vessel upon which they were put, to the owner, would undoubtedly destroy it. But this is not a common-law, but a maritime, lien. The Lime Rock was a foreign vessel. Her owner was not a resident of the state of New Jersey. The repairs done by the libelant corporation, admittedly, were absolutely necessary to enable her to proceed upon her contemplated voyage. It was stated by the owner *pro hac vice* that he was entirely without funds, or practically so, to pay for the repairs ordered to be made. Thus it seems that every element which goes to constitute the maritime lien was here present. Such lien is not destroyed by the loss of possession of the *res*. A lien of this character is in the nature of a proprietary right in the *res* itself, and will follow it into the hands even of an innocent purchaser without notice. The mere delivery of the lighter, therefore, to the claimant, when the repairs were completed, does not interfere in any degree with the libelant's rights, unless it can be shown that the lien was expressly waived.

As to the other matter of defense,—that the credit was given to Bates personally,—I think it may be taken as a fair deduction from the testimony that the credit was originally given partially to Mr. Bates, but I cannot conclude that the libelant corporation intended, under the circumstances, to divest itself of the right to enforce its claim by lien if the owner *pro hac vice* failed to keep his contract. It is quite true that the vessel was to be put back, by the agreement, into the possession of its owner, 30 days before any payment on account of the repairs was to be made, and after that payment the vessel was still to be left in the posses-

sion of the owner, that she might earn the balance of the debt; but it is equally a part of the contract in this case that the one-half of the bill for repairs was to be paid promptly at the end of 30 days after the completion of the repairs. Had the claimant or her owner *pro hac vice* performed that part of the contract, a different case might have been presented from that now under consideration. But it is well settled that a maritime lien is entirely consistent with a credit given for its payments, unless such lien be expressly waived. Repairs put upon a vessel under the circumstances that the repairs were put upon this vessel, raise a strong presumption that they were put there upon the credit of the vessel, and not upon the credit of the owner; and it is incumbent upon the claimant to show by weight of evidence that the lien was actually given up, in order to rebut that presumption. The burden is upon him. Not only does he fail to show such action on the part of the libelant corporation, but, when pressed for the amount of the claim due to it, he himself recognizes the right of the libelant to lien, and on that ground, to-wit, that the libelant has such lien upon the vessel for the bill, insisted that it ought to be lenient, and not press him into immediate settlement. This plea is entirely inconsistent with the theory that the libelant corporation had surrendered its lien. The true principle is that if the labor charged for has been performed, or the repairs done and the material furnished, for the vessel, no matter in what way the owner agreed to pay, if he fails to pay according to the agreement, he who furnishes the materials, or performs the labor, or completes the repairs has a right to resort to the security provided by law. I am of the opinion, therefore, that in this case the libelant corporation never intended and in fact did not divest itself of its right to lien; that right was reserved to itself in case the owner failed to comply with the terms of his contract, and pay one-half of the cost of the repairs within 30 days after the repairs were completed. This defense cannot avail the claimant.

As to the items which go to form the amount of the Starin claim, I cannot agree with the contention of the counsel for the claimant, that they do not afford ground for a maritime lien. These repairs, as it appears from the testimony, were put upon this vessel under the supervision of Mr. Bates, and they were paid for, at his request, by the libelant corporation. They constituted a lien upon the boat before payment, and it is settled that all advances of money made to pay off claims of such a nature, upon the credit of the vessel, as these claims were, and which constitute liens in admiralty, have the benefit of the lien, with the same rank as the original claim. The item of 334 meals furnished to a portion of the crew at a hotel near Elizabethport, while the vessel was being repaired, cannot be included in this claim. Under the circumstances, they afford no basis for a lien, and must be stricken out. Let the usual decree be entered.

THE DAVE & MOSE.

FAHEY v. MAYOR, ETC., OF CITY OF NEW YORK.

(District Court, S. D. New York. January 29, 1892.)

1. WHARVES AND WHARFINGERS—DUTY TO DREDGE.

The city is liable for injury to boats occasioned by its failure to remove at reasonable intervals the accumulations from drains at public wharves to which boats are invited, and at which the city collects wharfage.

2. SAME—DUTY OF BOAT AT WHARF—SOUNDINGS—INQUIRIES.

It is negligence in a boatman to tie up for the night at a dock on the Harlem river at 155th street without sounding, or inquiry as to the depth of water, or breasting his boat off.

In Admiralty. Suit by Michael Fahey against the mayor, etc., of New York city, to recover for loss of canal-boat sunk at respondent's wharf. Decree for libellant.

Hyland & Zabriskie, for libellant.

William H. Clark, Corp. Counsel, and *James M. Ward*, Assistant, for city.

BROWN, District Judge. On the 16th of September, 1891, the libellant's canal-boat Dave & Mose, loaded with 275 tons of coal, moored alongside the platform dock at 155th street and the Harlem river, to which she was consigned. Her bow was headed down river and projected 12 feet below the lower end of the dock, and her stern extended about the same distance above the upper end. Between 1 and 2 o'clock during the following night as the tide went down, the forward part of the boat caught on the bottom; and when the men on board were called between 1 and 2 A.M., she had a list to port, and with the help of others could not be shoved off. The bottom being sloping and the stern of the boat free, she got a twist; and the stern, careening to port, took in water so as gradually to pull her off until she sunk. The bottom was of silt or sand, with no stones. Adjacent to the dock the water at mean low tide varied from 6 feet near the upper end of the dock to 4 feet at and below the lower end, where a drain of the surface water from Seventh avenue brought in considerable quantities of silt and sand. Twenty feet out from the dock the depth of water at mean low tide was from 12 to 17 feet; 30 feet out, from 15 to 20 feet. The canal-boat was 17 feet wide. Similar boats have been accustomed to go to the dock for several years past. Only two cases of injury from grounding are shown by the evidence; and the proof is not clear whether those damages were at the dock or above. It was not uncommon for boats coming to the dock to catch temporarily, but they were easily shoved off without damage. The depths of water above stated are those ascertained by disk soundings, that is, to the top of the soft silt or sand. Soundings by the rod were about a foot or a foot and a half greater near the dock, and two or three feet greater further off.

The gradual filling in of the bottom around the lower end of the dock was known to the officers of the city. The last dredging was in February, 1889; the dredging next prior was in September, 1887,—17 months before. Two or three feet, the evidence shows, had collected between those two dredgings in 17 months. This accident was 19 months after the last dredging.

The libelant's boat had repeatedly been at the same wharf before with similar loads, and met with no difficulty. There is no evidence as to how she was managed on those occasions. The man in charge at this time had never been there before. He knew nothing of the depth of water; made no inquiries on arrival; made no soundings, and gave but small slack to his bow-line, but much slack to his stern-line; and he went to bed without breasting off or making any other provision for the safety of the boat during the night.

Upon the above facts I think both parties were in fault; the city, for not dredging again about the lower end of the dock after a lapse of 17 months, when, as previous experience had shown, new dredging became necessary, and the accumulations of sand there being known. The man in charge of the boat was negligent in tying up for the night at such a place as a dock on the Harlem river at 155th street without sounding, or inquiring as to the depth of water, or breasting off. Ordinary prudence and the habits of boatmen in such locations are to make soundings, or otherwise ascertain whether the boat can safely lie over low water before leaving her without attendance or watch for the night.

This duty, however, does not relieve the city from the obligation to remove by dredging at reasonable intervals the accumulations from drains at public wharves where they are inviting boats and collecting wharfage. Decree for the libelant for one-half the amount of his damage, (*Christian v. Van Tassel*, 12 Fed. Rep. 884,) with order of reference to ascertain the amount.

DICKIE *et al.* v. WILSON.

(District Court, S. D. New York. February 4, 1892.)

1. CARRIERS—DAMAGE TO CARGO—JAMAICA LOGWOOD—SHORT CUTTINGS—CUSTOM.

It was proved that, in loading "straight" logwood (*i. e.*, not roots or trunks with branches) in Jamaica, it is not customary to cut any considerable quantity in lengths of less than three feet, such cuttings injuring the value of the cargo. A deduction being claimed by the owners of the cargo of logwood from the freight due the carrier because 73 tons of logwood were delivered so cut short for the purpose of stowing a full cargo and against the protest of the shippers, but the evidence being inconclusive as to the exact amount of the short cuttings, *held*, that an allowance for 50 tons of short cuttings would be just.

2. COSTS—DECREE FOR LIBELANTS—SUBSTANTIAL VICTORY FOR RESPONDENT.

Libelants sued for \$216 and recovered judgment for \$68.59. *Held* that, as respondent was successful on the main issue, the decree should be without costs.

In Admiralty. Suit to recover a balance of freight. Decree for libelants.

Wing, Shoudy & Putnam, for libelants.
Henry D. Hotchkiss, for respondent.

BROWN, District Judge. A deduction of \$216 is claimed by the respondent from the amount of freight due on a cargo of logwood brought to New York from Black river, Jamaica, in March, 1889, by the bark *Bluebird*, which had been chartered to the respondent for that purpose. It is not alleged that all the logwood shipped was not delivered; but that in stowing the cargo about 72 tons out of a cargo of 436 tons were in pieces less than 3 feet in length, which had been cut from the logs by the stevedore of the ship for the purpose of stowing a full cargo. Freight was to be paid by the ton; and it was the interest, therefore, of the ship to take as full a cargo as possible. The charter, unlike many recent charters, contained no provision against cutting less than in lengths of three feet. There is sufficient proof on behalf of the respondent to show that, on contracts for the sale of logwood in New York, it has long been the custom to make an allowance to the vendee if on delivery more than 5 per cent. is found cut in lengths less than three feet. But the custom between vendee and vendor in New York does not, I think, affect the ship in the performance of a charter in respect to the mode of loading in Jamaica. The question concerns the loading there, and the ship's authority by the custom there to cut logs, and if so, to what extent, for the purpose of compact stowage. The evidence leaves no doubt that some cutting is necessary, and has long been authorized by the custom of that country; and that cutting is much less necessary in taking cargoes of straight logwood, than in taking cargoes consisting more or less of roots, or logs with branches. The latter must be sawed or cut considerably.

I think the weight of evidence on this point is with the respondent, as to the custom at Jamaica. It was well known that cutting any considerable quantity in lengths less than three feet materially diminished the market value of the cargo; and all the witnesses engaged in the trade there testify that there was no need of cutting, and no practice authorizing cutting, in lengths less than three feet in the case of what is called "straight" logwood; and the respondent's witnesses say this cargo was all of first-class straight logwood. The mate says that there were some roots and branches which they had to cut. But his testimony is too indefinite and insufficient to account for so considerable an amount of short cuttings as was made in this case; and the ship-masters that were examined there had too little experience, or were also too indefinite in their testimony, to overcome the evidence of the respondent's witnesses. During the loading repeated objection to the sawing of the wood in short pieces was made by the shippers to the captain and mate.

The failure, however, to ascertain, during the discharge of the ship, the true amount of short cuttings, makes it impossible to decide the case with any accuracy. In the course of the discharge a considerable quantity of short cuttings was noticed and complained of; but no effort was made to separate the short pieces, or to determine their actual number,

until the cargo had been more than half discharged, and removed for consumption. The amount of 72 tons claimed in the answer, is an estimate derived from the proportion of short cuttings observed in what remained of the cargo after more than half had been discharged. But one of the libelants' witnesses testifies very positively that a considerable amount of the shorter pieces during the earlier part of the discharge was allowed to fall down and accumulate in the hold, and was not taken out until the last. This would make the proportion in the last half, or third, of the cargo greater than in the whole cargo. On the other hand, one of the witnesses for the respondent who saw the unloading every day, testifies that in his judgment the proportion of short pieces remained about the same during the whole discharge. Under such circumstances, though I think the respondent is entitled to some offset, it is impossible to say that the amount of 72 tons is really proved; but as some accumulations of small sticks, in dealing in the usual way with a cargo of large and small ones, would naturally arise towards the end, I can only determine the matter as a jury under such circumstances would be obliged to do, and allow such deduction as seems probably just and equitable. I allow, therefore, for 50 tons, at the proved damage of \$3 per ton, making \$150. Deducting this amount from the amount of unpaid freight, there remains \$68.59 for which the libelants may take judgment, with interest; but as the respondent is successful on the main issue in litigation the decree must be without costs.

THE CITY OF ROME.

CARMODY v. THE CITY OF ROME.

(District Court, S. D. New York. November 21, 1891.)

ACTIONS FOR NEGLIGENCE—FORMER TRIAL AT COMMON LAW—WHEN A BAR IN ADMIRALTY.

Concurrent negligence of the plaintiff being a ground for dismissal of an action for negligence in a common-law court, but not in admiralty, a plea of a former common-law adjudication for the defendant is not sufficient unless it appear that the ground of the adjudication was absence of fault in the defendant, and not proof of fault in the plaintiff. It appearing in this case upon submission of the stenographer's notes of the former trial that a verdict for the defendant was directed by the judge, because the facts proved did not constitute negligence in the defendant, *held*, on exceptions to the answer, that this would constitute a bar to the present action.

In Admiralty. Libel by James Carmody against the City of Rome for personal injuries. Hearing of exceptions.

A. G. Vanderpoel, for libelant.

Frederick G. Gedney, for claimant.

BROWN, District Judge. Exceptions to the libel have been filed by the defendant setting up *res adjudicata* upon a trial of the same matter in a common-law action brought by the libelant against the owner of the

City of Rome, in the court of common pleas of this city. In that action concurrent negligence of the plaintiff would be a sufficient ground of dismissal; in admiralty, it is not. *The Max Morris*, 137 U. S. 1, 11 Sup. Ct. Rep. 29. To determine the sufficiency of the plea it is, therefore, necessary to know whether the former judgment of dismissal proceeded on the ground of the plaintiff's concurrent negligence, or solely upon the ground of failure of proof that the defendant was negligent. In the latter case, the former judgment, though in a common-law court, becomes a bar and estoppel here. Upon these exceptions no judgment can be rendered now, inasmuch as the facts stated in the exceptions must be sustained by proof at the hearing. I have, nevertheless, examined the matter upon the request of the parties and for their convenience in reference to any future trial. Upon the evidence as to the grounds on which the dismissal was ordered by the presiding judge on the former trial, as shown by the stenographer's notes of that trial submitted to me, and upon the admitted facts as stated in the affidavit of counsel, and assuming also on behalf of the libelant that the evidence offered by him was ruled out, as he states it was, I am satisfied that upon the hearing of this cause I should be obliged to hold that the former trial and judgment are a bar to the present action, inasmuch as the proofs submitted would be sufficient to show that the direction of a verdict by the judge was not based upon negligence of the plaintiff, but because the proofs before him did not amount to any negligence on the part of the defendant.

THE SERAPIS.

SMITH v. THE SERAPIS.

(District Court, D. Maryland. December 4, 1891.)

1. INJURY TO EMPLOYE—DANGEROUS APPLIANCES—CONTRIBUTORY NEGLIGENCE.

Libelant, a stevedore, lost his right hand by its being caught between the cogs of a steam-winch, which the court found to be dangerous and unsafe because of the nearness of the steam-valve to the cogs, and of the absence of casing over the cogs to prevent such accidents. Libelant knew the dangerous condition of the winch, and spoke of it to the mate of the vessel, but continued during part of two days to work the winch, unloading cargo out of the steamer's hold. Held, that the fact that libelant continued to work the winch with knowledge of the danger and risk did not of itself, as matter of law, bar his recovery in admiralty, but was evidence merely of contributory negligence on his part.

2. SAME—DAMAGES—IN ADMIRALTY.

Held that, the libelant's contributory negligence being neither willful, gross, nor inexcusable, and the facts presenting a strong case for his relief, he should be decreed one-half the sum as damages which he would have recovered if he had been without fault.

(Syllabus by the Court.)

In Admiralty. Libel for personal injuries.

J. Cookman Boyd, for libelant.

Convers & Kirkin and *W. Benton Crisp*, for respondent, cited—

Robertson v. Cornelson, 34 Fed. Rep. 716; *Stringham v. Hilton*, 111 N. Y. 188, 18 N. E. Rep. 870; *Railroad Co. v. McDade*, 135 U. S. 554, 10 Sup. Ct. Rep. 1044; *Miles v. The Servia*, 44 Fed. Rep. 943; *The Maharajah*, 40

Fed. Rep. 784; *Couillard v. Tecumseh Mills*, 151 Mass. 85, 23 N. E. Rep. 731; *Tuttle v. Railway Co.*, 122 U. S. 195, 7 Sup. Ct. Rep. 1166; *Townsend v. Langles*, 41 Fed. Rep. 919.

MORRIS, J. The libelant was one of a gang of stevedores employed in unloading a cargo of iron ore from the British steam-ship *Serapis* in the port of Baltimore. During the progress of the work he was assigned by the head stevedore to the duty of running the forward steam-winch. By the use of another winch the ore in buckets was being hoisted out of No. 2 forward hole, and the winch which libelant was attending was used to draw the crane to and from the wharf. He had to stand facing the winch, looking forward towards the bow of the ship, and was required for the proper performance of his duty to turn his head from time to time, to see the position of the bucket behind him, and to turn quickly and close or open the steam-valve by revolving a wheel in front of him with his right hand. While engaged at this work, and turning from looking back at the bucket, and having to take hold of the valve wheel, he put out his hand a little to far, and it was caught between the cogs of the driving-wheel, directly in front of him. His hand was so crushed that he has permanently lost the use of it. Three fingers have already been amputated, with the probability that the remaining one will have to be taken off, leaving him only an almost useless stump.

The libelant seeks to recover for his injury upon the ground that the winch was dangerous to any one working at it to unload the ship, and that the negligence on the part of the ship-owners in having it in this dangerous condition renders them liable in this suit. The winch is of a kind called by some of the witnesses a "camel-back winch." The steam is controlled by a valve near the deck at the feet of the winchman, from which a valve-stem rises about three feet directly in front of him, on which is a wheel by which it is turned. As the winchman stands facing the winch, with his left hand on the reversing bar and his right hand on the wheel, the cogs of two wheels which drive the axle meet in front of his right hand. The distance between the circumference of the wheel and the nearest point of the cogs is differently stated by the witnesses. The libelant says that it was seven or eight inches, and several other witnesses called by him say it was from five to six inches. The testimony of the master of the ship is that the intersection of the cogs is 12 inches from the wheel, but he leaves it uncertain from what points his measurement was taken. The contention on behalf of the libelant is that the valve-wheel was nearer to the cogs than is usual in such winches, and that usually there is a covering or casing over the cogs to protect the winchman from accidents. There were no witnesses examined as to the construction of the winch, other than the stevedores called by the libelant, and master and mate examined on behalf of the owners. The stevedores, who were all men of long experience, say that of such winches they have never seen one without a casing or cover over the cog-wheels; and some say that in other winches of this kind they have always found the valve-wheel higher, and at a greater distance from the cogs. The libelant says he had worked at a hundred different winches

on steam-ships, and that in all others the wheel was further from the cogs. He testifies as follows:

"I thought it was a queer apparatus. I said to the mate, 'You ought to have something over the cog-wheels.' The mate said to me, 'You be a little careful, and it will be all right.' I thought it looked dangerous to run, and thought if I spoke of it to the mate he would put something over the cog-wheels."

The libelant first ran the winch for four hours in the night-time, and the next day had run it for an hour and a half when his hand was caught. He testifies that he could not keep his hand on the valve-wheel and turn his head so as to see the tubs; that he was drawing in the slack chain by reversing the winch, and had turned to watch the tub, and was turning back to the winch to stop off the steam quickly, when, in placing his hand upon the wheel, he put it out a little too far, and it was caught. Another stevedore,—Tracy,—who was also running this winch the night before the accident, testifies that the mitten on his hand was caught in the same way, and taken off his hand. That he mentioned this to the donkey-engine man, in charge, and told him that it ought to have a cover on it; but the man only said, "Be careful."

From the testimony produced in this case I am unable to come to any other conclusion than that this winch was dangerous, and not proper to be furnished for work in which it had to be run continuously for hours by a workman who has to turn to see what is going on behind him, and has to start and stop it with great quickness. There is no testimony from which it can be inferred that the libelant was careless. Indeed, with the large open cogs undefended by any safeguard so near to his hand, it would seem that it would only be by good fortune that he could escape injury with the best attention his work permitted. Such a winch might be reasonably safe for hoisting an anchor, or raising sail, or any such short occasional use, in which the winchman could keep his eyes in front of him, with some one standing by to give him orders, but not for the continuous use which the work of hoisting out a cargo of ore requires. The testimony preponderates which goes to show that other such winches used for taking out cargoes have the cogs guarded, and that in this winch the man's hands had to be nearer to the cogs than is usual. Nothing ought to justify providing a machine so likely to maim the operator, except necessity arising from the difficulty of obviating the danger; and it is apparent that the danger can be obviated by an inexpensive casing, or by a very simple alteration by which the valve-wheel could be placed further from the cogs. The rule is firmly established that the employer is bound to see that the machinery furnished is reasonably safe and suitable for the purpose for which the employe is expected to use it.

The difficulty in the case arises from the fact that libelant saw and was aware of the defective construction of the winch, and the danger attending its use. It is contended by the ship-owners that the libelant, in going to work at it, entered upon a contract to work at that particular machine, with full knowledge of its defects, and that, therefore, he cannot recover. I do not think this statement quite fairly gives the sub-

stance of the transaction. The libelant, under the foreman of the stevedores, was employed generally to do any work usually done by stevedores in unloading a cargo of iron ore from a steam-ship. He knew nothing of the winch until his turn came to run it. He expected to find such a winch as was usual on such steam-ships, and reasonably safe. He spoke of its defect to an officer of the ship, but went on with his engagement as a stevedore, and ran it, exercising such care in its use as his duty permitted. This does not seem to me to amount to a contract to work at a defective winch, but rather to be a contract to assist in unloading the ship, with the incident that in the performance of that engagement the libelant continued to use a machine furnished to him which he knew to be dangerous after the employer had declined to alter it. At common law, under such facts, it could scarcely be contended that the libelant was entitled to recover. At common law, if his employer was guilty of negligence in furnishing him with an improper machine not safe to use, then, in knowing it was unsafe, he used it, he was guilty of negligence also, and his contributory negligence would, as a matter of law, bar his recovery. In admiralty this is not the rule. Contributory negligence does not of itself necessarily bar recovery, but leaves the court at liberty to apportion the damages upon principles of equity, and to hold the ship-owner liable for part of the employe's pecuniary loss. *The Max Morris*, 137 U. S. 1, 11 Sup. Ct. Rep. 29; same case in the district court, 24 Fed. Rep. 860, and in the circuit court, 28 Fed. Rep. 881.

The question whether using machinery known to be defective or dangerous absolutely bars recovery of itself, or is only evidence tending to show contributory negligence, is not without decisions both ways. In common-law cases it is most frequently of no importance how it is regarded, for whether the use by an employe of a machine with knowledge of its dangerous defects is held to be a contract by him to assume the risk of all danger from it, or is held to be evidence of contributory negligence, the employe is equally without remedy. But even at common law, since the general adoption of machinery driven by steam, the injuries from which are so severe, the rule that the employe is to be deemed to have assumed the risk of all danger by continuing to use such machinery with knowledge of its defects has been declared to be subject to very many exceptions. The tendency of the decisions is to harmonize those exceptions by adopting the principle that the conduct of the employe is to be judged by all the circumstances which go to show whether or not, under all the circumstances of his employment, a reasonably prudent man would have continued in the employment with the knowledge of the danger which the employe had; that is to say, was his conduct reasonably prudent, or was it negligent and reckless? In *Sherman and Redfield on Negligence* (sections 208, 209) this is stated to be the result of the more modern adjudications. Section 208 is as follows:

"The exemption of the master from liability to servants for injuries caused by defects which the servants knew or ought to have known is founded solely upon the general law of contributory negligence, and therefore the liability of a master in such cases must be determined by reference to that law."

The proper rule for the guidance of the admiralty courts of the United States, where there is contributory negligence in cases of marine torts, has been authoritatively settled by the supreme court in *The Max Morris*, *supra*, affirming the rulings of Judge BROWN in the district court for the southern district of New York, and of Judge WALLACE in the circuit court. The very question of the effect of contributory negligence in a similar action for personal injuries was certified to the supreme court, and, in answering, Mr. Justice BLATCHFORD, speaking for the court, said:

"Contributory negligence in cases like the present should not wholly bar recovery. There would have been no injury to the libellant but for the fault of the vessel; and while, on the one hand, the court ought not to give him full compensation for his injury, when he himself was partly in fault, it ought not, on the other hand, to be restrained from saying that the fact of his negligence should not deprive him of all recovery of damages. As stated by the district judge in his opinion in the present case, the more equal distribution of justice, the dictates of humanity, the safety of life and limb, and the public good will be best promoted by holding vessels liable to bear some part of the actual pecuniary loss sustained by a libellant in a case like the present, where their fault is clear, provided the libellant's fault, though evident, is neither willful, nor gross, nor inexcusable, and where other circumstances present a strong case for his relief."

This libellant has, in my judgment, made out such a case. He, a sober, industrious, skillful workman, 33 years of age, has lost his right hand in the service of the owners of this steam-ship. He has lost it because, notwithstanding his fears with respect to the danger, he consented to use a machine which was a permanent equipment of this ship, and furnished by them as safe and proper for his use, but which, upon the evidence, I find was unsafe and dangerous, and which, it is apparent, could without difficulty have been guarded by them so as to have been safe and suitable. It is not just that the ship-owners should provide such a machine, and throw all the risk of using it upon the unlucky workman who may chance to be injured by it.

I have held this case for some time under advisement, for, although at the hearing I was of opinion that the decisions cited by counsel for the owners applied to the facts of this case would bar any recovery by the libellant, the hardship of this result was such as to lead me to hesitate and to doubt its correctness. A careful reconsideration has brought me to the conclusion that the libellant, having brought his action in admiralty, is entitled to have applied to it, not the rules which would control it at common law, but those which accord with the now recognized principles which are to govern our admiralty courts in dealing with marine torts. I am aware that learned and experienced judges have in quite similar cases held differently. The case of *The Maharajah*, 40 Fed. Rep. 784, is a strong case in favor of the contention for the steamer, but in the present case the evidence that the winch was unusual and unfit is fuller, and notice was given of its defect. Moreover, the decision in the *Maharajah Case* was rendered before the supreme court had fully sanctioned the equitable ruling of the same learned judge in the case of *The Max Morris*.

The amount claimed by the libelant as compensation for his injuries is \$3,000. If the steam-ship had been solely in fault this would be a reasonable claim. I shall divide this amount, and award him \$1,500.

The only testimony on behalf of the steam-ship is the depositions of the master and mate, taken at Beaufort, S. C., to which port the steamer had gone for a cargo. The depositions were taken on September 22d, under a notice served on libelant's proctor, in Baltimore, on September 19th. This was not a reasonable notice, as it did not allow sufficient time for the libelant to be represented at the examination and to cross-examine the witnesses. The depositions were returned to this court and opened on September 25th, and upon motion of the libelant's proctor the hearing of the case was set for October 22d. The motion to suppress the depositions was not made until the hearing. Under the circumstances, I hold that the motion to suppress was made too late, and I have considered the depositions. The testimony of the master and mate is very guarded and formal, and not sufficient to affect my mind on the question of the unsuitableness of the winch for the purpose to which it was put. I will sign a decree for \$1,500 and half the costs.

THE TRANSFER No. 5.

NORWICH & N. Y. PROPELLER CO. v. THE TRANSFER No. 5.

(District Court, S. D. New York. January 22, 1892.)

COLLISION—LIGHTS—FALSE ASSUMPTION OF COURSE—CHANGE OF COURSE—CROSSING BOWS WITHOUT ANSWER TO SIGNAL.

The tug Transfer No. 5, with a car-float along-side, had come up the East river at night, and was in the east channel of Hell Gate, in the neighborhood of the Astoria ferry, and was about 150 feet from the Long Island shore. The steamer Delaware, coming west, rounded Hallet's point, and went down the east channel. Seeing the green light of the tug, she hastily assumed that the tug was crossing towards Horn's hook, blew two whistles, and, without waiting for an answer, starboarded. The tug stopped, slowed, and reversed, but the float and the Delaware came in collision. Held, that the collision was solely due to the Delaware's fault in changing her course, and running into the tug's water on her own signal, without waiting for an answer, and on a false assumption as to the tug's course, which she made at her own risk.

In Admiralty. Suit to recover damages caused libelant's steamer by collision with a float in tow of the Transfer No. 5.

Carpenter & Mosher, for libelant.

Page & Taft and *Robert D. Benedict*, for claimant.

BROWN, District Judge. About 3 o'clock in the morning of June 9, 1891, the tide being ebb, as the steam-tug Transfer No. 5 was proceeding eastward through the easterly channel of Hell Gate near the Astoria shore, having a car-float loaded with cars lashed to her port side and

projecting ahead of her about 75 feet, the float came in collision with the libellant's steam-propeller Delaware coming westward, striking the latter upon her starboard side about 20 feet from her stem, and inflicting considerable damage, to recover which the above libel was filed.

There is some dispute as to the precise place of the collision; otherwise, there is less contradiction than usual in collision cases. I find the following facts:

(1) The collision was about abreast of, and not below, the small point on which a derrick was located, about half-way between the Astoria ferry and Hallet's Point light, and was within, or along, the margin of the eddy, which upon the ebb-tide makes up along the Astoria shore, extending out from 50 to 150 feet from the shore.

(2) The tug had come up through the southerly channel by Blackwell's island and had passed quite near the Astoria ferry for the evident purpose of obtaining the benefit of the slack-water or upward current of the eddy near that shore, instead of going out in the channel where the tide would be about four knots against her.

(3) The Delaware was a small steamer; about 126 feet long, and of 8½ feet draught; she passed Negro point about two or three hundred feet from the shore, shaped her course nearly due west so as to pass about the same distance from Hallet's point, then swung to port to go down the easterly channel in her usual course at this stage of the tide, that is, about one-third the distance across to Flood rock, or about 200 or 250 feet from the Astoria shore. When she got straightened down the east channel so as to head for the Blackwell's Island light, and being about abreast of Hallet's point, or a little below it, she first saw the tug's green light, and her vertical lights indicating a tow, a little on the Delaware's port bow, and estimated their position to be a little below the Astoria ferry within 150 feet of the shore, and judged them to be bound for the Harlem river by way of Horn's hook and designing to cross the course of the Delaware to the westward. On this assumption the Delaware gave a signal of two whistles, and without waiting for any answer starboarded her wheel so as to haul a point to port, and head a point towards the Astoria shore, which brought the tug's green light a little on the Delaware's starboard bow; she received no immediate answer, and heard no whistle from the tug, until she had got about 700 feet below Hallet's point, when she did hear a whistle or whistles from the tug, then about 200 feet distant, and replied with two whistles, put her helm hard a-starboard, and reversed; but the vessels were then too near to avoid collision.

(4) At collision the tug and the Delaware were both heading somewhat towards the Astoria shore; the Delaware's bow was within the eddy so as to be carried round to the northward towards Hallet's point, and in that direction she rounded and afterwards went down river by the northerly, or main ship channel.

(5) The red light of the Delaware was seen from the tug a little on her starboard bow before the former had rounded Hallet's point. The tug thereupon gave her a signal of one whistle, which was not heard by the

Delaware; but after an interval somewhat longer than usual for answering, a signal of two whistles was heard from the Delaware, which was understood by the tug as an answer, and which I find to be the signal given by her when abreast of Hallet's point or a little below it. The tug, which had previously reduced her speed to slow, thereupon reversed until collision, having given several whistles in the mean time.

(6) When the Delaware gave her first signal of two whistles, the tug was not below or abreast of Astoria ferry, but within 100 or 200 feet of the small point on which the derrick is situated, and within the eddy, or the margin of the eddy; she was then heading a trifle off the Astoria shore, just enough to clear the derrick point, and consequently showed her green light to the Delaware; and afterwards, in order to keep close to the shore and in the eddy, she hauled to starboard under a port wheel so as to show her red light shortly before the collision.

Upon these facts I find the Delaware to be alone in fault for the collision. The Delaware had no right to assume that the tug was going across to Horn's hook. She was not at all in the position in which the Delaware's witnesses now say they thought her to be, but far nearer to the Delaware. In the situation where the tug was, so near the Astoria shore and so much above the Astoria ferry, she could not rationally be supposed to intend going by Horn's hook; and the mere fact that she showed her green light was no indication whatever that she was designing to go that way, and was in no way incompatible with her design to pursue her usual course towards the Harlem river by way of the east channel. In acting on the contrary assumption, if such is the fact, the Delaware acted at her own risk. The tug was so near the shore that it was her right and duty to keep there on the starboard side. It was not to be supposed that the Delaware would attempt to run in between her and the shore. Even under the common rules, the Delaware, having the tug on her port hand and seeing the tug's green light, but very near the shore, was required to "keep her course." Had she done so, there would have been no collision. The collision was caused solely by her change of course to port and running across the tug's bows and into her water under a signal of two whistles without waiting for any answer or permission to do so, and upon the false assumption which she made at her own risk.

The tug is without fault, because as soon as apprised of the Delaware's move to port under her starboard wheel, she reversed; and she could not otherwise have avoided collision.

APPOLOS *et al.* v. BRADY *et al.*

(Circuit Court of Appeals, Eighth Circuit. February 8, 1893.)

1. INDIAN TERRITORY—ADOPTION OF ARKANSAS STATUTES—FOLLOWING ARKANSAS DECISION.

In construing the statutes of Arkansas which were extended over the Indian Territory by Act Cong. May 2, 1890, the federal courts will follow the decision of the supreme court of that state.

2. ASSIGNMENT FOR BENEFIT OF CREDITORS—CONSTRUCTION OF DEED.

In determining whether a given instrument is an assignment for the benefit of creditors, under the law of the Indian Territory as adopted from Arkansas, the test is, according to the settled rule of Arkansas decisions, whether it was the intention of the parties to divest the debtor of the title, and to make an appropriation of the property to raise a fund to pay debts.

3. SAME.

Under this rule an instrument conveying property to a trustee, empowering him to take possession, sell at private sale, pay certain debts from the proceeds, together with all expenses, and then to turn over the remaining property and proceeds to the grantor, is an assignment, since no equity of redemption is reserved.

4. SAME—PAROL EVIDENCE.

While it is proper, in determining whether a given instrument is an assignment for benefit of creditors, or merely a mortgage, to show the intention of the parties by parol evidence of their situation, and of their acts in connection with the transaction, yet they themselves cannot be allowed, as against third persons, to testify as to what they had in mind when executing the paper.

5. SAME—VALIDITY.

In the Indian Territory an assignment for the benefit of creditors is void when the trustee is directed to sell at private sale, and when no bond is filed, as required by the Arkansas statute.

In Error to the United States Court in the Indian Territory.

Action by J. B. Brady, D. C. Brady, and W. H. Brady, commenced by attachment, against A. M. Means and J. S. B. Appolos, intervener. Verdict and judgment sustaining the attachment. Defendants bring error. Affirmed.

W. O. Davis, for plaintiffs in error.

A. Eddleman and *A. C. Cruce*, for defendants in error.

Before CALDWELL, Circuit Judge, and SHIRAS and THAYER, District Judges.

SHIRAS, District Judge. The defendants in error brought an action at law in the United States court in the Indian Territory against A. M. Means to recover the amount due upon a draft drawn upon and accepted by him, and caused a writ of attachment to be issued and levied upon certain articles of personal property. The defendant below traversed the facts relied upon as grounds for the issuance of the attachment, and one J. S. B. Appolos intervened in the cause for the purpose of asserting his rights to the attached property, based upon a written instrument executed to him as trustee, and which he averred was in fact a mortgage given to secure the claims of the firms named therein, to whom A. M. Means was indebted. The case went to trial before the court and jury upon these issues, with the result that the attachment was sustained, and the claim of the intervener was defeated on the ground that the instrument under which he claimed the attached property was an assign-

ment, and not a mortgage, and that as a deed of assignment it was void. The errors assigned relate only to the question touching the instrument under which the intervener claimed the property, the correctness of the verdict and judgment on the issue made upon the attachment not being questioned before this court.

The act of congress of May 2, 1890, makes applicable to the Indian Territory certain portions of the statutes of the state of Arkansas, including the chapter dealing with the subject of assignments of property for the benefit of creditors. When called upon to construe the sections of the statutes thus adopted, we deem it our duty to follow the construction given thereto by the supreme court of Arkansas. The adoption of this course as the settled rule to be followed by this court, and the court of original jurisdiction in the Indian Territory, must commend itself to all interested. Many, if not all, of the adopted sections of the Arkansas statutes have been carefully considered and construed by the supreme court of that state; and thus we have at hand a large number of decisions, by a court of high learning in the law, which will serve to explain and remove the doubts and uncertainties that always arise in the application of the general terms used in statutes to the varying affairs of human life. By adopting these decisions as an authoritative guide in solving the questions depending upon the local law, uniformity of construction will be secured, and the bench and bar of the territory will not be in doubt as to which one, among conflicting rules prevailing in the states, will be followed in determining any given question arising under these statutory enactments. In carrying out the spirit of the rule thus announced, it is clear that, as the Arkansas statute regulating assignments is made the law for the territory, the rules prevailing in Arkansas for determining whether a given instrument is to be deemed a deed of assignment, within the meaning of the Arkansas statute, should be applied to the determination of the like question when it arises in the territory.

Upon the trial before the jury, the court ruled that the instrument under which the intervener claimed was a deed of assignment, and, as such, was void as to creditors. This ruling is assigned as error, and hence the first question for consideration is as to the nature of this instrument. By its terms the maker thereof sells and conveys to the trustee therein named his entire stock of goods located in a certain building in Ardmore, and covenants that he is lawfully seised of said property, and will defend the same. The trustee is authorized and empowered to take immediate possession of the property, and sell the same at private sale for cash, and to apply the proceeds to the payment of the debts due the Waples-Platter Company and Tyler & Simpson, and to the payment of the expenses of sale, including a salary of \$75 per month to the trustee, it being further provided that, after said debts and the expenses have been paid, the remainder of the property and proceeds shall be turned over to the maker of the instrument, and on the payment of the expenses and said indebtedness out of the proceeds of the sale of the property the conveyance is to become null and void. The rule to be

followed in determining whether a given instrument is to be deemed a mortgage or a deed of assignment is fully stated by the supreme court of Arkansas in the cases of *Richmond v. Mississippi Mills*, 52 Ark. 30, 11 S. W. Rep. 960; *State v. Dupuy*, 52 Ark. 48, 11 S. W. Rep. 964; *Robson v. Tomlinson*, 54 Ark. 229, 15 S. W. Rep. 456; *Penzel Co. v. Jett*, 54 Ark. 428, 16 S. W. Rep. 120. These cases declare the test to be, has the party made an absolute appropriation of property as a means for raising a fund to pay debts, without reserving to himself, in good faith, an equity of redemption in the property conveyed? In *Robson v. Tomlinson*, *supra*, the rule is stated as follows:

"The controlling guide, according to the previous decisions of this court, is, was it the intention of the parties, at the time the instrument was executed, to divest the debtor of the title, and to make an appropriation of the property to raise a fund to pay debts?"

In *Richmond v. Mississippi Mills*, *supra*, it is held that, while the meaning of the instrument is ordinarily to be derived from the language used therein, yet parol evidence may be admitted, showing the collateral facts surrounding the transaction, for the purpose of enabling the court to determine the actual intention of the parties in the execution of the instrument; but that if, from the entire evidence, it appears that the debtor executed a conveyance with the intention of conveying the property absolutely, and without the reservation of the right to redeem, in order that the property may be appropriated to raising a fund for the payment of debts, then the transaction constitutes an assignment. The distinction existing between mortgages and deeds of assignment is very clearly stated in the opinion of Judge CALDWELL in the case of *Bartlett v. Teah*, 1 Fed. Rep. 768, in which it is shown that—

"A mortgage does not invest the mortgagee with an absolute and indefeasible title; the equitable title, called the 'equity of redemption,' remains in the mortgagor. The mortgage is a security for the debt, and creates a lien upon the property in favor of the creditor. There is no difference, in legal effect, between a mortgage with a power of sale and a deed of trust, executed to secure a debt, where the power of sale is placed in a third person. Both are securities for a debt. Both create specific liens on the property, and in both the equitable title or right of redemption remains in the debtor, and is an estate or interest in the property which the debtor may sell, or that may be seized and sold under judicial process by his other creditors, subject to the lien created by the mortgage or deed of trust. * * * Whereas a deed of assignment, unlike a mortgage or deed of trust, is not given by way of security. There is no defeasance clause giving the grantor the right of redemption. It does not create a lien on the property, but conveys it absolutely for the purpose of raising a fund to pay debts."

There can be no question that, under these decisions, the instrument executed by A. M. Means was rightfully held by the trial court to be a deed of assignment. It conveyed the title of the property to the trustee, and appropriated the property to the purpose of raising a fund to pay the debts named, without reserving an equity of redemption in the maker of the instrument. The defeasance clause is not to the effect that, upon payment of the debts by the debtor, the conveyance should be void; but only that, when the debts have been paid out of the pro-

ceeds of the sale,—acts to be done by the trustee,—then the conveyance should become void. If the instrument, as we hold it is, is in fact a deed of assignment, then it is not questioned that, under the settled rule obtaining in Arkansas, it is void, in that it directed the assignee to sell at private sale, and no bond was filed as required by the statutes. *Raleigh v. Griffith*, 37 Ark. 150; *Lincoln v. Field*, 54 Ark. 471, 16 S. W. Rep. 288.

It is, however, said that the trial court erred in refusing to permit the assignor and his attorney to testify that it was the intent of the parties to the instrument to give and receive a mortgage, and that it was not the purpose of the assignor to make an assignment, and that it was understood by all the parties to the deed at the time of its execution that said Means would, within a reasonable time, pay the indebtedness therein named and, release the property; and that in pursuance of this understanding said Means had acquired the money to pay the debts named in the deed, and thereby redeem the property, but was prevented from so doing by the levy of the attachment. It is urged in argument that the supreme court of Arkansas has held that parol evidence is admissible to show what the real intent of the parties was in the execution of the instrument which may be under consideration. This is undoubtedly true, but that does not open the door to the admission of everything which witnesses may be willing to swear to. It is a general rule that, as an aid to reaching the proper construction of any written contract or instrument, parol evidence showing the circumstances under which the instrument was executed and the situation of the parties may be introduced; and so, also, where doubt exists as to the true meaning of an instrument, the acts of the parties done in carrying out the contract may be shown as evidence of the construction put upon the terms of the instrument by the parties in interest.

Applying these general rules, the supreme court of Arkansas has held that parol evidence, showing the collateral facts and the acts done by the parties to an instrument like that under consideration, may be admitted to aid the court in determining the real intent of the parties; but this does not justify the admission of testimony as to the intent that may have existed in the mind of the parties, but which was not evidenced by acts done. The point of the inquiry is, what was the purpose of the party in executing a given instrument? and, as against persons not parties thereto, the intent must be held to be that which is properly derivable from the language of the instrument, applied to the subject-matter and read in the light thrown thereon by the attending circumstances and the acts done in carrying the contract into effect. Where the rights of the parties to the instrument are alone involved, and they agree upon the meaning thereof, a court would be justified in assuming their construction to be correct, without close scrutiny of the legal effect of the language used in the written instrument, but when the parties to the instrument rely thereon, as a means of defeating action taken by third parties, and limiting rights acquired in or to the subject-matter of the contract, then such third parties have the right to

insist that, as against them, the written instrument cannot be held to mean or intend anything other or different from the purpose which the language of the instrument, read in the light of its attending circumstances, shows to have been the intent of the parties in executing it.

To illustrate the thought, by reference to the case before the court, under the rule of the Arkansas decisions, it would doubtless have been open to the plaintiffs in error, had such been the fact, to prove that, notwithstanding the terms used in the instrument in question, the debtor continued in the open possession of the property, selling the same in the usual way of trade, and using the proceeds in the payment of the debts named in the instrument, and that he made purchases, from time to time, of other goods to be added to the stock described in the mortgage, and that there was in fact an agreement with the creditors and the trustee that possession would not be taken under the instrument until a fixed or reasonable time had elapsed, within which the debtor was at liberty to pay off the debts. Facts of this nature, accompanying the execution of the instrument, or in direct continuing connection therewith, would throw light upon the intent of the parties, and yet would not mislead third parties to their injury, because they would be open and known. This, however, was not the purport of the evidence offered and rejected on the trial of this cause. The admitted facts were that the instrument, which the court held on its face to be a deed of assignment, was executed on the 17th day of November, 1890, and on the same day the trustee therein named took possession of the property, and proceeded to sell the same at private sale, as directed in the deed. On the 24th of November the writ of attachment was levied in the suit of defendants in error, and the property was taken from the possession of the trustee. As already shown, there can be no doubt that, had the case been submitted at this point, the right of the attaching creditors to hold the property, as against the deed of assignment, would have been clear. To defeat the attachment, it was proposed to show, not the acts of the parties done in connection with the possession and sale of the property, but the intent existing in the minds of the parties, or the belief they entertained that the instrument was, in legal effect, a mortgage, and not a deed of assignment.

It was not error to reject evidence of this nature. Had it been admitted, it would have been the duty of the court to instruct the jury that, as against third parties, who can have no knowledge of secret purposes existing in thought only, and who have the right to regulate their action by that which the parties cause to appear in an open and usual manner, no weight could be given to evidence of this character as against that afforded by the written instrument and the acts of the parties in connection therewith, and that, therefore, it must be held that the instrument under which the intervener claimed the property was a deed of assignment, and as such was void under the provisions of the statute regulating assignments. Finding no substantial merit in the errors assigned, the judgment below is affirmed, at cost of plaintiffs in error.

THOMPSON *et al.* v. RAINWATER *et al.*

(Circuit Court of Appeals, Eighth Circuit. February 8, 1892.)

1. INDIAN TERRITORY—ASSIGNMENT FOR BENEFIT OF CREDITORS—EQUITY JURISDICTION.

Although in 1885 there was no statute in force in the Indian Territory authorizing assignments for the benefit of creditors, yet, such an assignment having been made, the United States court for the territory, in pursuance of its equity jurisdiction under Act Cong. March 1, 1889, (25 St. p. 783,) will recognize and enforce the trust, and apply the principles of equity in determining the nature and extent of the trustee's liability.

2. ASSIGNMENT FOR BENEFIT OF CREDITORS—ENFORCEMENT OF TRUST—DECREE.

In a suit to enforce a trust for the benefit of creditors, where it is found that the trustee has turned over a large part of the trust funds to his daughter, who is a party to the suit, the decree should state the total sum for which the trustee is liable, and fix a reasonable time for paying it into court, and award execution on default thereof. It should fix the total value of the assets received by the daughter, and require her to pay the amount into court, such sum to be credited, when paid, on the total sum found to be due from the trustee. It should find the amounts due on each of the several judgments recovered against the debtors by the parties to the proceeding, and should contain appropriate directions for the distribution of the fund realized.

Appeal from the United States Court in the Indian Territory. Decree modified.

STATEMENT BY THAYER, DISTRICT JUDGE.

This case comes from the United States court in the Indian Territory. Rainwater, Boogher & Co., who are citizens of the state of Missouri, brought an action against the appellants, and also against the firm of Smith & French, the purpose of which was to compel the appellants to account for certain property alleged to be in their possession, or which had been in their possession, that had been received by them from Smith & French. The bill filed in the lower court charged, in effect, that Smith & French, about the year 1885, assigned all of their partnership assets to Johnson Thompson, one of the appellants, in trust, to sell and dispose of the same, and appropriate the proceeds to the payment of the debts of Smith & French; that Thompson accepted the trust, but had utterly failed to execute the same; and that, after acquiring control of the partnership assets, he had turned over a large portion thereof, without consideration, to his daughter, Mrs. J. A. French, who was the wife of one of the assignors. The bill contained the usual prayer that the appellants might be required to account to the appellees for the value of the partnership assets which they had severally received. The chief contention in the lower court related to the existence of the alleged trust. Johnson Thompson denied that any property had been transferred to him, or that he had ever accepted the same upon trust to dispose of it, and apply the proceeds towards the payment of the debts of Smith & French. The trial in the lower court resulted, however, in a decree in favor of Rainwater, Boogher & Co., which established the existence of the trust, and directed an accounting before a master for the purpose of ascertaining the nature and value of the partnership assets. The master subsequently ascertained the value of the partnership property which had been turned over to Thomp-

son to be \$12,099.11, including interest from January 1, 1887, to July 1, 1891. Exceptions were filed to the report, which were overruled, and thereupon a final decree was entered, from which the present appeal is prosecuted. By its final decree the lower court adjudged that Johnson Thompson and Mrs. J. A. French should pay into court the sum of \$10,871.11 within 10 days from the date of the order, and that, in default of such payment, execution should issue. It was further adjudged that Mrs. French had received assets of Smith & French of the value of \$6,638.11; that judgment be entered against her and in favor of the appellees for that amount; and that whatever amount might be collected thereon should be credited on the sum of \$10,871.11, which both of the appellants had been ordered to pay into court.

Thomas Marcum, Wm. M. Cravens, and S. S. Fears, for appellants.

N. B. Maxey, Sandels & Hutchings, and Orr & Christie, for appellees.

Before CALDWELL, Circuit Judge, and SHIRAS and THAYER, District Judges.

THAYER, District Judge, (*after stating the facts as above.*) With respect to the main contention in the lower court, we only deem it necessary to say that there is abundant evidence in the record to support the finding that a trust was created for the benefit of the creditors of Smith & French. We have no doubt, in view of all the testimony, that by virtue of an agreement between Smith & French and Johnson Thompson, made some time in the fall of 1885, Thompson assumed possession and control of all the partnership assets of Smith & French, and undertook to apply them, as far as they would extend, towards the payment of the partnership debts. A considerable portion of these assets were subsequently turned over to Mrs. French by Johnson Thompson, the trustee. It has been contended in this court that the appellees are without right to relief, because at the date of the alleged assignment by Smith & French there was no statute or law in force in the Indian Territory, where the assignment was made, authorizing such a conveyance. We think this contention is wholly without merit. In the absence of any statute regulating or expressly authorizing assignments, Smith & French certainly had power to pay their debts, and to that end might transfer their property to a third person for the benefit of their creditors; and we think that the transaction between Smith & French and Johnson Thompson created a trust for the benefit of the creditors of the firm, which the United States court in the Indian Territory had power to enforce. In cases of equitable cognizance, of which that court has jurisdiction under the act of congress of March 1, 1889, (25 St. p. 783,) it is its right and duty to apply those general rules of law which are usually recognized and enforced by courts of equity. It follows, therefore, that the lower court properly treated the appellants as trustees, and properly applied the principles of equity in determining the nature and extent of their liability.

This view of the case also disposes of the question of interest, concerning which much controversy has arisen. Although there was no statute on the subject in the Indian Territory, yet it was competent for the lower

court to charge the appellants with interest upon the amount of the trust assets, following in that respect the uniform practice of courts of equity when dealing with trustees who have wrongfully appropriated trust property.

Finding no error in the proceedings in the respects above mentioned, we will next consider an exception that has been taken to the master's report. The members of this court are of the opinion that Johnson Thompson should not have been charged, on account of the "Marker cattle notes," with a sum exceeding \$1,500, and interest thereon from January 1, 1887; whereas, the master appears to have charged him with a sum considerably in excess of \$3,322. After a careful examination of the evidence, we have reached the conclusion that the interest of the firm of French & Smith in the Marker notes did not exceed \$3,000; and as the Marker notes amounted to \$8,000, and as the amount eventually collected thereon, after much trouble and expense, did not exceed \$4,000, we conclude that Thompson should not have been held accountable to the creditors of Smith & French for more than three-eighths of that amount,—that is to say, for more than \$1,500. In consequence of this error in the account as stated by the master, it becomes necessary to remit the cause to the lower court with directions to set aside its final decree of August 26, 1891, and in lieu thereof to enter a new or modified decree correcting the error above noted. In entering such decree, the interest computations should be carried forward to the date when such modified decree is entered, instead of July 1, 1891, as computed by the master.

And, as the existing decree must be modified, we deem it proper to direct the lower court to alter it in some other respects wherein it appears to us to be not sufficiently full and explicit, to-wit: The modified decree should state the total value of the assets of Smith & French which came to the possession of Johnson Thompson, and for which he is primarily responsible. It should require that sum to be paid into court by Johnson Thompson, within such reasonable time as the court may fix, and award execution therefor if not paid within the time limited. It should state the total value of the assets for which J. A. French is responsible, and should require said amount to be paid into court by her, and that the sum so paid by her be credited, when paid or collected, on the total sum for which Johnson Thompson is primarily responsible. The decree should also contain appropriate directions for the distribution of said money, when collected, among the judgment creditors of Smith & French; to which end there should be a finding in the decree of the amount of the several judgments which have been recovered against Smith & French by those creditors of the firm who have made themselves parties to the proceeding. In the respects last noted the final decree in the record now before us is not as full, clear, and explicit as the circumstances of the case would seem to require to avoid future complications and litigation.

CHICAGO, M. & ST. P. RY. CO. v. PULLMAN PALACE-CAR CO.

(Circuit Court, N. D. Illinois. December 31, 1891.)

INJUNCTION—RESTRAINING ACTION AT LAW—RELIEF IN EQUITY.

Complainant railroad company and defendant car company entered into a contract for the joint ownership and operation of parlor and sleeping cars; the accounts to be kept by defendant, and monthly balances and payments to be made; complainant, in case of termination, to pay defendant the cash value of its interest in the joint property. On the termination of such contract, the property being in custody of complainant, defendant brought trover to recover its interest in the property, whereupon complainant filed a bill in equity for an accounting, alleging incorrect and unfair accounts by defendant of the receipts and expenses, and the retention by defendant of profits in excess of its interest in the property, and asking to restrain the action at law. *Held* that, as the rights of both parties could be completely protected in equity, the action at law should be enjoined.

In Equity.

Walker & Eddy and John W. Carey, for complainant.

Isham & Beale, for defendant.

GRESHAM, Circuit Judge. Having owned and operated sleeping-cars on its own lines prior to September 22, 1882, the complainant on that day entered into a contract with the defendant, under which the latter acquired the right and assumed the obligation of operating sleeping-cars, parlor-cars, and hotel-cars, on all lines owned by the complainant, for 15 years, for the joint benefit of both parties. The cars previously owned by the complainant became joint property, the defendant paying for a one-fourth interest in them. It was contemplated that additional equipment would be needed, and it was obtained. The complainant was to have three-fourths of the profits, and the defendant one-fourth, and losses were to be borne in the same proportion. It was made the duty of the defendant to keep accurate books of account, showing receipts and expenses, profits and losses, and balance the books monthly. Payment was to be made by one party to the other, on such showing, before the end of the succeeding month. The complainant had the right to inspect the books at all reasonable times. Section 22 of article 3 of the contract reads:

"In case either of said parties shall at any time hereafter fail to keep and perform any of the covenants herein contained, to be by such party kept and performed, then and in that case, after written notice shall have been given to the defaulting party of the default complained of, if the said defaulting party shall refuse or neglect to make good, keep, and fulfill such unfulfilled covenants and conditions of this agreement, within a reasonable time after such notice, the other party shall be at liberty to declare this contract ended, and no longer in force. The railway company reserves the option and may elect to terminate the contract set out in the article at the end of five (5) years or at the end of eight (8) years or at the end of eleven (11) years from the thirteenth day of September, 1882: provided that, if it shall elect to terminate it at any of the above-named periods, it shall give notice in writing to the Pullman Company of such election at least six (6) months before the day or days on which it may so elect to have this agreement end. If the agreement set out in this article is terminated, according to the terms hereof, by the

election of the railway company, and without any fault or neglect on the part of the Pullman Company, the railway company shall purchase the undivided interest of the Pullman Company in all sleeping and hotel cars jointly owned by both companies, and pay the fair cash value thereof. If the railway company shall elect to terminate said contract because of the neglect or refusal of the Pullman Company, as herein provided, or the contract shall terminate by expiration of the time for which it is agreed it shall remain in force, the railway company shall have the first right and opportunity to purchase the interest of the Pullman Company in any or all cars thus jointly owned, by paying the fair cash value thereof." "In all cases the fair cash value to be paid by the railway company for the interest of the Pullman Company shall, in default of agreement by the parties, be fixed by the decision of arbitration, as provided in the twenty-fourth section of this article."

On March 12, 1890, a written notice was served on the defendant by the complainant that the latter had elected to terminate the contract on September 30, 1890. After this notice was given, the parties commenced negotiating for a new contract; and, in order to enable them to continue their negotiations, it was agreed, on September 26th, that the terms of the old contract should remain in force for 30 days after the 30th day of the same month, and, in case a new contract should be made, "it shall take effect from and after the 30th day of September instant, and whatever business is transacted during the thirty days succeeding shall be considered as transacted and performed under said new contract; but, in case no new contract shall be made, then it is understood and agreed that said business shall be settled and adjusted in pursuance of the terms of the old contract as it now exists." "It is further mutually understood and agreed that this stipulation and extension of time shall have no effect upon the rights of the respective parties, except as herein stated, and that, if no contract shall be completed, then and in that case the original contract shall cease and determine at the expiration of said thirty days from the 30th day of September, and no other further or additional notice shall be necessary or required for the purpose of terminating the same."

The parties failed to agree upon a new contract, and after the additional 30 days had expired, the cars being in the custody and use of the complainant, the defendant commenced an action of trover in this court against the complainant to recover the value of its one-fourth interest in the joint property on the ground that it had been unlawfully converted, and for damages for breach of the contract; and subsequently the complainant brought this suit for an accounting. The bill alleges that the defendant failed to perform the covenants in the contract; that it rendered monthly accounts of receipts and expenses, which were incorrect and unfair; that it retained more than its share of the joint profits; that it was notified from time to time that the accounts rendered did not show the correct amount of profits due the complainant; and that the amount still due largely exceeded the value of the defendant's interest in the joint property. The court is asked to restrain the prosecution of the action at law until this suit is finally heard. After giving to either party the right to annul the contract for failure of the other

to fulfill any of its covenants, the section above quoted authorizes the complainant, "without any fault or neglect on the part of the Pullman Company," to terminate the agreement at the end of three named periods. The complainant served a proper notice on the defendant for the annulment of the contract at the end of eight years from September 30, 1882; and it would have terminated on that day but for the agreement of September 26th, which continued it in force for 30 days more. It is now contended, however, that, because the complainant did not pay the defendant for its interest in the cars within six months after service of the notice, the contract is yet in force. Even if the language of section 22 is thus construed, the defendant stands confronted with the concluding paragraph of the agreement of September 26th, which, it may safely be assumed, the defendant entered into under the advice of counsel. If the complainant cannot terminate the contract without paying for the defendant's interest in the joint property within six months after the giving of the notice, the latter can maintain the partnership relation, notwithstanding the notice, by refusing to have the value of that interest ascertained as provided. In view of the explicit language of section 22, and the no less express language of the agreement of September 26th, it is not a debatable question whether or not the agreement has been terminated. A single contract is the foundation of both suits. Damages are claimed for its breach in both suits, and the defendant can accomplish nothing by its action at law that may not be accomplished by filing a cross-bill in this suit. It is clear that, in this suit in equity, all controversies growing out of the contract can be finally determined, and a decree entered against the party found to be indebted; and it is equally clear that the same result cannot be reached in the action at law. If the complainant should be permitted to prove the damages it alleges it has sustained in consequence of the defendant's breaches of the contract, by way of recoupment, in the action at law,—and I do not hold that it could,—it would be necessary for the jury to examine and pass upon numerous books and accounts, covering a period of eight years; and it is not to be expected that the verdict would be satisfactory. It is the peculiar province of a court of chancery to pass upon such accounts, and adjust the equities of the parties. There is no necessity for prosecuting both suits at the same time, and in this suit in equity the court can afford complete protection to all the rights of both parties. An order will therefore be entered, staying the prosecution of the action at law until the further order of the court.

HAMILTON et al. v. SAVANNAH, F. & W. RY. CO. et al.

(Circuit Court, S. D. Georgia, E. D. January 4, 1892.)

1. EQUITY—OMISSION OF PARTIES—PRESERVING JURISDICTION OF COURT—DECREE.

Notwithstanding Act Cong. 1889, (5 St. at Large, p. 321, § 1,) and rule 47 for the equity practice of the circuit courts, passed in pursuance thereof, relieving plaintiff in equity from the obligation of making persons in interest parties when the effect of their joinder would oust the court of jurisdiction, no decree can be made between the parties, before the court, involving the rights of such omitted party.

2. SAME—TRANSFER OF CORPORATE FRANCHISES—CANCELLATION—NECESSARY PARTIES.

Plaintiffs alleged that they were promoters of the E. G. & F. R. Co., organized for the construction of a railroad; that they entered into a contract with McC. & Co. for the construction of the road, by which the company's franchises, right of way, and improvements were conveyed to McC. & Co., who were to build the road, plaintiffs to receive in return certain stock and first mortgage bonds of the road, and a cash consideration; that McC. & Co., having obtained control of all the capital stock and property of the company, elected a board of directors, composed of themselves and others, and sold out the whole property to defendants, a competing company, without attempting to construct the road; that defendants took with full notice of plaintiffs' rights. The bill prayed that the transaction might be held void, and defendants declared trustees for plaintiffs, etc., but sought no affirmative relief against McC. & Co. Held, that McC. & Co. were not indispensable parties to the suit. *Railway Co. v. Mills*, 5 Sup. Ct. Rep. 456, 118 U. S. 256, distinguished.

3. PARALLEL RAILROADS—ILLEGAL PURCHASE BY COMPETING ROAD.

The purchase by defendants of the road in question, which was parallel to that of their own, was illegal and void, under Const. Ga. 1877, art. 4, § 2, par. 4, forbidding one corporation to make any contract with another tending to defeat or lessen competition in their respective businesses. *Langdon v. Branch*, 37 Fed. Rep. 449, reaffirmed.

4. RAILROAD COMPANIES—LEASE OR SALE OF FRANCHISE—VALIDITY.

A lease or sale of the corporate franchises of a railroad company to another corporation, by which it ceases to operate its lines, is an abandonment of its duty to the public, is *ultra vires*, and is absolutely null and void. *Central Transp. Co. v. Pullman Palace Car Co.*, 11 Sup. Ct. Rep. 478, 139 U. S. 24, followed.

In Equity.

Charlton & Mackall, for plaintiffs.

Erwin, Du Bignon & Chisholm, for defendants.

SPEER, District Judge. Charles H. Hamilton, a citizen of New York, and William F. Bishop, a citizen of Connecticut, filed this bill against the Savannah, Florida & Western Railway Company, a corporation created under the laws of Georgia, and a citizen thereof, the East Georgia & Florida Railroad Company, also a corporation created under the laws of Georgia, and a citizen thereof, "and against William V. McCracken, George A. Evans, and Neil McDonald, who orators aver are citizens of the state of New York, and residents of the city of New York, in said state, copartners under the firm name and style of W. V. McCracken & Co." The complainants by their bill make the following case: They are copartners under the firm name of Hamilton & Bishop. The East Georgia & Florida Railroad Company was incorporated under the general laws of Georgia, for the purpose of constructing and operating a railroad from Buffalo to or near St. Mary's. The certificate of incorporation is attached to the bill, and it shows that L. M. Lawson, Samuel Thomas, and H. S. Terrell, of New York, and C. D. Willard, of Washington, D. C., were the incorporators. Afterwards the route was changed from the southern terminus northwardly, by the most direct and practicable line, through

the counties of Camden and Wayne, to Jessup, connecting at that point with the East Tennessee, Virginia & Georgia Railroad Company. The object of this company was to connect at St. Mary's with a system of railroads running to Jacksonville, and thence through Florida, and thus to supply railway facilities to a considerable portion of the state as yet without them. The Savannah, Florida & Western Railway Company owns and operates a line of railway from Savannah to Jacksonville by way of Waycross, which passes through Jessup. The East Georgia & Florida Railroad Company, when constructed, would become and be a competing line for business between Jessup and Jacksonville and other points. On December 22, 1885, by resolution of the directors of the East Georgia & Florida Railroad Company, its capital stock was fixed at \$400,000, divided into 4,000 shares, of \$100 each, such stock to be non-assessable and non-preferred, and the same remained so fixed during all the times hereinafter mentioned. By the same resolution it was declared that 51 per cent. of the stock should be issued to W. V. McCracken & Co., 30 per cent. to C. H. Hamilton, and 19 per cent. divided into seven equal parts, one each to Goodyear, Kay, Hamilton, Dill, Morse, and Cox, and half of a share each to J. T. Collins and M. M. Welch. By the same resolution it was declared that the various interests in lands, etc., of the incorporators at St. Mary's and elsewhere, should be distributed in substantially the same manner. Hamilton in all these matters was in fact acting as the representative of the firm of Hamilton & Bishop, who still are the real parties in interest. By virtue of said resolution, the complainants became the owners of, and entitled to, 1,200 shares of stock, and an undivided one-seventh of a right of way for a railroad occupying a portion of the territory to be covered by the railroad of the East Georgia & Florida Railroad Company, and all the improvements and work made and performed thereon, and an undivided one-seventh of the rights and franchises formerly belonging to the Great Southern Railway Company of Georgia, all of which were of great value. Complainants were promoters of the incorporation and organization of the East Georgia & Florida Railroad Company. They expended much time, money, and influence in the enterprise, with a view to realize a profit from the construction of the road. The Great Southern Railway Company was incorporated by act of the legislature of Georgia approved October 17, 1870, and was authorized to construct and operate a road from Millen, in as near a straight line as the topography of the country would permit, to the St. Mary's river, there to connect with the Great Southern Railway Company of Florida. On July 3, 1877, by decree of Wayne superior court, rendered in the case of Goodyear and Harris, for the use of the Southern Atlantic Telegraph Company, against the Great Southern Railway Company, the Great Southern Railway was sold by John F. King, receiver, to Willis Clary, property and franchises, who subsequently died, leaving Lucinda Clary, his widow and heir at law, as the owner of the assets of the Great Southern Railway Company. Lucinda Clary pooled her interests with the interests of complainants and their associates, as promoters of the East Georgia & Florida Railroad Company,

in the proportions hereinafter set out. Under a resolution of the directors of the East Georgia & Florida Railroad Company, said company made a contract with W. V. McCracken & Co. for building a line from Jessup to Hart's Road. This contract bears date December 22, 1885, and is attached to the bill as Exhibit B. On or about April 20, 1886, the promoters of the East Georgia & Florida Railroad Company, looking to the construction of said road, entered into a written contract with and conveyance to W. V. McCracken & Co., wherein it is recited that McCracken & Co. have entered into a contract with the East Georgia & Florida Railroad Company, a corporation duly organized under the laws of Georgia and Florida, and authorized to construct and operate a railroad to extend from Millen, Ga., to Hart's Road, Fla., by which McCracken & Co. have undertaken, in consideration of the compensation in said contract provided, to furnish the right of way, and all material necessary for, and to construct and build, the said railroad; that the parties of the first part thereto (the promoters) are severally the owners of certain interests in a right of way for a railroad occupying a portion of the territory to be covered by the railroad of the East Georgia & Florida Railroad Company, and certain grading and other work done and materials furnished for a railroad over said right of way, and also of certain grants of land and concessions, and also are, or claim to be, the owners of certain rights and franchises formerly belonging to the Great Southern Railroad Company of Georgia, which were sold and conveyed to Willis Clary; and under and by said contract and conveyance the said parties of the first part thereto sold, granted, and assigned unto McCracken & Co., and their assigns, all the right, title, and interest of the said parties of the first part, and each of them, in and to the right of way aforesaid, and all the improvements and work made and performed thereon, and of, in, and to all the aforesaid franchises, rights, and privileges, and also an equal, undivided half part of, in, and to all the aforesaid grants and concessions; and the said parties of the first part did thereby covenant and agree, at their own cost and expense, to secure for and transfer to said McCracken & Co. a full and complete right of way for the said railroad over the whole of the proposed route between Hart's Road and Jessup. The consideration moving to the parties of the first part for this contract and conveyance is therein stated to be certain stock and first mortgage bonds of the East Georgia & Florida Railroad Company, and certain sums of money payable in the manner set out in the said contract and conveyance. The consideration moving to Hamilton is stated to be 100 shares of stock of the East Georgia & Florida Railroad Company, and \$3,000 in cash, payable October 1, 1886. The bill further avers that the complainants' interests in said properties, on April 20, 1886, were 1,200 shares of the stock of the East Georgia & Florida Railroad Company, one-seventh part of the said right of way and improvements, and of said rights and franchises, and one-fourteenth of the grants and concessions. That Hamilton, acting for the complainants, was to get from McCracken & Co., as a consideration for signing this contract and conveyance, \$3,000 in cash, payable on October 1, 1886, and 1,100 shares of stock upon completion

of the road, and as soon as said shares should be delivered to McCracken & Co., or as soon as their right to receive such shares should accrue; and that in the mean time the said McCracken & Co. would hold the same as trustees for said Hamilton. A copy of the aforesaid contract and conveyance is attached to the bill as Exhibit C. At the time said contract and conveyance were made, McCracken & Co. did not mean to build the road, but intended to sell out to the Savannah, Florida & Western Railway Company, or other parties, at a profit, without regard to complainants' rights. That, by means of said sale and conveyance, McCracken & Co. obtained control of all the capital stock and property aforesaid, and elected a board of directors composed of themselves or persons representing their interests, to the exclusion of all other interests, and continued in sole control of the corporation, through all the transactions hereinafter set out. That without completing the road or their contract with Hamilton, and without his authority, McCracken & Co. sold and transferred the East Georgia & Florida Railroad, with all of its property and franchises, or attempted so to do, to the Savannah, Florida & Western Railway Company. At the time of said sale the Savannah, Florida & Western Railway Company not only had full notice and knowledge of the contract between McCracken & Co. and the East Georgia & Florida Railroad Company, but also of complainants' rights and interests therein. Before the Savannah, Florida & Western Railway Company paid the consideration for said sale to McCracken & Co., it again received notice of complainants' rights. Said sale and conveyance was contrary to paragraph 4, § 2, art. 4, of the constitution of Georgia, as being a contract or agreement intended to have the effect of defeating or lessening competition and encouraging monopoly, "and the said contract is therefore void, and should be so declared by this court." The Savannah, Florida & Western Railway Company, since buying the property, has made no attempt to build the road, but has abandoned the enterprise. The East Georgia & Florida Railroad Company is insolvent. Its franchises and property were rendered almost valueless by the acts of McCracken & Co. and the Savannah, Florida & Western Railway Company. In equity and good conscience, the Savannah, Florida & Western Railway Company should have assumed and carried out the obligations of the East Georgia & Florida Railroad Company and of McCracken & Co. with complainants. Complainants have requested the Savannah, Florida & Western Railway Company to account to them for the value of their rights and interests in the East Georgia & Florida Railroad Company, but said Savannah, Florida & Western Railway Company refuses. The said contract and conveyance of April 20, 1886, is absolutely void, because of fraud and want of consideration, and the same cannot, in equity, be considered as binding in any shape or form upon complainants. The Savannah, Florida & Western Railway Company, notwithstanding the notice it received of complainants' rights, has paid McCracken & Co. a large sum of money, and has taken an indemnity bond from McCracken & Co. to protect it against the claims of complainants. The road along the line of the East Georgia & Florida Railroad Company is considered

by business and railroad people a practicable and reasonable project, and there are capitalists ready to build the road if the same can be legally accomplished. Complainants have an equitable claim to 1,200 shares of said stock, an undivided one-seventh interest in the rights of way, improvements, and franchises aforesaid, and an undivided one-fourteenth interest in the grants and concessions aforesaid.

Such are the averments of the bill. The relief prayed is as follows: (1) That the attempted sale made by McCracken & Co. to the Savannah, Florida & Western Railway Company may be decreed to be void and of none effect, as being in violation of the constitution of Georgia, and that the Savannah, Florida & Western Railway Company may be declared to be a trustee for complainants, and such other persons as may be equitably entitled thereto, of all the property, assets, and franchises of the East Georgia & Florida Railroad Company. (2) An injunction to restrain the Savannah, Florida & Western Railway Company from further destruction of the property. (3) The appointment of a receiver to take charge of the property, assets, and franchises of the East Georgia & Florida Railroad Company, and to manage and control the same subject to the further order of the court. (4) That the Savannah, Florida & Western Railway Company may be compelled to account to a receiver for the value of the property of the East Georgia & Florida Railroad Company destroyed by it. (5) That the rights and claims of complainants in and to the East Georgia & Florida Railroad Company may be protected and established by the decree of this court, and that the Savannah, Florida & Western Railway Company may be decreed to respond to complainants for such damages as may be shown to have resulted to them by reason of its illegal and unwarranted acts in the premises. (6) Discovery. (7) The usual prayer for further and other relief. (8) Subpoena is prayed against the East Georgia & Florida Railroad Company, the Savannah, Florida & Western Railway Company, and also against the members composing the firm of McCracken & Co., provided they, or either of them, should come within the jurisdiction of this court, and they should appear to the court to be necessary and proper parties to the bill.

This cause is pending upon an application for an injunction and the appointment of a receiver *pendente lite* for the purposes described in the foregoing statement. The grounds of defense the defendants present by answer are—*First*, that under the allegations of the bill this court, for the want of proper parties, has no jurisdiction in the premises; *second*, that it appears from the bill that there are no grounds for interference by a court of equity; *third*, that upon the proofs the merits of the case are with the respondents.

The questions thus presented will be considered in the order in which they are stated.

It is insisted for the respondents that McCracken & Co. are necessary parties to the bill, and inasmuch as Hamilton, one of the complainants, and McCracken & Co. are citizens of the same state, the court here has no jurisdiction to proceed with this suit. Equity rule 47 provides that—

"In all cases where it shall appear to the court that persons who might otherwise be deemed necessary or proper parties to the suit cannot be made parties by reason of their being out of the jurisdiction of the court, or incapable otherwise of being made parties, or because their joinder would oust the jurisdiction of the court as to the parties before the court, the court may, in their discretion, proceed in the cause without making such persons parties; and in such cases the decree shall be without prejudice to the rights of the absent parties."

Respondents insist that McCracken & Co. are indispensable parties, because the prayers of the bill are to declare as void the sale made by them of the East Georgia & Florida Railroad to the Savannah, Florida & Western Railroad; that the Savannah, Florida & Western Railway Company may be declared a trustee for the complainants, and such others as may be entitled; that, if the sale is set aside and declared void, the title to the property will be in McCracken & Co.; that to appoint a receiver for the property the title to which is in McCracken & Co. would be to deprive them of their property without due process of law,—without giving them an opportunity of being heard, if they desire voluntarily to come to this court for relief,—for, as McCracken & Co. and Hamilton are citizens of the same state, this court can under no circumstances hear any controversy between them. The defendants cite and rely upon the case of *Shields v. Barrow*, 17 How. 146. That case was argued by Mr. Judah P. Benjamin for the appellants, and by Mr. Janin for the appellee, and Mr. Justice Curtis delivered the opinion of the court. The vendor had sold an estate in Louisiana for a large sum of money, and received payment from time to time for nearly one-half the amount. Afterwards he agreed to take back the property upon the payment of an additional sum of money which was secured to him by the promissory note of six individuals, four of whom lived in Louisiana and two in Mississippi. Becoming dissatisfied with this arrangement, he filed his bill in the circuit court of the United States against the two citizens of Mississippi to set aside the agreement as having been improperly procured, and to restore him to his rights under the original sale. The four parties to the compromise who resided in Louisiana not being suable in the circuit court of that state, and their presence as defendants being necessary, it was held that the court could not rescind the contract as to two, and allow it to stand as to the other four. Consequently it could not pass a decree as prayed. The court held that neither the act of congress of 1839, (5 St. at Large, p. 321, § 1,) nor the forty-seventh rule for the equity practice of the circuit court, above quoted, enables a circuit court to make a decree in equity, in the absence of an indispensable party whose rights must necessarily be affected by such decree. The court go on to say:

"Such being the scope of this bill and its parties, it is perfectly clear that the circuit court of the United States for Louisiana could not make any decree thereon. The contract of compromise was one entire subject, and from its nature could not be rescinded, so far as respected two parties to it, and allowed to stand as to the others. Thomas R. Shields, the principal, and four out of six of his indorsers, being citizens of Louisiana, could not be made de-

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fendants in this suit, yet each of them was an indispensable party to a bill for the rescission of the contract. In *Russel v. Clark's Ex'rs*, 7 Cranch, 78, this court said: 'The incapacity imposed on the circuit court to proceed against any person residing within the United States, but not within the district for which the court may be holden, would certainly justify them in dispensing with parties merely formal; but in this case all the parties are essential to the merits of the action.'

The court proceeds to point out three classes of parties to a bill in equity. They are: (1) Formal parties. (2) Persons having an interest in the controversy, and who ought to be made parties, in order that the court may act on that rule which requires it to decide on and finally determine the entire controversy, and do complete justice by adjusting all the rights involved in it. These persons are commonly termed "necessary parties," but, if their interests are separable from those parties before the court, so that the court can proceed to a decree and do complete and final justice without affecting other persons not before the court, the latter are not indispensable parties. (3) Persons who have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience. The court adds:

"On February 28, 1839, the act of congress was passed upon this subject, and this court adopted the forty-seventh equity rule. That is still of force. It provides that, in all cases where it shall appear to the court that persons who might otherwise be deemed necessary or proper parties to the suit cannot be made parties by reason of their being out of the jurisdiction of the court, or incapable otherwise of being made parties, or because their joinder would oust the jurisdiction of the court as to the parties before the court, the court may, in their discretion, proceed in the cause without making such persons parties, and in such cases a decree shall be without prejudice to the rights of the absent parties. This act relates solely to the non-joinders of parties who are not within reach of the process of the court. This court had already decided that the non-joinder of a party who could not be served with process would not defeat the jurisdiction."

It remains true, then, that, notwithstanding the act of congress and the forty-seventh equity rule, a circuit court can make no decree affecting the rights of an absent person, and can make no decree between the parties before it which so far involves or depends upon the rights of an absent person that complete and final justice cannot be done between the parties to the suit without affecting those rights. To use the language of this court in *Elmendorf v. Taylor*, 10 Wheat. 117:

"If the case may be completely decided as between the litigant parties, the circumstance that an interest exists in some other person whom the process of the court cannot reach, as if such a party be a resident of another state, ought not to prevent a decree upon its merits; but, if the case cannot be thus completely decided, the court should make no decree."

In the last case above referred to Mr. Justice MARSHALL, delivering the opinion of the court, uses the following language:

"*Second.* It is contended that he [the plaintiff] is a tenant in common with the others, and ought not to be permitted to sue in equity without making his co-tenants parties to the suit. This objection does not affect the jurisdiction, but addresses itself to the policy of the court. Courts of equity require that all the parties concerned in interest shall be brought before them, that the matter in controversy may be finally settled. This equitable rule, however, is framed by the court itself, and is subject to its discretion. It is not like the discretion of parties,—an inflexible rule, a failure to observe which turns the party out of court because it has no jurisdiction over his cause,—but, being introduced by the court itself for the purposes of justice, is susceptible of modification for the promotion of those purposes. In this case the persons who are alleged to be tenants in common with the plaintiffs appear to be entitled to a fourth part, not of the whole contract, but of a specially described portion of it, which may or may not interfere with the part occupied by the defendant. Neither the bill nor the answer alleges such an interference, and the court ought not, without such allegation, to presume it."

In *Payne v. Hook*, 7 Wall. 425, it was held that, in a bill in equity in the circuit court by one distributee of an intestate's estate against an administrator, it is not indispensable that such distributee make the other distributees parties, if the court is able to proceed to a decree and to do justice to the parties before it without injury to absent parties equally interested. After stating the general rule, which is that all persons materially interested in the subject-matter of the suit should be made parties to the suit, the court proceeds:

"But this rule, like all general rules, being founded in convenience, will yield whenever it is necessary that it should yield in order to accomplish the ends of justice. It will yield if the court is able to proceed to a decree and do justice to the parties before it without injury to absent persons equally interested in the litigation, but who cannot conveniently be made parties to the suit." Citing *West v. Randall*, 2 Mason, 181; *Story, Eq. Pl. § 89 et seq.*

The necessity for the relaxation of the rule is more specially apparent in the courts of the United States, where oftentimes the enforcement of the rule would oust them of their jurisdiction, and deprive parties entitled to the interposition of a court of equity of any remedy whatever. The present case would seem to afford an ample illustration of this necessity. The bill itself is drafted upon the theory that *McCracken & Co.* are not necessary parties. No subpoena is prayed against them. There is, however, a prayer that, if the court should deem them to be necessary parties for any purpose in such case, an order might be passed to that end, under section 8 of the act of March 3, 1887. The *gravamen* of the bill is the recaption of certain railroad stock alleged to belong to the plaintiffs, which it is alleged is held by the Savannah, Florida & Western Railway Company. The bill further seeks to establish an equitable lien upon the right of way of the East Georgia & Florida Railroad Company, also within the southern district of Georgia. It is alleged that the transfer of this property, to-wit, the franchise and assets, to its present custody was tortious as to the plaintiffs, and absolutely void, because a distinct violation of the organic law of the state. If this be true, may not the parties at interest proceed directly against the person or corporation holding their property without making any intermediate wrong-

doer a party to the proceeding? If the conveyance from McCracken & Co. to the Savannah, Florida & Western Railway Company is absolutely void and unconstitutional, the latter could acquire no title, for title does not pass under a void contract. If it be true, as alleged, that Hamilton conveyed to McCracken & Co. his interest in the East Georgia & Florida Railroad to enable the latter to build a railroad, and if instead of building the railroad its entire franchise and all its holdings were conveyed by a void contract to another corporation, it is optional with Hamilton to proceed against McCracken & Co. for the breach of their undertaking, or to pursue and attempt the recaption of the property itself. Code Ga. § 2333. This is especially true where the taker from McCracken & Co. had notice of the nature of the obligation they were under to Hamilton and his associates, as is alleged here. Here the proceeding is to declare a trust upon the property within the district, with a prayer that all others who have an interest in it may come in and be made parties; and, if it be true that McCracken & Co. have interests which should be protected by the court, it would seem that they might come in as parties complainant, or by intervention, and protect themselves, and at the same time not oust the jurisdiction of the court. *Brown v. Steam-Ship Co.*, 5 Blatchf. 526. In *Ribon v. Railroad Co.*, 16 Wall. 450, also cited by defendant, the sale sought to be rescinded was not void, but merely voidable. As it was a sale under a decree foreclosing mortgages, it was manifestly true that the trustees in the mortgages were indispensable parties. In the case of *Coiron v. Millardon*, 19 How. 113, cited also, the bill attempted to set aside the sale of mortgaged property on the ground of irregularity simply, and the mortgagees were held indispensable parties. The court, on page 115, uses, however, this significant language:

"A court of equity, in setting aside a deed of a purchaser upon grounds other than positive fraud on his part, sets it aside upon terms, and requires a return of the purchase money, or that the conveyance stand as a security for its payment. *Boyd v. Dunlap*, 1 Johns. Ch. 478; *Sands v. Codwise*, 4 Johns. 536, 598, 599. This constitutes the essential difference between relief in equity and that afforded in a court of law. A court of law can hold no middle course. The entire claim of each party must rest and be determined at law, on the single point of the validity of the deed; but it is the ordinary case in the former court that a deed not absolutely void, yet, under the circumstances, inequitable as between the parties, may be set aside upon terms."

Of course, all the parties to the deed merely voidable would be entitled to receive the benefit of such terms as the court ought to make in the order of rescission, but the supreme court would seem to imply that, where the deed is absolutely void, no terms will be considered; therefore such parties would not be necessary. In the case of *Railway Co. v. Wilson*, 114 U. S. 62, 5 Sup. Ct. Rep. 738, it was held that, to compel a corporation to transfer to the plaintiff stock standing on its books in the name of a third person, the corporation is a necessary party. There the principal relief was against the railroad company, and the case would be pertinent if the plaintiffs had filed their bill against McCracken & Co., and had omitted the Savannah, Florida & Western Railway. The case of *Railway Co. v. Mills*, 113 U. S. 256, 5 Sup. Ct. Rep. 456, is the

strongest authority we have been able to find for the defendant's proposition. There a suit was filed by citizens of New Jersey in a New Jersey court against a New Jersey corporation, and citizens of New Jersey, and a Pennsylvania corporation. The proceeding was to set aside a lease made by that corporation, the New Jersey railroad company, of its railroad and property, in excess of its corporate powers, and in fraud of the rights of the plaintiffs. All the defendants, including the New Jersey corporation, united in defending the acts complained of, and denying the illegal and other charges against them. The court held, on a motion to remand the cause after its removal to the circuit court, that the New Jersey corporation was in no sense a mere formal party to the suit, or a party in the same interest with the plaintiffs, but was necessarily made a defendant. "The bill seeks affirmative relief," continued the learned justice who rendered the opinion, "against the directors as well as against the two corporations, for one and the same illegal and fraudulent act. The single matter in controversy between the plaintiffs and all the defendants is the validity of that act, and, unless it is determined that the action of the New Jersey corporation was invalid as against the plaintiffs, there can be no decree against any of the other defendants."

It cannot be denied that this is exceedingly like the case at bar; and, if it may not be distinguished therefrom, it is controlling. Upon careful consideration, it seems, however, to be distinguishable. There the defendants, who were the railroad companies and many other citizens of New Jersey, had been sued in the New Jersey courts upon a subject-matter of which these courts had jurisdiction concurrent with the circuit court of the United States. They were before a court, therefore, with competent power to decide all the questions in controversy; and there could be no failure of justice because a party having a substantial interest was out of the jurisdiction. It may well be doubted, however, if the suit had been brought by the stockholders of the New Jersey corporation who were residents of Pennsylvania, in the circuit court of the United States for New Jersey, whether that court would have denied the plaintiffs a hearing because they had failed to make the Pennsylvania corporation a party, when to have done so would have defeated the jurisdiction of the United States circuit court for New Jersey. Besides, this bill seeks no affirmative relief against McCracken & Co.; and while they would be proper parties, and perhaps ought to be parties, before all the matters which may arise in the controversy can be adjudicated, yet it does not seem that they are such indispensable parties as, upon consideration of the authorities, will oust the jurisdiction and deny to the plaintiffs a hearing in the forum which they have sought. In the case of *Railroad Co. v. Mills*, *supra*, the question arose on motion to remand, and the court was not in the position to exercise that discretion in the furtherance of justice to which Chief Justice MARSHALL adverted in the case of *Elmendorf v. Taylor*, 10 Wheat. 117. On the other hand, this would seem to be a case in which there is a proper occasion,

in the felicitous language of the late Justice MILLER, "for the exercise of the beneficent powers and flexible methods of courts of equity."

It remains to be determined whether the transfer of the East Georgia & Florida Railroad to the Savannah, Florida & Western Railway Company by McCracken & Co. is void because in violation of the constitution of the state of Georgia. The statement of this question cannot readily be made in more appropriate language than that used in his brief by the learned counsel for the plaintiffs, Mr. Walter G. Charlton:

"(a) The language of paragraph 4, § 2, art. 4, of the constitution of 1877, is as follows: 'The general assembly shall have no power to authorize any corporation to buy shares or stock in any other corporation in this state or elsewhere, or to make any contract or agreement whatever with any such corporation which may have the effect, or be intended to have the effect, to defeat or lessen competition in their respective businesses, or to encourage monopoly; and all such contracts and agreements shall be illegal and void.' Analyzing this section, we have the following: (1) The general assembly shall have no power to authorize any corporation to buy shares or stock in any other corporation in this state or elsewhere which may have the effect, or be intended to have the effect, to defeat or lessen competition in their respective businesses. (2) The general assembly shall have no power to authorize any corporation to buy shares or stock in other corporations, in this state or elsewhere, which may have the effect, or be intended to have the effect, to encourage monopoly. (3) The general assembly shall have no power to authorize any corporation to make any contract or agreement whatever with any such corporation which may have the effect, or be intended to have the effect, to defeat or lessen competition in their respective businesses. (4) The general assembly shall have no power to authorize any corporation to make any contract or agreement which may have the effect, or be intended to have the effect, to encourage monopoly. The foregoing constitute four distinct inhibitions upon the power of the general assembly, and it goes without saying that any attempt of the legislature to legalize either or all of these forbidden acts would be *ultra vires* and void. Then comes: (5) And 'all such contracts and agreements shall be illegal and void.' What contracts or agreements? Clearly, the contracts or agreements of corporations which have the effect, or are intended to have the effect, to defeat or lessen competition or to encourage monopoly. In other words, the constitution, after specifying the four things which the legislature shall not do, then declares what acts of the corporations themselves shall be void. 'Contracts and agreements' must refer to transactions of corporations, and not to acts of the legislature. If, then, the contract or agreement by which the Savannah, Florida & Western Railway Company obtained possession of the properties and franchises of the East Georgia & Florida Railroad Company is obnoxious to any or all of the aforesaid inhibitions, such contract or agreement must perforce be void, and, under the decision in the *Langdon Case*, a court of equity will interfere to protect the property for the benefit of those entitled to it."

The learned counsel refers, in the last sentence quoted, to the case of *Langdon v. Branch*, decided by this court November 20, 1888, and reported in 37 Fed. Rep. 449-465, a case based upon facts similar in many respects to those in the case at bar as they now appear, and involving the application of the clause of the constitution of the state above quoted. In the decision with reference to that clause the court used the following language:

"This is the action of the sovereign people of Georgia in convention assembled. They chartered the Central Railroad & Banking Company. They chartered the Savannah, Dublin & Western Short-Line Railway Company. They granted to these railways vast, valuable, and perpetual franchises. With these rights thus granted, no power can interfere. They are perpetual; they are indefeasible. But with these rights are carried all the deterring and prohibitory effects of the constitutional inhibition just quoted, by which the people seek to defeat the aggregations of monopoly, and prevent the corporations which they permit to exist from aggrandizement of power, to the injury or destruction of public and private rights. The court has no official concern in the policy of this law. It is too plain and significant for intelligent controversy. Whatever may be the rules upon similar topics prescribed in other states, the people of Georgia, with full power to act, with undeniable jurisdiction over the important parties here, have embodied in their fundamental law this comprehensive and vital clause, clearly intended to accomplish what they deemed the salutary and healthful result of competing lines for railway transportation. Contracts in violation of this clause are not permitted. When attempted, they are utterly void. They have no binding force. They are nullities, and are to be disregarded and ignored whenever it concerns a party at interest to do so. Now, what may not be done directly may not be done by indirection. The Central Railroad & Banking Company could not purchase the control of a railroad running parallel with its line from the same terminal points. Such a contract would be absolutely void, and being void, and an absolute nullity, no title would pass under it."

The decision was not appealed, notwithstanding the large interest involved, and is believed to contain a definite and valid exposition of the law, as declared by the constitution. Of course, by the language used the court did not mean to intimate that private parties could by their personal action ignore or disregard contracts void under this statute, but that courts in proper cases would hold them void. The construction placed upon this clause by the learned counsel for the plaintiffs here appears to be unanswerable. After declaring that the general assembly shall have no power to authorize any corporation to buy shares of stock in any other corporation, or to make any contract which may have the effect, or be intended to have the effect, to defeat or lessen competition in their respective businesses, or encourage monopoly, and then declaring that all such contracts and agreements shall be illegal and void, it may not be supposed that the constitutional convention presumed that the legislature would authorize contracts which the constitution inhibited. So far as legislative impotency upon the subject is involved, it was sufficiently declared by the words of the clause: "The general assembly shall have no power to authorize," etc. The meaning of the last paragraph of the clause is therefore clearly that contracts and agreements between corporations to buy shares or stock in another corporation in this state, and contracts and agreements which may tend to defeat or lessen competition in the business of said corporations, or which may have the effect or tend to encourage monopoly, are illegal and void. If it be true, however, that the clause of the constitution is intended to declare merely that legislative action authorizing contracts of this injurious tendency is invalid and void, *a fortiori* would it be true that such contracts by corporations, which are the creatures of the legislature, when made

without legislative authority, will be void, and they would be held by the courts of the country as invalid and void. The clause of the constitution in question is self-operative, and needs no legislation to enforce it. The import of the clause may also be regarded as prohibiting the legislature from changing the common law upon this subject. It has long been true that, before one corporation can acquire the stock of another corporation, there must be express authority given for it by the state. At common law there was no such power. *Railroad v. Collins*, 40 Ga. 582; *Railroad Co. v. Wood*, 7 South. Rep. 108, (Sup. Ct. Ala. Nov. term, 1889, opinion of Chief Justice STONE;) Cook, Stocks, §§ 667-672. It does not appear that any statutory authority was given to the Savannah, Florida & Western Railway Company to buy stock in any other corporation. In fact, its charter was not granted until after the adoption of the constitution of 1877, from which the inhibitory clause is taken.

Since the argument of this cause the supreme court of the United States, after an elaborate and careful review of the leading cases upon the general subject, has rendered a decision confirming in all material respects the decisions in *Railroad v. Collins* and *Landon v. Branch*, *supra*. We refer to the cases of *Central Transp. Co. v. Pullman Car Co.*, 139 U. S. 24-61, 11 Sup. Ct. Rep. 478, (decided the 2d day of March, 1891.) Decision by Mr. Justice GRAY for the entire court, except Mr. Justice BROWN, who, not having been a member of the court when the case was argued, took no part in the decision. Of this important case, its copious, careful citation and analysis of the authorities, and deduction of salutary principles therefrom, without making the superfluous attempt to apply the doctrine there settled, it will suffice to say it announces that where a corporation, although empowered by its charter to enter into contracts with other corporations of any state, for the leasing or hiring and transfer to them, or any of them, its railway cars and other personal property, transfers to any corporation all its cars, railroad tracks, patent-rights, and other personal properties and rights of action for a term of 99 years, and covenants it not to engage in the business for which it was chartered while the indenture should remain of force, the contract was unlawful and void, because beyond the corporate powers of the lessor, and involving an abandonment of his duty to the public; and therefore no action could be maintained by the lessor upon the contract, or to recover the sums thereby payable, notwithstanding the fact that the lessee had enjoyed the benefits of the contract. The learned justice sums up the decision in the language following:

"A contract of a corporation which is *ultra vires*, in the proper sense,—that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature,—is not voidable only, but wholly void, and of no legal effect. The objection to the contract is not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it. When a corporation is acting within the general scope of the powers conferred upon it by the legislature,

the corporation, as well as persons contracting with it, may be estopped to deny that it has complied with the legal formalities which are prerequisites to its existence or to its action, because such requisites might in fact have been complied with. But when the contract is beyond the powers conferred upon it by existing laws, neither the corporation, nor the other party to the contract, can be estopped, by assenting to it, or by acting upon it, to show that it was prohibited by those laws."

As to the right of the Savannah, Florida & Western Railway to recover the money paid McCracken & Co., the following remarks of the learned justice seem important:

"A contract *ultra vires* being unlawful and void, not because it is in itself immoral, but because the corporation, by the law of its creation, is incapable of making it, the courts, while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties, so far as could be done consistently with adherence to law, by permitting property or money, parted with on the faith of the unlawful contract, to be recovered back, or compensation to be made for it. In such case, however, the action is not maintained upon the unlawful contracts, nor according to its terms, but on an implied contract of the defendant to return, or, failing to do that, to make compensation for, property or money which it has no right to retain. To maintain such an action is not to affirm, but to disaffirm, the unlawful contract."

The ground and the limits of the rule concerning the remedy, in the case of a contract *ultra vires*, which has been partly performed, and under which property has passed, can hardly be summed up better than they were by Mr. Justice MILLER in a passage already quoted, where he said that the rule "stands upon the broad ground that the contract itself is void, and that nothing which has been done under it, nor the action of the court, can infuse any vitality into it;" and that, "where the parties have so far acted under such a contract that they cannot be restored to their original condition, the court inquires if relief can be given independently of the contract, or whether it will refuse to interfere as the matter stands." *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.*, 118 U. S. 317, 6 Sup. Ct. Rep. 1094. This case would control the action of the court, even in the absence of the constitutional inhibition, as construed in *Landon v. Branch*.

With reference to the merits of the controversy, it will be sufficient to say that it appears, as we are now informed, that the East Georgia & Florida Railroad Company and the Savannah, Florida & Western Railway Company are "competitive," in the sense in which the term is used in the clause of the constitution of Georgia above referred to. It further appears that, if the Savannah, Florida & Western Railway Company were permitted to control or suppress the East Georgia & Florida Railroad, it will have a monopoly of railway transportation for goods and passengers in all that section of the state from Jessup to the Florida line. It is not denied that the entire franchises and assets of the East Georgia & Florida Railroad Company are now controlled by means of the sale from McCracken & Co. to the Savannah, Florida & Western Railway Company. The interest of the complainants here is their claim to 1,200 shares of stock of the East Georgia & Florida Railroad, and

one-seventh of the "right of way." Sufficient appears to give the plaintiffs a standing in court, at least for the purposes of litigating their rights and taking evidence, to show, if they can, that they are meritorious. All of these facts, of course, are made apparent merely by affidavits, or by the undisputed or conceded facts in the pleadings. After thorough investigation attainable by the usual progress of a suit in equity, a different appearance may be given to the case. As we are advised, however, at present, we feel obliged to grant the injunction prayed for, and appoint a receiver *pendente lite*, in accordance with the prayers of the bill. An order will be taken accordingly.

FITZGERALD v. EVANS.

(Circuit Court of Appeals, Eighth Circuit. February 1, 1892.)

1. RECORD ON APPEAL—PRESUMPTIONS.

The circuit court of appeals cannot take knowledge, actual or judicial, of what may appear upon the records of the district and circuit courts within the boundaries of the judicial circuit, and to support the right of appeal cannot assume the existence of necessary facts which do not appear of record in such court.

2. SAME—DISMISSAL.

On appeal from an allowance of a claim in railway mortgage foreclosure proceedings, by one styling himself "the purchasing trustee of defendant's property," it did not appear from the record that the property had been sold under the decree, or what interest or right appellant had in the proceedings, for whom he was trustee, or that the moneys out of which the claim was paid were a part of any fund in which he had an interest. *Held*, that the appeal should be dismissed, appellant not showing by the record any right to appeal.

3. FORECLOSURE OF RAILROAD MORTGAGE—INTERVENTION.

In cases of railway foreclosures, where the property is sold before the rights of intervening parties are determined, and by the terms of the decree the court reserves full power to hear such matters after the sale, and subject the property or its proceeds to the payment of claims finally adjudged to be prior to the mortgage lien, the proper practice is for the purchaser, upon confirmation of the sale, to make himself a party to the foreclosure proceedings by filing a supplemental bill or petition of intervention, and, if a non-resident, to appear by attorney; and, where the purchaser fails in such particular, the court should compel him to be made a party to the record.

Appeal from the Circuit Court of the United States for the Eastern District of Arkansas.

Bill by the Central Trust Company of New York against the St. Louis, Arkansas & Texas Railway Company to foreclose a mortgage upon defendant's road. Louis Fitzgerald appeals from the allowance of a claim of Annie Evans out of the fund in court. Dismissed.

S. H. West and J. M. & J. G. Taylor, for appellant.

Oscar D. Scott, for appellee.

Before SHIRAS and THAYER, District Judges.

SHIRAS, District Judge. This cause is now before us on a motion to dismiss the appeal, and an examination of the record discloses the following to be the position in which the matter stands before this court:

In May, 1889, the Central Trust Company of New York filed in the circuit court of the United States in the eastern district of Arkansas its bill in equity against the St. Louis, Arkansas & Texas Railway Company, for the purpose of foreclosing a mortgage upon the road of said company in the state of Arkansas, and averring therein that said trust company had previously filed a bill in the circuit court for the eastern district of Missouri, for the purpose of foreclosing the mortgage upon that portion of the line of railway that was situated in the state of Missouri. Receivers of the property were appointed in the usual mode, and with the usual powers, and orders were made consolidating several proceedings for the foreclosure of different mortgages upon the line of railway. On the 15th day of July, 1890, a decree of foreclosure was entered in the circuit court for the eastern district of Arkansas, a like decree being also entered in the circuit court for the eastern district of Missouri, in which it was provided that the mortgaged property should be sold by a master under the provisions and restrictions in said decree contained, which, among other things, expressly provided that all debts incurred by the receivers in operating the property under their charge, and all debts contracted by the railway company before the suit for foreclosure was filed, which might be adjudged by the United States circuit courts to be entitled to a preference over the mortgage debt, and all claims pending, or which might be thereafter brought, and which should be adjudged to be prior to the mortgage lien, should be entitled to be paid out of the proceeds of the sale before payment was made to the holders of the mortgage bonds; and by section 8 of the decree the circuit court for the eastern district of Arkansas expressly reserved to itself jurisdiction, as against the parties to the foreclosure proceedings and the purchaser at the contemplated sale, to hear and adjudicate all pending claims, and all claims thereafter to be filed, and to determine the priority thereof, and to provide for the payment thereof, to which end the court reserved the right to retake possession of the property ordered to be sold; it being further provided that the parties to the suit and the purchaser under the decree should have the right to appear and contest the validity or priority of all claims, with the right to appeal in all cases where by law an appeal could be taken. It further appears from the record on file that one Annie Evans recovered a judgment in the circuit court for the eastern district of Arkansas, at Texarkana, for the sum of \$1,991 and costs, and on the 7th day of February, 1891, made application to the circuit court for the eastern district of Arkansas, at Little Rock, for an order directing the payment of the claim out of the fund in court; and upon the hearing of the application, counsel for the intervener and for the receivers appearing and being heard, the order asked was granted, and a check for the amount was drawn on the fund in court and paid for the benefit of Mrs. Evans. The record further shows that one Louis Fitzgerald, on the 13th day of April, 1891, describing himself as "the purchasing trustee of defendant's property," filed in the circuit court at Little Rock an assign-

ment of errors, based upon the allowance of the claim of Mrs. Evans, and prayed that an appeal should be allowed "to said Louis Fitzgerald, purchasing trustee," and, the same having been allowed, the present record was filed in this court.

It will be noticed that the record before us contains no evidence that the mortgaged property has yet been sold under the terms of the decree above recited. This court cannot take knowledge, actual or judicial, of what may appear upon the records of the numerous district and circuit courts that are within the boundaries of the eighth judicial circuit. We can act only upon such facts as are made to appear in the proper mode by the record before us, and, to support a right of appeal, we cannot assume the existence of necessary facts which do not appear of record in this court. This court does not know who "Louis Fitzgerald, purchasing trustee of the property of defendant," is, nor what interest or right he has in the matter of the foreclosure proceedings against the St. Louis, Arkansas & Texas Railway Company. It is not shown that a sale of the mortgaged property had taken place, and that Louis Fitzgerald had become the purchaser at such sale, and therefore was entitled to the rights reserved to such purchaser. The only averment is that found in the petition for appeal, in which he is described as the purchasing trustee of defendant's property; but this does not show that he has yet bought the property, or, if bought, how he bought the same, nor whether he bought as the representative of the bondholders. In other words, the record wholly fails to show that Fitzgerald has acquired any such interest in the property affected by the foreclosure decree, or in the questions therein reserved for future action by the court, as entitles him to question in any court the rightfulness of the order now complained of. Furthermore, the record shows that the order made upon the application of Mrs. Evans was to the effect that the same be paid by the receivers "out of the first moneys coming into their hands applicable to that purpose;" and if it be true, as stated in the assignment of errors, that the claim has been paid, it is not made to appear that the moneys out of which it was paid were part of any fund in which the present appellant had an interest. As the record, therefore, wholly fails to show that Louis Fitzgerald has any interest in the foreclosure proceedings, in the property covered by the mortgage foreclosed, or in the fund out of which the claim of Mrs. Evans was ordered to be paid, it fails to show that he is entitled to prosecute the present appeal. If by any means he had become interested in the proceedings or in the property affected thereby, and desired to be heard, either in the trial or appellate court, in opposition to the allowance and payment of the claim of Mrs. Evans, he should, by petition, have intervened in the cause, and have obtained recognition as a party in interest. See *Ex parte Cutting*, 94 U. S. 14. No such action, so far as the record before us discloses, was taken by him in the court below, and the record before us wholly fails to show that Fitzgerald has any interest in the matter sought to be presented by the appeal. It cannot be expected that this court will en-

tain appeals or writs of error on behalf of strangers to the proceedings, and it follows that this appeal must be dismissed, for the reason that it does not appear that the appellant has the right to appeal.

In view of the action we have felt compelled to take in this matter, we deem it advisable to call attention to the practice that should be followed in cases of railroad foreclosures, where a sale of the property is had before the rights of all intervening parties are determined, and where, by the terms of the decree, the court reserves full power to hear such matters after the sale, with the right to subject the property and its proceeds to the payment of claims finally adjudged to be prior to the lien of the mortgage. When a sale is made under a decree of the kind described, it is the duty of the purchaser, upon a confirmation of the sale, to make himself a party to the foreclosure proceedings, by filing therein a supplemental bill or petition of intervention, setting forth the fact that he has, by purchase of the property, become a party in interest, thus showing that he has become subject to the burdens and entitled to the benefits of the decree under which he has purchased the property. Furthermore, if the purchaser does not reside within the territorial limits of the jurisdiction of the court, he should appear by an attorney who is a member of the bar of the court having charge of the foreclosure proceedings, so that when need arises the court may be enabled to have before it all persons interested in resisting the allowance or payment of claims which are asserted to be entitled to priority of payment. It not unfrequently happens that the purchasers at railway foreclosure sales may reside at distant points, and without the jurisdiction of the court. If the purchaser who thus resides at a distance does not become a party to the record, and have an attorney representing him, upon whom service may be made, the court and litigants are put to a great disadvantage in disposing of the claims asserted against the property or its proceeds. Many of the claims are of small amounts, and if, before the same can be allowed and paid, it is necessary to procure orders for service upon a purchaser living in New York, or some other distant point, and to complete such service at his place of residence, the expense thereof will eat up the claim. It is due to the court, and necessary for the prompt and inexpensive disposition of claims of the nature indicated, that the purchaser shall become a party to the record, and subject himself to the jurisdiction of the court in the manner indicated. If the purchaser fails in this particular, then the court having jurisdiction of the foreclosure proceedings should, by appropriate action, compel the purchaser to become a party to the record, in order that the business of winding up the foreclosure case and finally settling the rights of all interested may be proceeded with in an orderly way. If a purchaser at a foreclosure sale makes himself a party to the record in the manner indicated, then it will be the duty of the circuit court to cause notice to be given him before passing upon intervening claims, or directing their payment from the fund in court, and thus full opportunity will be afforded to all parties in interest to be heard for the protection of their rights. It may be, in the present cause, that this

course has been in fact pursued, but the record now before us fails to show it, and hence we are compelled to dismiss the appeal, because it is not made to appear that Louis Fitzgerald has any interest in the controversy, or any right to take an appeal from the order directing payment to be made of the claim of Mrs. Evans.

LAST CHANCE MIN. CO. v. BUNKER HILL & S. MINING & CONCENTRATING CO.

(Circuit Court, D. Idaho. February 29, 1892.)

WATER-RIGHTS—CHANGE OF PLACE OF USE.

The appropriator of water, to be used at a specified place for the purpose of operating machinery and other works, after so using and returning it to its original channel, cannot change the place of use, to the damage of a subsequent appropriator lower down on the stream.

(Syllabus by the Court.)

W. B. Heyburn, for plaintiff.

McBride & Allen, for defendant.

BEATTY, District Judge. This cause is submitted upon an agreed statement of facts, from which it appears that the defendant, during the months of February, April, and May, 1886, located three water-rights on Milo creek, in Shoshone county, Idaho, the water of which was conducted by separate ditches to defendant's ore milling plant, known as the "Old Concentrator;" that after being there used for the purpose of concentrating the ore from defendant's mine, and running the machinery connected with the mine and works, it was turned back into the natural channel of said creek; that it thereafter continued to flow therein unclaimed, until in the month of June, 1889, the plaintiff, at a point on said creek some distance below where defendant so returned it, located 2,000 inches thereof, and thereafter continued to use it for milling purposes in concentrating the ore from its mines, until July, 1891, when the defendant, at a point on one of its ditches above its mill, so constructed a flume as to carry all the water of said creek, during the season of low water, around and beyond the place of appropriation and diversion by plaintiff, and thereby prevented plaintiff from any use thereof; and that all such premises and water-rights are situated upon the public lands of the United States. Under such circumstances, can the defendant, as the prior appropriator, now so change the place of use of such water as to deprive the plaintiff thereof? is the question for determination.

With the first development of the Pacific coast by the American pioneer, water became an indispensable factor in mining, agricultural, and other material interests, and with its early use began the formulation of rules for its regulation. Those rules were by the courts and

legislatures first followed, then adopted as laws, and subsequently were ratified by congress by act of 1866. Among the first of such rules, which has ripened into law, was that favoring the prior actual appropriation made for some useful purpose. The use, however, was to be a reasonable one, and, as far as possible, be consistent with a use by others. Prior possession did not imply authority to take what was not needed, or, by prodigality, waste what others might profitably utilize. That such equitable rule might be enforced, it became necessary that some notice, or acts equivalent to notice, should be made of the claim. To this in time were added the positive requirements of a written notice, with full details of the amount, nature, and place of diversion and use. These general principles were, prior to the inception of the rights involved in this action, incorporated into the laws of this state, which, in pursuance of those of congress, must govern all water-rights located upon the public lands and streams of the general government. By section 3160, Rev. St. Idaho, it is provided that the appropriator of water must post "a notice in writing * * * stating therein" the amount claimed, "the purpose for which he claims it, and the place of intended use." This requirement is designed less for his protection than as a notification to others of what is left unclaimed which they may appropriate. It would follow that when an appropriation is made with full knowledge of prior rights, and in entire subordination thereto, it is as much entitled to protection against the aggressions of a prior claimant as the latter would be against subsequent intrusions. Also it is provided, by section 3156 of said statute, that "the appropriation must be for some useful or beneficial purpose, and when the appropriator ceases to use it for such purpose the right ceases." These sections together would seem to lead to the conclusion that, when an appropriator ceased to use the water at the place and for the purpose by him designated, he would be precluded from using it elsewhere or otherwise, and his rights concerning it would terminate. I think, however, a more liberal construction is justified, and, to render these rights of any permanent or material value, is demanded. The use for which the water is appropriated and to which it is applied is an important factor in the construction of the statute. The controlling question, in any case, is whether subsequent locators have had such notice of prior rights, and their extent and effect, as would guard them against making invalid locations.

In illustration, suppose some certain amount of water is appropriated to be used as a power by its conversion into steam; or, by combination with other elements, is to be converted into articles of merchandise; or to be used upon some certain tract of land for the purpose of irrigation. Should the appropriator be precluded from thereafter changing either or both,—its use, or the place thereof? The reply must be in the negative; for in all such cases the purpose of the appropriation is such that no subsequent appropriator can thereby be misled to his injury. Distinct notice is given in such cases, not only that so much water is drawn from the public supply, but that its appropriation is such that it cannot be used a second time. It is a notice that so much water is practically destroyed,

—is eliminated from existence as water. A subsequent locator has actual notice that this amount of water is withdrawn from all public claim, is absorbed, and has become a vested right. He cannot base any claim upon it, or upon any expectation that, some time in the future, it will become the subject of appropriation. Should such prior right be subsequently forfeited, he gains nothing thereby, as his rights are measured alone by what he could, and actually did, claim at the time of his appropriation. Neither does he lose anything, nor is he in any way damaged, should the first appropriator change his use, or the place thereof, for, in either event, he still has left all he ever claimed, or was entitled to claim. The appropriation of water for placer mining purposes, at some specified place, involves a somewhat similar principle. It is such an actual appropriation of a definite amount, and for such purpose, as, in the nature of things, must operate as a notice to all that its place of use must, from time to time, as the ground is worked, be changed. Should one use the water after it passes from the works of the prior claimant, he must do so at his own risk, and he cannot complain that changes are made which he had full notice would likely occur. In this action, however, the facts are quite different. In 1886 the defendant located the water, specifying that it was to be used at its mill for the purpose of power in operating machinery and in concentrating ores, and in pursuance of such notice conducted it to such mill, and, after there so using, returned it to the original channel of the stream from which it had been taken, and practically undiminished in quantity or deteriorated or changed in quality. The use made of it was purely usufructuary, and in no sense partaking of the nature of ownership in the water. The defendant, by its declarations and acts, in effect said to the world that the only use it had for the water was at the place and in the manner specified, and that, when so used, it had no further claim upon and abandoned it. Under such circumstances, there was neither direct nor implied notice that it would be used elsewhere or for other purposes by defendant. On the contrary, the public was justified in believing that defendant had made the only use thereof intended; that the same would continue; and that in the future it would be returned to the creek as it had been. Would it not follow, from such facts, that plaintiff, in claiming the water after its return to the creek, was fully justified? If justified in such claim, then protection thereof must follow. If the defendant's position is sustained by the law, it would follow that the prior appropriator would, in all cases, so absolutely control the water, to the extent of such appropriation, that no other person could thereafter attempt any permanent use of it, except at great risk of loss, even when such use would not damage the first appropriator. Suppose, in this case, the stream below defendant's mill were lined with ore-mills, all operated by the same water, as it passed from the wheels of one mill to the next below, and all by appropriations subsequent to defendant. Upon defendant's theory, all such mills may be closed, and utterly destroyed, whenever the latter concludes to modify its plans, and divert the water elsewhere. Such a

rule, I am firmly convinced, is counter to the policy of the law. Instead of developing the country, it would block its progress. Instead of utilizing, as generally as possible, nature's elements for the public good, it would subject them to the arbitrary will of any individual who might first assume a claim to them. It would be an extension of the maxim, "first in time, first in right," far beyond the limits of equity or justice. In this case the facts are not limited simply to the appropriation of the water, its use and return to the stream by defendant, but such *status* continued for over three years before plaintiff located, and thereafter continued for over two years to use it, without objection by defendant, and before the latter attempted, through the means stated, to interfere therewith.

Even if defendant's original claim of the water, its use and return to the stream, without any notice or reservation, direct or implied, of any other use, did not constitute a release of further claims, it certainly should be held that the continuation of such *status* for over five years must operate as an abandonment of any further or different claim than that exercised. In view of all the facts, the doctrine urged by the defendant cannot be acceded to, unless it is sustained by most potent judicial authority. From those cited, and from others, it appears, in *Maeris v. Bicknell*, 7 Cal. 261, that the court distinctly held that a prior appropriator could change the place of use as against a subsequent appropriator, but how this question was involved is not apparent; for the important question, as stated by the court,—and the only one shown by the facts,—was whether the plaintiff, who had cut a ditch for drainage, could, after defendants had cut another to appropriate the water, use the water as against defendants. It was held he could not, because, prior to defendants' appropriation, he had neither used nor avowed any intentions to use it. In *Davis v. Gale*, 32 Cal. 26, and *Correa v. Prietas*, 42 Cal. 342, the prior appropriation was for the purpose of working placer mining ground, and it was held that the place of use could be changed as against subsequent appropriators. In *Woolman v. Garringer*, 1 Mont. 535, the defendants having located water to be conducted 27 miles for mining purposes, the plaintiffs, within three months thereafter, located the same, upon the theory that defendants had not made an actual use thereof, or conducted it from the stream, or given due notice of their intention to do so, prior to plaintiffs' appropriation. The cases above cited were quoted and approved, and the court further added that—

"The notice posted on the stream, of the appropriation of so much water for general mining purposes, and the immediate entering upon the * * * construction of the dam and ditch, * * * were sufficient to put the plaintiffs on their guard, * * * and to apprise them of * * * defendants' superior rights. The plaintiffs could acquire no other than a mere privilege or right to the use of the waste water, or, at most, but a secondary and subordinate right to that of the first appropriators, and only such as was liable to be determined by their action at any time, unless the water had been turned back into the original channel after it had been used, and answered v.49f.no.6—28

the purposes of the first appropriators, without any intention of recapture, and thereby became *publici juris*."

In *Eddy v. Simpson*, 3 Cal. 249, the defendants, after using water for mining purposes, let it escape into plaintiffs' creek, and subsequently attempted to reclaim it, which it was held could not be done after plaintiffs began using it. In *Ortman v. Dixon*, 13 Cal. 36, the defendants first appropriated the water as a mill-power. Plaintiffs subsequently, by a ditch above the mill, used the water for mining purposes when the mill was not running. Still later defendants took out a ditch above plaintiffs, and conducted the water away for mining purposes. The court held defendants could not thus change its use; that—

"The measure of the right, as to extent, follows the nature of the appropriation, or the use for which it is taken. If A. erects a mill on a running stream, this shows an appropriation of the water for the mill; but if he suffers a portion of the water, or the body of it, after running the mill, to go down its accustomed course, we do not see why persons below may not as well appropriate this residuum as he could appropriate the first use. It may be true, as * * * argued, that he may change the use, and even the place of using; but the concession does not help the argument, for the question is not how he may use his own, but what is his own."

In *Water Co. v. Powell*, 34 Cal. 109, the plaintiff having first constructed a dam to utilize the water it claimed, the defendants then took up some mining ground on the creek above such dam. The bed of the creek became so filled with *debris* from the mining operations of third parties that it was necessary for plaintiff to raise its dam to make any use of the water it had first appropriated, and this resulted in backing the water over defendants' mining ground. In holding that plaintiff could not so raise its dam, the court said:

"Its right to appropriate and use said water in the manner adopted, and to the extent of the appropriation, would not prevent other parties from acquiring rights in the surplus water, or in the bed and banks of the stream, or in the adjacent lands, to any extent which should not interfere with the rights before acquired. * * * When the right has once vested in the defendants, the plaintiff is no more justified, by extending its own claim, or changing the measure of appropriation, or interfering with the full enjoyment of the right vested in the defendants, than defendants would be in encroaching upon the prior rights of plaintiff."

In *Proctor v. Jennings*, 6 Nev. 87, it is held—

"That the rights of each [appropriator] are to be determined by the conditions of things at the time he makes his appropriation. So far is this rule carried that those who were prior to him can in no way change in extent their use to his prejudice, but are limited to the right enjoyed by them when he secured his."

It may be urged, as to some of the above noted cases, that they only determine that subsequent rights cannot be molested, and do not establish any rule by which it can be held, in this case, that plaintiff's appropriation was lawful. Certainly it must be conceded that, if it was unlawful, it cannot be protected, and defendant may do with the water what it will; but, without restating the facts, if under them the plaintiff

was not justified in making the claim it did, it would be difficult to imagine a case in which the water of a stream, once used as it was by defendant in this case, could ever be safely appropriated by a second party for any use whatever.

When defendant's water locations were made, section 3 of the act approved February 10, 1881, (11 Sess. Laws Idaho, 267,) was in force, as follows:

"The appropriator, or his or their successors in interest, may change the place of diversion, if the rights acquired by others are not thereby interfered with, and no injury to others therefrom result, and may also extend any ditch, canal, flume, pipe, or other conduit to points or places beyond such as may have been designated or first used, saving the rights which may have accrued prior to such extension."

The plaintiff claims that, as defendant's rights were acquired under this section, its rights now are so controlled, as against plaintiff, by the last clause, that no change of the place of use can be made. But long before plaintiff made its location this section was revised into section 3157, Rev. St. Idaho, as follows:

"The person entitled to the use may change the place of diversion, if others are not injured by such change, and may extend the ditch, flume, pipe, or aqueduct, by which the diversion is made, to places beyond that where the first use was made."

Whatever rights this revised section confers would accrue to defendant, and the defendant now relies upon this section in support of its right to make the change complained of. This position is fortified by the fact that the clause in the old statute prohibiting such change is omitted in the new. While it is evident that the legislature was simply aiming to exactly follow and adopt section 1412, Civil Code Cal., I think that it designed, by the statutory change, to permit the prior appropriator to change the place of use, as against a subsequent appropriator; but that it intended this to be done in all cases, regardless of the facts, is quite a different proposition. I still think it was designed that this extended liberty should include those cases, as above stated, in which the use of the water amounted to its absorption, or it was such as to imply notice to all that such change could be reasonably expected, and to exclude cases like the present, where it is appropriated and used for a specific purpose, and then abandoned. That the waters of the country may be monopolized by the few first comers, when they may be made to serve the many, would be an imputation of such improvident and inequitable legislation as should not be indulged, save upon overwhelming conviction. It must be concluded that plaintiff is entitled to protection for its water-right claim, its right thereto quieted, and defendant perpetually enjoined from interfering therewith, and it is now so ordered.

MARVIN v. MAYSVILLE ST. RAILROAD & TRANSFER CO.

(Circuit Court, D. Kentucky. January 18, 1899.)

1. DEATH BY WRONGFUL ACT—RIGHT OF ACTION—PARTIES.

The right of action for damages given by Gen. St. Ky. c. 57, p. 550, to the personal representative of "any person" whose life is lost by the negligence of a railroad company, etc., to be pursued "in the same manner that the person himself might have done for any injury where death did not ensue," is not confined to decedents who were citizens or residents of Kentucky, nor to personal representatives appointed in and by the state of Kentucky.

2. SAME—ASSETS—ADMINISTRATION.

Such right of recovery is not an asset upon which administration, in the case of a non-resident, can be obtained in Kentucky.

At Law. On demurrer to complaint. Overruled.

William M. Tugman, G. Bambach, and L. W. Robertson, for plaintiff.

A. M. J. Cochran and Wm. H. Wadsworth, for defendant.

BARR, District Judge. This is a suit by the plaintiff, as administrator of Marion Wilson, deceased, who was at the time of his death a citizen of the state of Ohio, and who is alleged to have been killed in Maysville, of this state, in November, 1890, by the negligence and carelessness of an employe of the defendant. The plaintiff has been appointed by the proper court in the state of Ohio as the administrator of decedent, and is himself a citizen of Ohio, and the defendant is a Kentucky corporation, and, as such, a citizen of this state. The plaintiff claims his right of action, both under the Kentucky and Ohio statutes, and the defendant has filed a general and special demurrer. The grounds of the special demurrer are that this court has no jurisdiction of the defendant, or the subject of the action, and that plaintiff has not legal capacity to sue. The action is for the death of the decedent under the first section of chapter 57, Gen. St., and not under chapter 10 of said statutes. That section enacts:

"If the life of any person not in the employment of a railroad company shall be lost in this commonwealth by reason of the negligence or carelessness of the proprietor or proprietors of any railroads, or by the unfitness or negligence or carelessness of their servants or agents, the personal representative of the person whose life is so lost may institute suit and recover damages in the same manner that the person himself might have done for any injury where death did not ensue." Gen. St. c. 57, p. 550.

If the life of any person is lost in this state by reason of the negligence, carelessness, or unfitness of the agents or servants of a proprietor of a railroad, or by his own negligence or carelessness, a right is given his personal representative to recover damages. Evidently there is nothing in this section that confines this right to citizens or residents of the state of Kentucky, but the right is given to any person without regard to residence or citizenship. The remedy is given to the personal representative of the person thus killed, and he may pursue the remedy thus given "in the same manner that the person himself might have done for any injury where death did not ensue." As a mere matter of construc-

tion, the remedy seems to be as broad as the right which is given by the statute; but does "personal representative" mean any one who may be appointed by this state, or any other state, or is it only a personal representative appointed in and by the state of Kentucky? This is the question raised by the demurrer, and one not free from difficulty. It may be assumed as settled that, had the decedent not died from his injuries, his action would have been a transitory one, which he could have enforced in this or any state where he could have obtained actual service. *Mostyn v. Fabrigas*, 1 Cowp. 161; *McKenna v. Fisk*, 1 How. 241; *Watts v. Thomas*, 2 Bibb, 458. We think it is the law of this state that actions like this one are transitory, unless made local by the act of the state which gives the right and remedy. *Dennick v. Railroad*, 103 U. S. 11; *Bruce v. Railroad Co.*, 83 Ky. 174.

It is argued that as non-residents of this state who are killed by negligence and carelessness, as indicated in this section, usually have no personal estate in the state, a construction of the act, so as to confine the remedy to personal representatives appointed by and in the state of Kentucky, would deprive those non-residents of all remedy. This, it is claimed, would be in contravention of section 2, art. 4, of the constitution, which provides "that citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states." Justice WASHINGTON in *Corfield v. Coryell*, 4 Wash. C. C. 381, in considering this section, says: "We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental;" and then enumerates some privileges which are clearly fundamental, and among these he puts the right "to institute and maintain actions of any kind in the courts of the state" which a citizen of the state could. It becomes, therefore, important to inquire whether the right given under this section (chapter 57, § 1) is sufficient to give Kentucky county courts jurisdiction to appoint a personal representative for a non-resident of the state who was killed in this state by the negligence or carelessness described in said section.

In *Thumb v. Gresham*, 2 Metc. (Ky.) 308, the court of appeals of this state declare:

"Where there are no assets in this state belonging to a decedent who resided in another state, to be administrated here, the county courts have no jurisdiction to grant administration; and any such grant is void, and confers no power or authority on the person appointed as administrator."

The broadest definition of "assets" that I have seen is that given by Justice Story, who says:

"In an accurate and legal sense, all the personal property of the deceased, which is of a salable nature, and may be converted into ready money, is deemed 'assets.' But the word is not confined to such property; for all other property of the deceased which is chargeable with his debts or legacies, and is applicable to the purpose, is, in a large sense, assets." Story, Eq. Jur. 531.

The right given under this section (chapter 57, § 1) never belonged to the decedent. It was never his property, if property it be, until recovery; but both the right and the remedy are given by the express

language of the section to his personal representative, who ever that might be, after his death.

It is quite true that this recovery, if obtained, is a part of the personal estate of the decedent, and as such is subject, in this state, to the payment of his debts, and goes to his distributees under the statute of the state as other personal property. This is, however, by force of the statute, and not because it ever belonged to the decedent. It is compensation for his death when recovered, which becomes a part of his personal estate by force of the statute, and could as well have been given to his wife, if one survived him, or any kinsman or connection of the decedent, if the statute had so provided. We think, therefore, that the right to recover for the death of a decedent given by this section is not assets upon which an administration of a non-resident decedent could be obtained in this state. And this, even though it be conceded that a right of action for personal injuries during a decedent's life, and which is made to survive his death by statute, (chapter 10,) might be sufficient assets to obtain administration upon his estate here. This is a remedial statute, and should be construed liberally for the purpose of carrying out the legislative intent. And certainly, if the language is doubtful, and one construction would make the law unconstitutional and the other constitutional, the latter construction should be given. But, aside from the constitutional question, it seems to me that the legislature did not intend, in this section, to confine either the right or the remedy therein given to personal representatives appointed by the courts of this state. The plaintiff, by reason of his appointment by a proper court in Ohio, is within the description of the persons entitled to sue by the Kentucky statute, and may maintain this action. But he must conform to Kentucky law as to the manner of recovery, and the disposition of the recovery. This recovery becomes liable to decedent's debts due to citizens and residents of Kentucky, because, when recovered, it becomes part of the personal estate of decedent. After these are paid, the balance is to be distributed and disposed of according to the laws of the state of which decedent was an inhabitant. Sections 6-8, art. 2, c. 39, Gen. St. This disposition of any recovery that may be had, should be secured by a bond similar to the bond provided for by sections 43, 44, art. 2, c. 39, Gen. St. It is true that this action is not for a debt, nor is it due the decedent, and therefore it is not within the terms of these sections; yet the court, under its general powers, has the authority to require such a bond, so as to protect the creditors who may be entitled to subject this recovery, if any, to the payment of their debts under the Kentucky laws. The conclusion reached by the court is not free from doubt, but it seems to be the only practical solution of the question so as to make the law uniform in its operation, and constitutional. The demurrers should be overruled, and it is so ordered.

CUNNINGHAM v. NEW YORK CENT. & H. R. R. Co.

(Circuit Court, S. D. New York. February 10, 1892.)

DAMAGES—OPINION EVIDENCE—FUTURE EFFECT OF INJURIES.

In an action to recover damages for personal injuries, the opinions of medical experts as to the permanence and probable future effect of those injuries may be received.

At Law. Action by Edward H. Cunningham against the New York Central & Hudson River Railroad Company to recover damages for personal injuries. There was a verdict for plaintiff, and defendant moves for a new trial. Motion overruled.

Daniel Nason, for plaintiff.

Austen G. Fox, for defendant.

WHEELER, District Judge. The plaintiff got a verdict for injuries to his person while a passenger on one of the defendant's freight trains. The principal questions saved at the trial, and relied upon now, relate to the testimony of expert physicians who attended upon him, and have since examined him, as to the permanency and probable future effects of the injuries, and to his right to recover damages for what these effects are likely to be. "The opinions of medical men are constantly admitted as to the cause of disease or of death, or the consequences of wounds, and as to the sane or insane state of a person's mind as collected from a number of circumstances, and as to other subjects of professional skill." 1 Greenl. Ev. § 440. The questions objected to were allowed because thought to be within this rule, and they are still thought to be so. The principal objection to answers allowed to stand is that they were not positive, but more or less conjectural. They could not, however, from the nature of the subject, be absolutely positive, but, being as to opinion, must be more or less uncertain. Their weight, according to their positiveness, with other respects, was for the jury, and was left to the jury. *Fetter v. Beal*, 1 Ld. Raym. 339, 692, 1 Salk. 11, 12 Mod. 542, was for the coming out of part of the plaintiff's skull in consequence of a battery, after recovery for the battery; and, on demurrer to a plea of the former recovery, Lord Holt, C. J., said: "If this matter had been given in evidence as that which in probability might have been the consequence of the battery, the plaintiff would have recovered damages for it;" and the demurrer was sustained. This case is not shown nor seen to have been overruled or questioned, but seems to have been approved, and to be correct in principle. Sedg. Dam. 104; *Whitney v. Clarendon*, 18 Vt. 252; *Fulsome v. Concord*, 46 Vt. 135; *Stutz v. Railway Co.*, 73 Wis. 147, 40 N. W. Rep. 653; *Treadwell v. Whittier*, 80 Cal. 575, 22 Pac. Rep. 266. The ruling on this subject seems to be within this principle. Another point suggested now, as to expenses of treatment and of journey home, does not appear to have been saved at the trial, perhaps because not of much importance, and it could have been helped by amendment. Motion for new trial overruled.

ST. LOUIS & S. F. RY. CO. v. O'LOUGHLIN.

(Circuit Court of Appeals, Eighth Circuit. February 15, 1892.)

1. RAILROAD COMPANIES—KILLING STOCK—INSTRUCTION—HARMLESS ERROR.

In an action for the killing of a mule, struck by a locomotive on the prairie in broad daylight, three passengers on the train testified that they saw a bunch of mules ahead of the train; that they ran a considerable distance along the track; that the train was running at a good speed, and was not slowed up until it ran into and scattered the mules; and that it seemed as if the engineer were trying to run them down. Defendant failed to call the engineer as a witness, or to offer any evidence on this issue. *Held* harmless error to charge that the engineer was bound to use the "utmost" care, as it was evident that no care whatever was exercised.

2. INDIAN TERRITORY—LIMITATIONS—MISSOURI STATUTES.

The statutes of the territory of Missouri, including the statute of limitations, ceased to operate in the region now composing the Indian Territory when that region ceased to be a part of Missouri, and there was no statute of limitations in force in the Indian Territory from that time until May 2, 1890, when congress extended over it the statute of Arkansas.

In Error to the United States Court in the Indian Territory.

Action by John O'Loughlin against the St. Louis & San Francisco Railway Company to recover for the killing of a mule. Verdict and judgment for plaintiff. Defendant brings error. Affirmed.

E. D. Kenna and *L. F. Parker*, for plaintiff in error.

S. B. Dawes and *W. P. Thompson*, for defendant in error.

Before CALDWELL, Circuit Judge, and SHIRAS and THAYER, District Judges.

CALDWELL, Circuit Judge. This action was commenced in the United States court in the Indian Territory by O'Loughlin against the railway company, to recover damages for a mule alleged to have been killed by the negligence of the company. The defense was a general denial, and a plea of the statute of limitations of three years. The plaintiff recovered judgment below for \$241.65, and the company sued out this writ of error.

The first error assigned is that there is no evidence of negligence. There is in the record the testimony of three witnesses, who were passengers on the passenger train which struck and injured the plaintiff's mule, and from which injuries it soon thereafter died. One of these witnesses testifies that "the train was running at about its usual rate of speed. There was a bunch of mules on the prairie in front of the train, and the engineer seemed to be trying to run them down; for we were going over a rough road, and running at a good speed, as fast or faster than its usual speed on good road. There was a slough on one side of the track, and some mud holes on the other side. I saw the bunch of mules on the prairie, near the track, in front of the train. When the train run into the bunch, they scattered." The second witness testified that he "was looking out the window, and saw a bunch of mules, four or six in number, on the prairie, near the railroad, in front of the train. They started off in a run down the track, and it looked like the engineer was trying to run them down. The train run into the bunch. * * * I then

saw the gray mule in question. It was plaintiff's. The train slowed up just as it run into the bunch of mules." In answer to questions on cross-examination he said: "I thought the engineer was trying to run the mules down, because they ran some distance along by the track in front of the train, and the train did not slow up until it ran into and scattered the bunch." The third witness testified that he "saw five or six mules in the prairie, running along in front of the train. The engineer whistled and slowed up just as it scattered the mules. I then saw a gray mule getting up out of a hole of water near the engine. It looked like the engineer had knocked the mule off the track. I don't think the train slowed up until it run into the bunch of mules." All this occurred in broad daylight, on an open, level prairie. If the engineer did not see the mules under those conditions in time to avoid running into them, it was because he was not exercising that reasonable degree of care and watchfulness which the law requires of him. But it is obvious that he did see the mules, and did not exercise any degree of care to avoid injuring them. The witnesses all agree in saying that he seemed to be trying to run the mules down, and never whistled or slowed up until just as the engine struck and scattered them. This is not the case of animals suddenly and unexpectedly running across or coming upon the track. The mules were going "in a run down the track," and "ran some distance along by the track in front of the train." The engineer was not called as a witness. The defendant introduced no testimony on this issue, and no explanation was offered as to why the engineer did not stop or slacken the speed of the engine before running the mules down. The verdict was right, and was the only one the jury could have rendered upon this evidence. It is quite immaterial that the court told the jury that it was the duty of the engineer to exercise the "utmost" care to avoid killing stock on the track after he saw it. He exercised no care at all, but was guilty of a high degree of negligence. The jury must have found as they did, if they had been instructed that it was only necessary for him to exercise the slightest degree of care. No degree of care whatever was exercised, but, on the contrary, it is clear that the engineer was guilty of culpable negligence. The defendant, therefore, was not prejudiced by the error of the court in defining the degree of care which an engineer must exercise to avoid injury to stock which he sees upon the track. *Thomp. Trials*, §§ 2401-2403; *Sanger v. Flow*, 48 Fed. Rep. 152.

The court sustained a demurrer to defendant's plea to the statute of limitations of three years, and this ruling is assigned for error. The cause of action accrued in the Indian Territory in March, 1882. The learned counsel for the plaintiff in error says the plea of the statute of limitations is rested on the statute of limitations of the territory of Missouri, which, it is claimed, was in force in the Indian Territory when that country was a part of the territory of Missouri. The contention is that that statute remained in force in the Indian country, notwithstanding the separation of the territories, and the cession by the government to the Indians of the land in, and the government over, the Indian Ter-

ritory. But the contention is not tenable. More than 60 years ago the country now known as the "Indian Territory" was granted by the United States, by treaty, to the Cherokee and other nations of Indians now in that territory. The preamble to the treaty made with the Cherokee Nation on the 6th of May, 1828, declares that, it "being the anxious desire of the government of the United States to secure to the Cherokee Nation of Indians * * * a permanent home, and which shall under the most solemn guaranty of the United States be and remain theirs forever,—a home that shall never in all future time be embarrassed by having extended around it the lines, or placed over it the jurisdiction, of a territory or state, nor be pressed upon by the extension in any way of any of the limits of any existing territory or state," etc. The terms of the treaty gave effect to these expressed desires of the government. The treaty with the Choctaw Nation of September 27, 1830, is of similar import. These treaties convey the lands described in them to the Indian nations named, in fee-simple, and under their provisions the only local laws and governments that were to obtain or have any force in that country, aside from the laws of the United States, were the laws and governments of the Indian nations inhabiting it. The government bound itself in the most solemn manner to exclude white people from the territory, and never permit the laws of any state or territory to be extended over it.

It would serve no useful purpose in this case to go into the history of the government's relations to these Indians prior to the making of these treaties, and to explain why it was that the Indians demanded, and the government conceded to them, so much. The operation of the Indian laws, and the jurisdiction of Indian courts, were restricted to the Indians. The Indian laws had no operation on citizens of the United States or of the states, natural or artificial, and the Indian courts could exercise no jurisdiction over them. On the 1st day of March, 1889, congress, with the assent of the Indians, passed an act (chapter 333, p. 783, 25 U. S. St. at Large) creating a court for the Indian Territory, and conferred on it "jurisdiction in all civil cases between citizens of the United States who are residents of the Indian Territory, or between citizens of the United States, or of any state or territory therein, and any citizen of or person or persons residing or found in the Indian Territory." By the terms of the act of May 2, 1890, (section 31, c. 182, p. 94, 26 St. U. S.) the statute of limitations of the state of Arkansas was put in force in the territory. Prior to the passage of the act of 1889, there was no court in the territory in which this plaintiff could have sued the defendant. There was no court in which any civil right could be asserted or enforced; nor was there any statute upon any subject in operation in the territory, outside of the acts of congress regulating intercourse with the Indians, and punishing offenses against the United States. The laws of the territory of Missouri had no force or effect in the Indian country after that country ceased to be a part of such territory. A statute of limitations in a country without courts would be an anomaly. When the courts of a country are closed by war, the statute of limita-

tions does not run, (*Hanger v. Abbott*, 6 Wall. 532,) and *a fortiori* it does not run in a country which never had either a statute or courts. It is not claimed that the plaintiff's demand is barred or presumed to be satisfied by lapse of time at common law. The condition of affairs in that country before congress passed the act creating a court was bad enough. Those having just claims and demands against persons in the territory were remediless. They could have no redress in the courts, because there were none. It was never supposed that, while they were thus denied any tribunal in which they could assert their demands, the statute of limitations of the territory of Missouri was running against them. There was no statute of limitations in force in the territory until congress, on the 2d day of May, 1890, put in force therein the statute of limitations of the state of Arkansas, and that statute had no retrospective operation, and for that reason, doubtless, it was not pleaded. There is no error in the judgment of the court below, and it is therefore affirmed.

GOULDING *et al.* v. HAMMOND *et al.*

(Circuit Court, S. D. Georgia, E. D. January 21, 1892.)

CONTRACTS—CONSTRUCTION—MODIFICATION.

Plaintiffs having the option to require delivery any time during June-September of a cargo of phosphate rock sold by defendants, on August 21st wired defendants to "please extend time for delivery of rock until Nov. 1st," and defendants replied: "Can't you make it Dec. delivery? This preferred to Nov." Plaintiffs acknowledged the reply, saying it had been communicated to the Dublin office, and their reply would be given defendants as soon as received. Defendants at the same time wrote plaintiffs, quoting their telegram, and stating: "Of course it is understood that we will make the delivery in Nov., yet we trust, as stated, you will have it in Dec." *Held*, that defendants were entitled to conclude that plaintiffs asked for a delivery on November 1st, and not an extension of the option; and their acceptance of the change in the terms of the contract, with the letter showing their understanding of plaintiffs' request, to which plaintiffs did not reply, made a completed contract under Code Ga. § 2756, providing that, where the intentions of the parties differ, the meaning placed on the contract by one, and known to be thus misunderstood by the other at the time, shall be held to be the true meaning.

At Law. Action by W. & H. M. Goulding against Hammond Hull & Company for breach of contract. Motion to direct verdict for defendants. Granted.

Charlton & Mackall, for plaintiffs.

Denmark, Adams & Adams and *Erwin, Du Bignon & Chisholm*, for defendants.

SPEER, District Judge. The plaintiffs have brought their action to recover damages for a breach of the following contract:

"SAVANNAH, GA., 28 May, 1889.

"Sold to Messrs. W. & H. M. Goulding (T. V. Kessler, Agent) of Dublin, Ireland, for account of Messrs. Hammond, Hull & Co., a steamer cargo of kiln-dried river phosphate rock, as follows:

"Quantity: About twenty to twenty-five hundred tons, of 2,240 lbs. each, more or less.

"Price: Six dollars per ton of 2,240 lbs., delivered along-side buyers' steamer at sellers' wharf, Battery creek, near Port Royal, S. C.

"Analysis: Guaranteed fifty-five (55) per cent. of bone phosphate of lime by analysis of Prof. C. U. Shepard, of Charleston, S. C.

"Delivery: Any time during June, July, August, and or September, 1889, at buyers' option.

"Terms of Payment: Cash against documents on presentation at Baltimore, Md., or London, England, buyers' option.

"Conditions: Sworn weigher's weights and sampling at point of shipment. Due notice of charter to be given sellers soon as charter is made. Sellers to have privilege of stavedoring cargo at usual rate for such work.

"Brokerage: Payable by sellers on completion of contract at usual rate per ton.

[Signed] J. M. LANG & Co., Brokers.

[Signed] HAMMOND, HULL & Co.

"Per H. P. RICHMOND, Atty."

To which the following was added on May 31st, at the instance of Hammond, Hull & Co.:

"Steamer always afloat."

The phosphate provided for, to which the contract refers, was not delivered in accordance with the clause of the contract upon which the controversy has been occasioned, to-wit:

"Delivery: Any time during June, July, August, and or September, 1889, at buyers' option."

The plaintiffs and defendants are, respectively, firms of high business reputation, and it appears from all the evidence that the action has resulted from an honest difference with the reference to the obligations of the parties. The material evidence is all in the telegraphic and written correspondence, and the motion necessarily submits to the court for its instruction the contract thus evidenced.

There is no ambiguity whatever as to the meaning of the original contract; the plaintiffs have the option of directing the delivery of the bone phosphate at any time during the months specified. It is in evidence that the plaintiffs had great difficulty in chartering a steamer. The 21st of August had arrived. On that day they sent, and the defendants received, the following telegram:

"BALTIMORE. Hammond, Hull & Co.: Please extend time for delivery of rock until November first. Telegraph reply.

"[Sgd.]

W. & H. M. GOULDING."

The defendants replied immediately:

"W. & H. M. Goulding, Baltimore, Md.: Can't you make it December delivery? This preferred to November.

"[Sgd.]

HAMMOND, HULL & Co."

The plaintiffs' agent received the reply, and acknowledged it with thanks, stating "it had been cabled to our Dublin office," "and as soon as I receive their reply, will advise you." On the same date Hammond, Hull & Co. wrote the plaintiffs, quoting their telegram, asking that it be made December delivery, and stating further:

"We prefer December to November, and trust it may be your pleasure to make it December, thereby making the transaction agreeable to all interested. Of course, it is understood that we will make the delivery in November, yet we trust, as stated, you will have it in December."

This concluded the correspondence of the 21st of August, the day when the change in the contract was first suggested by the plaintiffs. From this it appears that whatever may have been the purpose of the plaintiffs in the use of the language "extend the time for delivery until November the first," Hammond, Hull & Co. construed it to be a request to extend the actual delivery until November 1st, and at once assented, as appeared by their letter of that date we have just read. The letter was written on the 21st, and the acceptance took effect immediately when it was sent. Code Ga. § 2728. If the proposition is made by letter, the acceptance by written reply takes effect from the time it is sent, and not from the time it is received; hence the proposer cannot withdraw in the mean time. If the letter contains alternative propositions, the party receiving may elect. See Add. Cont. par. 22; Langd. Cas. Cont. par. 4 *et seq.*; *Deshon v. Fosdick*, 1 Woods, 286. Contract is held to be complete on delivery of letter in post-office. *Bryant v. Booze*, 55 Ga. 448. But the telegram of the defendants of the 21st also conveyed to the plaintiffs that it was understood that a November delivery was asked for "Can't you make it December delivery?" they telegraphed. "This is preferred to November." The import of this manifestly is that a December delivery is preferred to a November delivery. It also appears from a certificate from the Beaufort Phosphate Company that on the 21st of August the defendants requested the company to extend the time of delivery of 2,000 or 2,500 tons of phosphate rock from September to November delivery, possibly to December delivery. This certificate was inclosed to the plaintiffs, and is evidence, along with the other correspondence. It is therefore clear that the defendants understood that the delivery asked for by the plaintiffs was on November 1st, and necessarily, from the nature of the cargo, for such other time as was necessary to load. The plaintiffs insist, however, that this was not a proper construction of their request. They merely asked, they insist, for an extension of the buyers' option until November 1st; and it may be, and indeed it is fair to conclude, that this is all the plaintiffs' agent intended. But the construction which the defendants placed upon the contract could not have been misunderstood by the plaintiffs. That the defendants did not regard the plaintiffs' telegram of the 21st as a demand for an extension of the option is now clear, and it seems equally clear that the plaintiffs perceived that the defendants, while agreeing to a November, preferred a December, delivery, and did not propose to extend the option of November, with a preference for an additional extension of the same to December. If it were otherwise, why should the plaintiffs delay acceptance, and cable the Dublin house for its assent? Why was this necessary for a mere extension of the buyers' option? It gave them greater latitude, with no possibility of injury. The letter containing this statement by the plaintiffs was written on 21st

August. Then the misunderstanding of the defendants was known to the plaintiffs, and it was the duty of the plaintiffs at once to telegraph the defendants and call their attention to their misconstruction of the plaintiffs' request. The law upon this subject is well expressed by section 2756 of the Code of Georgia:

"The intention of the parties may differ among themselves. In such case the meaning placed on the contract by one party, and known to be thus understood by the other party at the time, shall be held as the true meaning."

This we understand to be the general law of contracts. See, also, *Garrison v. U. S.*, 7 Wall. 688-692. This view of the question is, in our opinion, strengthened by the following considerations: When Goulding & Co. sent the first telegram of the 21st of August, they proposed a change in the contract,—a contract which was itself without ambiguity, and distinctly understood. The telegram was not an inquiry, as stated in one of their letters, but it was an earnest solicitation for a change of the contract. Then they were under a peculiar obligation to correct instantly, by the most expeditious method, any misapprehension of their proposal which the defendants had given. With such conditions, a failure to comply with the original contract, superinduced by the plaintiffs' original telegram by a misunderstanding of the same which it was the duty of the plaintiffs to correct, cannot, in our opinion, be a cause of action. The question is, however, by no means free from difficulty, and its determination in this manner upon a motion to direct a verdict, counsel on both sides agreeing that the decision must finally depend upon the construction of the written evidence, will enable the plaintiffs readily and speedily to have their rights again considered, which I trust may be done. At present, however, we feel obliged to direct a verdict for the defendants.

UNITED STATES *v.* DURWOOD.

(District Court, D. Washington, W. D. February 10, 1892.)

1. CUSTOMS DUTIES—VIOLATION OF LAWS—BREAKING OPEN BONDED CARS.

One who maliciously breaks into a bonded freight-car, containing merchandise in transit through the United States between two places in the British provinces, is not punishable under Rev. St. U. S. § 2998. That section is applicable only to cars *en route* between certain named ports of entry in the United States and certain other places in the United States.

2. SAME.

As Act Cong. July 28, 1866, (Rev. St. § 8005,) authorizing transportation of merchandise in bond through the United States to places in the adjacent British provinces, prescribes no penalties, no criminal prosecution can be founded upon it for breaking open a car in transit.

At Law. Prosecution of James Durwood for breaking open and entering a bonded freight-car on the Northern Pacific Railroad. Jury instructed to return a verdict of not guilty.

P. C. Sullivan, Asst. U. S. Atty.
 Garvey & Smith, for defendant.

HANFORD, District Judge. The defendant is indicted under section 2998, Rev. St., for maliciously breaking into and entering a freight-car on the Northern Pacific Railroad containing merchandise, delivered for transportation through the United States from Victoria, in British Columbia, to Montreal. It is my opinion that the statute referred to is not applicable to the case, and that the defendant cannot be punished for the acts charged against him. Section 2998 of the Revised Statutes is section 37 of the act of July 14, 1870, entitled "An act to reduce the internal taxes, and for other purposes." 16 St. p. 256. Said act provides for the transportation of imported merchandise in bond from certain named ports of entry in the United States to certain other places in the United States, but contains no provision for the transportation of bonded merchandise towards a destination in a foreign country; nor is it so related to the other statutes which are in the Revised Statutes, grouped together under the title of "The Bond and Warehouse System," as to subject a person to punishment under the penal clause for interference with merchandise in transit through the United States to a foreign destination. The law authorizing transportation through the United States of merchandise in bond *en route* to places in the adjacent British provinces (section 3005, Rev. St.) is found originally in the act of July 28, 1866, (14 St. p. 328.) No penalties are therein prescribed; therefore no criminal prosecution can be founded upon it.

The jury is instructed to render a verdict of not guilty.

OAKES v. TONSMIERRE *et al.*

(Circuit Court, S. D. Alabama. June Term, 1883.)

1. TRADE-MARKS—TRANSFER—FRAUD ON PUBLIC.

The firm of Probasco & Oakes manufactured and sold candies under the name of "Excelsior Candies," but, finding this name unsatisfactory, afterwards called their goods "Oakes' Candies." Oakes sold out to Probasco, including in the bill of sale the right to use this name. He then entered the employ of Probasco, and continued therein several years, superintending the making of the candies, during which time Probasco devised and used a trade-mark consisting of two oak trees, with the words "Oakes' Candies" printed across them. Oakes subsequently quit Probasco's service, and several years later the latter sold the business, together with the right to use the trade-mark. *Held* that, as the trade-mark was used to denote candies made by the firm and was not a guaranty that they were made by Oakes personally, the use thereof was not a fraud on the public, and the sale of the right thereto was valid.

2. SAME—BONA FIDE PURCHASER.

The bill of sale by Oakes to Probasco stipulated that the right to use the name "Oakes' Candies" should cease on a sale of the business by Probasco to a stranger, and should then revert to Oakes; but the purchaser from Probasco was not aware of this condition. *Held* that, being a *bona fide* purchaser, he was not bound thereby.

3. SAME.

As the *bona fide* purchaser had good title to the trade-mark, he could convey it to another, even though the latter had notice of the stipulation.

4. SAME—PERSONAL DESIGNATION.

The purchasers, however, had no right to use the name "Peter Oakes" in the sale of their candies, and were liable to account for the profits of such sales, even though the use was by mistake and inadvertence.

In Equity. Suit by Peter Oakes against Henry Tonsmierre and John Craft to enjoin the use of a trade-mark.

Harry Pillans and E. S. Russell, for complainant.

W. S. Lewis and Stephens Croom, for defendants.

BRUCE, District Judge. The evidence shows that Peter Oakes, complainant, and one Hiram S. Probasco, in December of the year 1865, in St. Louis, Mo., entered into a copartnership for the manufacture and sale of candies, under the firm name of Probasco & Oakes. This firm first called their candies "Excelsior Candies," but, as Probasco testified, they found this name too long, hard to be remembered, and not easily spoken by children, and they changed the name to "Oakes' Candies," "Oakes' Home-Made Candies," and "Oakes Pure Home-Made Candies." This firm of Probasco & Oakes carried on the business of making and selling candies up to May 17, 1869, when Peter Oakes, for a valuable consideration, sold out to his partner, Probasco. The bill of sale is in evidence, and, to quote the language, the transfer is of—

"All my right, interest, and estate, it being one-half, in and to the stock of candies, materials, goods, wares, and merchandise, fixtures, furniture, tools, and equipments of the firm of Probasco & Oakes; also the good-will of the business, and name of the firm of Probasco & Oakes, and the exclusive right to make and sell 'Oakes' Candy,' and to use the name thereof."

On the same date another memorandum of agreement was made, which is also in evidence, by which Oakes agreed to work for Probasco, and Probasco agreed to employ him for two years, at wages therein specified, at manufacturing home-made candies, or at any work necessary to be done or properly appertaining to the business of candy-making; and in this memorandum it is provided that—

"Should he, Probasco, sell out his said business of candy making and selling within said two years, or at any other time, then said Oakes shall be relieved from all obligations under this agreement, and the right and privilege of making and selling 'Oakes' Candies' and of using said name shall revert to said Oakes."

Probasco continued the business after the dissolution of the firm, and in addition to the word "Oakes," or the words "Oakes' Candies," in 1870 he devised a trade-mark of two oak trees, with the word "Oakes" across the branches, and the word "Candies" on a plank across the trunks of the trees; and used this trade-mark or symbol in his store, and upon labels placed upon packages and boxes of candies offered and sold in the market. He continued this business and use of the trade-mark after Oakes sold out to him, and after Oakes had quit his employment, which continued after the sale for 18 months, when Oakes left Probasco's employment, by mutual consent, as he states.

In January, 1877, over seven years after the sale from Oakes to Probasco, Probasco sold out to one W. J. Hammon, for a valuable consid-

eration, and in May afterwards transferred in writing, which is in evidence, "the trade-mark, name, good-will, and reputation connected with the manufacture, production, and sale of certain candies, * * * commonly known as 'Oakes' Candies.'" W. H. Hammon carried on the business until the 25th of March, 1878, when he sold out to H. Skinner and N. C. Skinner, who carried on business as Skinner & Co., and who constituted Tonsmierre & Craft, the defendants herein, their agents in Mobile, Ala., for the sale of Oakes' candies, made by Skinner & Co., of St. Louis, Mo. Tonsmierre & Craft received candies from Skinner & Co. of St. Louis, advertised and sold them as the genuine Oakes' candies, and their advertisement sometimes stated that the Oakes' candies were made by Skinner & Co. of St. Louis, and sometimes not, and sometimes only stated that Tonsmierre & Craft were the agents for the sale of the genuine Oakes' candies.

Complainant prays for an injunction against the defendants—

"To restrain them from selling or offering for sale * * * any kind of candies or caramels as 'Oakes' Candies,' or to use in any way the name or trade-mark of Oakes', or simulate the same in connection with the manufacturing, selling, or offering for sale * * * any candies or caramels as 'Oakes' Candies,' except such as may be manufactured by and purchased from Peter Oakes; and that Tonsmierre & Craft be ordered and decreed to account to Peter Oakes for all the profits which they have made, * * * and all the profits which Peter Oakes could or would have made, on the sales of his genuine candies and caramels; and the prayer is for general relief."

The right of the defendants to use the trade-mark in question, which combines the word or name "Oakes" with the two oak trees, and their right to represent and advertise themselves as the agents for the Oakes' candies in the market here in Mobile, depends upon the right of Skinner & Co., of St. Louis, to use this trade-mark and the name "Oakes," and their right depends upon the right of W. J. Hammon, from whom they purchased it, and their right in turn depends upon the right of Hiram S. Probasco, from whom he purchased. What right, then, had Probasco to use the trade-mark in question,—either to use the name or word "Oakes" alone, or in combination with any other mark or device, in the sale of the candies made by him? The general principle is that one man will not be permitted, by imitating the distinctive name or mark used by another person to designate articles of the latter's manufacture, to impose articles of his own manufacture on the public as the articles of the former. The cases so holding rest upon two considerations: (1) That it would be a fraud on the rights of the former person thus to permit this trade-mark to be imitated; (2) that it would be a fraud on the public. *Skinner v. Oakes*, 10 Mo. App. 45, and cases there cited. See, also, *McLean v. Fleming*, 96 U. S. 245. The courts proceed upon the twofold principle that the public have a right to know that goods which bear the signature or mark of a particular manufacturer or vendor are in fact the goods of such manufacturer or vendor, and that the manufacturer or vendor of such goods had a right to any advantage which

v.49f.no.6—29

might accrue to him from the public knowing that fact. Same authority and cases cited.

The evidence shows that Peter Oakes was a particular candy-maker, that he superintended the making of the candies of his firm during its existence; and perhaps it is only fair to infer from the testimony that he continued to do so after he sold out to his partner, and during the 18 months after the sale that he remained in his employ. It does not appear, however, that the candies made and sold by Probasco & Oakes at their place of business in St. Louis, Mo., were called "Oakes' Candies" because the man Peter Oakes made or superintended the making of them, but it is shown by the evidence that the reason why these candies were called "Oakes' Candies" was because the name was deemed by the firm a proper one to designate their candies. They were first called "Excelsior Candies," but this was a difficult name for children to speak, and "Oakes" was deemed the better name. Probasco was not a particular candy-maker, yet he was the business man of the concern, and most probably had as much or more to do with building up the reputation of the candies manufactured by this firm as had his partner, Peter Oakes. The evidence on this subject I think repels the idea that the candies of this firm were called "Oakes' Candies" because Peter Oakes manufactured them, or that the use of the name was intended to be any guaranty to the public that Peter Oakes actually manufactured or superintended the manufacture of them.

This case, then, does not fall within the rule that one man is not permitted to use the trade-mark of another, for the use of the word "Oakes" was as much the device of Probasco as it was of Peter Oakes, and the more elaborate mark of the two oak trees, with the words "Oakes' Candies," was the device of Probasco alone.

In the case of *Skinner v. Oakes*, *supra*, it is said to be settled law that the right to use a trade-mark is not a mere personal privilege, but within certain limits it is capable of being bought and sold as other property. "A trade-mark," says Justice STRONG, "like the good-will of a store or manufacturing establishment, is a subject of commerce, and it has been many times held to be entitled to protection at the suit of vendors." *Fulton v. Sellers*, 4 Brewst. 42, and other authorities. See, also, *Kidd v. Johnson*, 100 U. S. 617.

In the same case, however, (*Skinner v. Oakes*), the court proceeds: "But when the trade-mark consists of a name, how far is it capable of assignment? is a more difficult question." It is a name that we are dealing with here, and I cannot do better than to give the answer which the court gave in that case to the query which is propounded. The court said:

"We think the answer to this question depends upon the effect which the use of the name, in each particular instance, is shown to have upon the minds of the public. If it leads the public to believe the particular goods are in fact made by the person whose name is thus stamped upon them, or in whose name they are advertised, whereas they are in fact made by another

person, then such a use of the name will not be protected by the courts, for to do so would be to protect the perpetration of a fraud upon the people."

Tested by this rule, what is there to show that the use of the name or word "Oakes" by Probasco in the sale of his candies implied, or was calculated to imply, any guaranty to the public that the candies were made by Peter Oakes? While Peter Oakes was a member of the firm, it might be a reasonable inference on the part of the public that he made the candies; but after he sold out to Probasco, and after Probasco had devised and used in his business the more elaborate trade-mark of the two oak trees with the words "Oakes' Candies" upon them, and this had been continued for years after Peter Oakes had ceased all connection with the business carried on by Hiram S. Probasco, how could such use of the name "Oakes" lead the public to believe that the goods were made by the man Peter Oakes? On the contrary, it is but common experience that articles bearing a particular name are not regarded by the public as being the actual manufacture of the person whose name they bear. It may have been so originally, for it is only natural that the article should be associated with and called by the name of its first maker or vendor; but, generally speaking, unless in cases of inventions or articles produced by special skill, which are usually protected by letters patent, the public do not in fact think and are not justified in the conclusion that, because articles bear a particular name, the person of that name is in fact the manufacturer or vendor of the article. The principle contended for here by the complainant goes to the extent that Probasco, after the sale by Oakes to him, had no right to use the name of "Oakes" as a trade-mark, because by doing so he was perpetrating a fraud upon the public, holding out the idea that Oakes actually manufactured the candies which he, Probasco, made and sold, when such was not the fact. But this view of the subject cannot be maintained, and was not maintained in the case of *Probasco v. Bouyon*, 1 Mo. App. 241, in which case the court say:

"By the dissolution of the firm, and Oakes' sale to Probasco, the latter acquired the rights of his firm to the name. Oakes could so sell his name as to deprive himself of the right to use it for his own manufacture, and give that right to another."

The court in this case holds that a trade-name may be the subject of a sale; that the name of Oakes was the subject of a sale by Peter Oakes to Probasco; but the court could not so have held if the use of the name "Oakes" carried with it an assurance to the public that the man Oakes manufactured the candies, for that would have been to protect Probasco in perpetrating a fraud upon the public. So that it is clear that Probasco's right to make and sell Oakes' candies did not at all depend upon the fact that Oakes made the candies. The case falls within another principle, which is that a name may be used as a mere adjective of description or quality, which the public do not understand as any warranty that the person whose name is used is the maker of the article; and in these cases the right to use the name may be sold with the right

to manufacture and vend the goods, without reference to the question as to what person or persons actually manufacture them.

But it is claimed that, though Probasco had the right to carry on the business and use the trade-name in question, yet he had no right to sell it, because he had agreed with Oakes in 1869 that should he, Probasco, "sell out his business within two years, or at any other time, * * * then the right and privilege of making and selling Oakes' candies, and of using said name, shall revert to said Oakes." It may well be questioned if this agreement meant anything more than that, upon a sale by Probasco of his business, Oakes was then to have an equal right with Probasco's vendee to the use of the name "Oakes" in the manufacture and sale of candies; but if that admits of doubt, still can it be doubted that a subsequent purchaser for value, without notice of this private agreement between the parties, would acquire the right to use the trade mark or name here in question? Probasco was carrying on the business of manufacturing and selling candies, and advertising and designating them by a trade-mark, consisting in part of the name "Oakes," and he was in the open possession and enjoyment of this trade-mark. The great mark of ownership of personal property is possession, and contracts that the title to personal property shall be in one party and the possession in another cannot be set up to the prejudice of a *bona fide* purchaser without notice. In 1877 Probasco sold out to W. J. Hammon for \$4,000, and on May 17th executed in writing a transfer of the trade-mark, name, good-will, and reputation connected with the manufacture, production, and sale of certain candies commonly known as "Oakes' Candies." Here, then, was a sale of the business and trade-mark for value to one Hammon, who had the right to purchase, and who is not shown to have had any notice of the agreement between Oakes and Probasco, which was a private one, never placed upon record, and which, therefore, could not affect the rights of Hammon.

It is claimed that in August, after the sale to Hammon, notice was served upon both Skinner and Hammon of this agreement of Oakes and Probasco; but, even if Skinner & Co. had notice, they would be entitled to defend themselves behind Hammon's want of notice. *Sugd. Vend.* 531; *Boone v. Chiles*, 10 Pet. 177. Again, it is claimed that the case of *Skinner v. Oakes*, *supra*, shows that the complainant is entitled to recover in this suit. True, in that case the complainants failed to maintain their bill in the court of appeals of Missouri, but an examination of the opinion shows the reason for such failure. The court says:

"If we could gather from the record that the plaintiffs are the successors in business of Probasco & Oakes, that they had become the assignees, not merely of the trade-marks and tokens, but also of the establishment and the business, so that they are really carrying on the same business, and manufacturing and selling the same goods, as Probasco & Oakes, we would have no difficulty in holding that they are entitled to the relief which the court below awarded them."

In the case at bar the evidence shows that Skinner & Co. were the successors in business of Hiram S. Probasco, who succeeded the firm of Probasco & Oakes. Hammon testifies that he succeeded to the business, making no changes in the methods of manufacturing and selling the candies, and did it for a considerable time at the same shop and number in St. Louis at which Probasco had carried on the business. I see nothing unreasonable or impossible in this. If there was anything in the nature of the business of candy-making,—any art or incommunicable secret,—known only to the man Oakes, it might be said that Skinner & Co. and Hammon, and even Hiram S. Probasco, did carry on the same business and manufacture the same goods as did the firm of Probasco & Oakes. But the proof shows that the quality of the candies of Probasco & Oakes consisted not only in the skill of Oakes as a candy-maker, but in the use of fine sugars, nuts, and flavors; and the weight of the testimony is that the Oakes' candies manufactured and sold by Skinner & Co. were quite equal, if not superior, in quality to those manufactured by Peter Oakes.

The result of these views is that Skinner & Co. had a right, derived as shown in the evidence, to the use of the trade-mark in question, and that the respondents, Tonsmierre & Craft, as their agents in Mobile, had such right, and the relief prayed against them by the complainant on account of their use of the word or name "Oakes" is denied.

The use, however, of the name "Peter Oakes" stands upon different principles, and it is not claimed by counsel that they had any right to use this name, but that it was used by reason of an inadvertence or mistake, was not intentional, and, in point of fact, it was used to a very limited extent. The rule, however, is that trade-marks are protected, not exclusively on the ground of fraud, but also on the ground of property. The testimony shows that Peter Oakes is making and selling candies in his own name, and designating them in the market by the name of "Peter Oakes;" so that, if insisted upon, the case may go to a master for an account of gains and profits, on account of the unauthorized, though not intentional and fraudulent, use by respondents of the name of Peter Oakes.

LANE v. PARK *et al.*

(Circuit Court, W. D. Pennsylvania. February 11, 1892.)

1. PATENTS FOR INVENTIONS—INFRINGEMENT—PLOWS.

The claim of the patent in suit was for "the improvement herein described in the manufacture of plows and cultivators; that is to say, the making of them of metal plates, having a center layer of soft iron or steel, with exterior layers of cast-steel, substantially as and for the purposes described." Soft center steel plates themselves were old. The defendants, steel manufacturers, made the plates, and, upon orders, cut them into blanks of suitable size and shape for plow mould-boards and cultivator teeth, and sent the rough blanks to the persons ordering them, who were manufacturers of plows and cultivators. *Held*, that the defendants did not infringe.

2. SAME.

The defendants were not bound to inquire whether or not the purchasers from them were licensed by the plaintiff to use the invention, and, having done no wrong themselves, they were not answerable for the unlawful acts of others.

At Law. Action by John Lane against Sarah Park and others for infringement of a patent. Judgment for defendants.

FINDINGS OF FACT.

In pursuance of written stipulation, this case was tried by the court without the intervention of a jury. The following facts, therefore, are found by the court:

(1) On September 15, 1868, letters patent of the United States No. 82,130 were granted to the plaintiff, John Lane, for an improvement in the manufacture of plows and cultivators; the invention consisting, the specification declares, "in constructing the mould-boards and shares of metal plates, having a center layer of iron, with a layer on both exterior surfaces of cast-steel." After stating the advantages of the invention, and the method of manufacturing the compound plates, the specification closes with the following disclaimer and claim:

"Since perfecting my invention, I have learned that compound bars of iron and cast-steel, constructed in a similar manner, were described as having been invented in England for the manufacture of edge tools, and therefore I do not claim the bars themselves as my invention; but, having thus fully described my invention, what I do claim is the improvement herein described in the manufacture of plows and cultivators; that is to say, the making of them of metal plates, having a central layer of soft iron or steel, with exterior layers of cast-steel, substantially as and for the purposes described."

The letters patent are made part of this finding.

(2) On December 17, 1866, Lane filed in the patent-office an application for letters patent for an "improvement in plates used in the manufacture of plows," the described method of manufacturing the same consisting in welding two layers of soft semi-steel on a central layer of tough, fibrous iron, heating the plate thus formed, and then casting on both sides of it highly carbonized molten steel, and rolling down the ingot to the proper thickness. The claim was this:

"As a new article of manufacture, plates for manufacturing plows, composed of layers of metal of the several qualities herein specified, arranged substantially as and for the purposes described and set forth."

The application was rejected, and after amendments was again rejected, and on August 27, 1867, was withdrawn. On April 11, 1867, Lane filed an application for "an improvement in cast-steel plows," the invention consisting—

"In making the mould-boards of cast-steel plows of layers of metal of different qualities, the face or wearing surface being composed of highly carbonized cast-steel, while there is secured thereto or combined therewith, in any suitable manner, a layer or layers of iron or soft wrought steel, forming a center lining or back, which serves to toughen and strengthen the mould-boards."

The original claim of this application was:

"A plow, when the mould-board thereof is composed of cast-steel, combined in any suitable manner with a toughening layer or layers, substantially as specified, and for the purposes set forth."

This application was rejected upon references, and after repeated amendments was still rejected. In the course of the proceedings the applicant addressed a communication to the commissioner of patents, in which he stated:

"Finally, I would add my claim is for a mould-board made of steel, with iron center. I do not claim the method of making this steel, though described in the specification. It is the result only—the mould-board—that I claim; and, if necessary, I would disclaim expressly everything except that."

In another communication to the commissioner the applicant said:

"I do not claim the ingot; that is not my invention; but I do claim the final product,—the mould-board; that is my invention."

The final claim was this:

"I claim as new articles of manufacture, mould-boards for plows, when made in laminated plates, having a steel face and back, and a central toughening layer, substantially as specified."

This application was finally rejected March 23, 1868. On September 26, 1867, Lane filed a third application, being the one under which the patent in suit, No. 82,130, was granted. Originally this application was for "an improvement in the manufacture of cultivator teeth," and the material, use, and mode of manufacture were thus described:

"I take a plate of the proper thickness, and composed of a layer of cast-steel on one side and a layer of soft steel or wrought iron on the other, or of two layers of cast-steel, with the layer of soft steel or wrought iron between them, and cut it into blanks of the proper size to make the teeth, and then from these blanks I form the teeth by swaging, or in any other convenient way, and finally harden the cast-steel, if desired, in the usual manner."

The first original claim was this:

"The above-described blank for making cultivator teeth, composed of a layer or layers of cast-steel, combined with a layer or layers of wrought iron, soft steel, or other suitable toughening material."

This application having been rejected, Lane, on April 9, 1868, addressed to his attorney a letter, which was filed in the patent-office in the case, and in which he said:

"I am aware that to make plates of compound quality is not new, but I believe law will allow me the claims in some shape that will be good for a tooth of cast-steel face and back, combined with a tough layer throughout the center, hardened; the face and back being very hard, while the tough layer is soft, or softer than face and back. * * * Drop all claim to the unsharpened blank, and confine to the finished tooth; also confine, if you think best, to hardened tooth. I think best."

Lane's attorney then, on May 26, 1868, canceled the original specification and claims, and substituted the specification and claim of the patent in suit, the petition for the allowance of this change, stating that the new application was "intended to be a substitute for both the previously filed applications; that on the plows being withdrawn for the purpose of having it embodied in this case." Eventually the patent in suit was granted September 15, 1868. Exhibits A, B, and C, being copies of the file-wrappers and contents in the three above-recited applications, are made part of this finding.

(3) The manufacture by the method set forth in Lane's patent of compound or soft center steel, having a central layer of iron, with an outer layer, on each face, of cast-steel, was made known and fully described in English letters patent No. 2,033, *prout*, dated January 19, 1795, granted to Arnold Wilde, for the invention of "making and manufacturing of all sorts of plane irons, scythes, sickles, drawing-knives, hay-knives, and all other kinds of edge tools, from a preparation of cast-steel and iron, united and incorporated together by means of fire." And the use in the manufacture of plows of iron-backed steel, or two-ply compound plates, composed of an iron back and steel face, as shown by United States letters patent No. 34,262, dated January 28, 1862, granted to William Morrison, *prout*, and United States letters patent No. 47,753, dated May 16, 1865, granted to Francis F. Smith, *prout*, was old at the date of Lane's invention.

(4) In the manufacture of plows and cultivators, the old and customary method was to cut the rolled metal plates into blanks, or pieces of suitable size and shape, and these pieces were first bent into proper form, and were then tempered or hardened, and finally were ground or polished, and when finished were bolted in place. But, with the metal plates used prior to Lane's invention, the tempering or hardening process was apt to warp the pieces out of proper form.

(5) The object of Lane's invention was the production of plow mould-boards and shares and cultivator teeth, which, after being bent to the required forms, could be tempered or hardened without warping or change of form. To prevent this warping in the tempering or hardening process is the distinctive and valuable feature of Lane's invention. This he accomplishes by the use of soft center or iron center steel, as it is called, or plates formed of an iron or soft semi-steel center layer between two steel faces or outer layers. Lane's invention soon came into very general use.

(6) The plaintiff's established license fee was \$5 per ton, and the defendants' books show the exact number of tons of plow and cultivator shapes made and sold by them, as set forth in the next finding.

(7) The defendants at the times and on the occasions mentioned in the declaration, between the grant of the plaintiff's patent and the expiration thereof, were steel manufacturers at Pittsburgh, in the western district of Pennsylvania, and then and there, in the usual course of their business, manufactured and sold metal plates having a center layer of soft iron or steel with exterior layers of cast-steel, for use chiefly in the manufacture of plows and cultivators, safes, and jail-bars; and the defendants, upon the order of the purchasers, cut these plates to pattern for plow mould-boards, plow-shares, land-sides, and cultivator shovels, and also into such shapes and patterns for other purposes, as ordered by the purchasers. The blanks or pieces so cut to shape for plows and cultivators they shipped to their customers, manufacturers of plows and cultivators, in a flat, unbent, unpolished, and unhardened state.

C. C. Linthicum, S. Whipple Gehr, and George W. Acklin, for plaintiff.
W. Bakewell & Sons, for defendants.

ACHESON, Circuit Judge. Waiving the question whether the plaintiff's application of soft center steel, a material confessedly old, to the manufacture of plows and cultivators involved anything more than the exercise of good mechanical judgment, and assuming that his specification disclosed a patentable invention, we proceed at once to the question of infringement. And here we have first to notice that the claim of the patent is so awkwardly expressed as to give rise to controversy whether it is for the method of making plows and cultivators out of the described material, or for the product or manufacture made in the defined manner. The plaintiff takes the latter view, and we adopt it as the better opinion. But what, as new articles of manufacture, does the claim cover? The plaintiff contends that it embraces the flat pieces of metal plate cut to pattern by the steel manufacturer upon the order of the purchaser,—the mere blanks out of which the mould-boards and plow-shares and the cultivator teeth are made by the person ordering the material. But assuredly these blanks are not in terms within the claim, which, as we have seen, is in these words:

"The improvement herein described in the manufacture of plows and cultivators; that is to say, the making of them of metal plates, having a central layer of soft iron or steel, with exterior layers of cast-steel, substantially as and for the purposes described."

According to the letter of the claim, the pronoun "them" plainly relates to the "plows and cultivators" previously mentioned. But, if we look beyond the claim itself, into the specification, we find nothing therein to countenance the broad construction upon which the plaintiff insists. The method of cutting the steel plates in prior use into pieces of proper size and form to make the mould-boards, plow-shares, and cultivator teeth is described as old, as is also the after-treatment of these pieces, namely, the shaping, tempering, grinding, and polishing thereof. It is shown that the difficulty sought to be overcome did not arise until after the blank pieces had been bent and formed into mould-boards, plow-shares, and cultivator teeth; that it is in the still later process of

tempering or hardening these formed parts that the difficulty existed. To prevent these completely formed parts from warping during the process of tempering or hardening is the very essence of the described invention. The specification declares that "the invention consists in constructing the mould-boards and shares of metal plates, having a central layer of iron," etc. And again: "By having the steel on both sides of the iron, the mould-boards and shares, after being bent to the required form, can be tempered without warping or changing their form." By no allowable reading of the specification can the invention be held to exist in the bare metal blanks cut from the admittedly old soft center steel plates. Again, we have seen that in his second application, which became merged in his third one, the plaintiff addressed the commissioner of patents thus: "My claim is for a mould-board made of steel, with iron center. I do not claim the method of making the steel. * * * It is the result only—the mould-board—I claim; and, if necessary, I would disclaim expressly everything except that." Then he intentionally and very deliberately canceled and abandoned his claim for the blanks for making cultivator teeth. The restricted claim, as finally formulated by the plaintiff and allowed by the office, after repeated rejections of broader claims, is strictly binding upon the plaintiff, and he is precluded from insisting upon a construction which would so broaden the claim as to take in the mere flat metal blanks in their rough state. *Sargent v. Lock Co.*, 114 U. S. 63, 5 Sup. Ct. Rep. 1021; *Shepard v. Carrigan*, 116 U. S. 593, 6 Sup. Ct. Rep. 493.

But the plaintiff further contends that, if the patented invention was not embodied in the metal blanks, so as to constitute a direct infringement of the claim of the patent, still the defendants are liable, by reason of their contributory act in cutting the blanks, as joint infringers with the manufacturers, who used them in making plows and cultivators; and to sustain this position *Wallace v. Holmes*, 5 Fish. Pat. Cas. 37, is cited. But between that case and the one in hand there is no real analogy. In *Wallace v. Holmes* the defendants made and sold the completed burner, which contained the distinguishing feature of the invention, and which was entirely useless without the lamp chimney; so that, as the court said, every sale of a finished burner was a proposal to the purchaser to supply the chimney, and every purchase was a consent that this should be done. Moreover, the acts of the defendants there were clearly indicative of the intention to infringe, and actual concert with others to do so was a certain inference from the proofs. The case here is rather within the principle of the case of *Keystone Bridge Co. v. Phoenix Iron Co.*, 5 Fish. Pat. Cas. 468, where, the patent being limited to the use of the described chords in bridge structures, it was held by Judge McKENNAN that the defendants might lawfully make the chords, and were not responsible for the infringing act of the bridge builders in using them. Now, indisputably the right to manufacture soft center steel plates was open to everybody, and the mere cutting them, according to order, into convenient patterns or shapes, to suit the purposes of the plow-maker or manufacturer of the cultivators, was no encroach-

ment upon the exclusive rights of the plaintiff. The defendants were not bound to inquire whether or not the purchasers from them were licensed by the plaintiff to use the invention; and, having done no wrong themselves, they are not answerable for the unlawful acts of others.

In the facts of this case we discover no ground whatever for imputing infringement to the defendants. And now, February 11, 1892, upon the facts found, the court finds in favor of the defendants.

SCOTT v. FRASER.

(Circuit Court, D. Massachusetts. February 23, 1892.)

PATENTS FOR INVENTIONS—PRIOR ART—INFRINGEMENT—WHIP-SOCKET CLASPS.

Letters patent No. 166,724, issued August 17, 1875, to Erastus W. Scott, for an improvement in clasps for holding whip-sockets to the dashers of carriages, consist mainly "of a metallic band or screw-nut or female screw in the band, a clamp-screw, and a saddle provided with an eye to receive the band." *Held*, that in view of the prior state of the art, and the fact that all the elements of the combination are old, the patent must be strictly limited to the arrangement described, and it is not infringed by letters patent No. 423,679, issued March 18, 1890, to Daniel Fraser.

In Equity. Suit by Erastus W. Scott against Daniel Fraser for infringement of patent. Bill dismissed.

A. G. N. Vermilya, for complainant.

J. E. Abbott and E. B. Stocking, for defendant.

WEBB, District Judge. This is a suit for infringement of letters patent No. 166,724, granted to the complainant for an improvement in whip-socket clasps, dated August 17, 1875. The defense is denial of infringement, and of the validity of the patent. Complainant's specification sets out:

"The clasp in question is to encompass a whip-socket firmly, and hold it in connection with the dasher of a carriage; and it mainly consists or is composed of a metallic band or screw-nut or female screw in the band, a clamp-screw, and a saddle provided with an eye to receive the band, all as hereafter explained;"

—and continues with a description of the several parts. They are: A saddle, or seat, made concave on both its faces, to conform in a general way to the convexity of the socket and of the dash-rail, which are to rest upon it, cut out in the center, so that it bears only on the edges; at one end of the saddle is a loop or eye, by which a strap passing through it is constricted, and kept closer to the whip-socket and rail, which are of different diameters; a flexible metallic strap, long enough to extend round both socket and dash-rail, with several holes at one end, to adapt the length to different sizes, and in the other end a single hole, to allow the passage of a screw, and lips to be bent in and grasp the edges of a nut; a nut and a screw;—all which are shown in the drawings. For use,

the single hole in the strap is adjusted over the perforation of the nut, and that end of the strap is bent closely down upon two of the edges of the nut, and the lips are turned in upon the other two edges, these parts being thus held together. The other end of the strap, passing around the socket, through the loop or eye in the saddle, and up over the dash-rail, is brought to a point where the screw, passing through one of its holes and through the leather of the dasher, will enter the nut. By setting up the screw, the ends of the strap, the end of the saddle, and the leather of the dasher are gripped between the screw-head and the nut, and are firmly held. If the strap is so short that a strain upon it is necessary to bring the parts to a solid bearing, the action of the screw and nut supplies the strain, and draws it tightly about the socket and rail. As the clasp is intended to be adapted to dash-rails and sockets of any size, the number of holes in one end of the strap are designed to vary its length as may be necessary. It may easily happen that no one of these holes will be found exactly in the right place for this purpose.

There are two distinct claims in the patent, but infringement of the first only is charged. They are:

"(1) The improved whip-socket clasp, as described, viz., as composed of the metallic band, B, and the screw-nut, C, in combination with the screw, D, and the saddle, A, provided with the eye, *a*, all arranged and to operate substantially as set forth. (2) The band, B, arranged with or to clasp the nut, C, on two opposite sides thereof, and having lips, *b b*, to embrace the nut on its other two opposite sides, all as set forth."

March 18, 1890, letters patent No. 423,679 were granted to the defendant for "certain new and useful improvements in whip-socket attachments," under which he makes and sells, and asserts a right to make and sell, the article alleged to infringe the complainant's patent. There is no element in either device which was not old and familiar long before the date of the supposed invention. They were not only old, but nearly every one had been employed in earlier patents for whip-socket holders. The complainant does not pretend to any exclusive property in any one of the parts or elements of his device, but relies upon his combination of them.

Considering the previous state of the art, if any invention was required to make the combination, the patent should be construed so as to hold him very closely to the exact arrangement he has described and claimed in his application. The nut and strap, though not connected, are evidently intended to be guarded against accidental separation when not in use, and during the process of applying them. This is accomplished by the awkward method of wrapping the strap around the nut so that it can be pushed or fall out of the grasp only laterally, and by securing it against such lateral removal by bending down upon its sides the lips on the strap. But, whether connected together or detached from each other, they would operate independently of the saddle, and admit of motion towards or away from its eye or loop, so as to slacken or tighten the portion of the strap around the socket, and slip the strap easily through the

loop, without the aid of the screw. The defendant uses a saddle with a loop or eye substantially the same as the complainant's, and, like his, the loop constricts the band or strap to closer grasp of the socket. This saddle is also made with concave bearings for the socket and rail, and a portion of its middle is open. In this open portion, and opposite to the loop end, is a spur or hook. It has also a projecting horn, in which is tapped a female screw. His strap is constructed with a hole at one end and a slot at the other. The end with the hole is hooked upon the spur inside the saddle, the strap is then brought down through the bottom, carried round the socket, up through the loop or eye, and over the dasher's edge and rail. The clamping screw passes through the slot, and the leather of the dasher into the threaded hole in the horn of the saddle. The complainant regards this construction as the equivalent of his own. He especially contends that the female screw in the horn of defendant's saddle, taken with the spur on which the end of the strap is hooked, is only a mechanical equivalent for his nut. In support of this contention he refers to this language of his specification: "It mainly consists or is composed of a metallic band or screw-nut or female screw in the band." This is obscure and confused. It probably means a metallic band, with nut or female screw in the band. Even if so, the female screw in the defendant's attachment or clasp is not in the band. It is in the saddle. It cannot move the band independently of the saddle, or draw up any slack between the hooked end and the loop. Looseness on that portion of the strap can only be corrected by drawing in the other direction, through the loop, towards the head of the screw. The distance from the point of attachment on the spur to the loop is fixed and invariable. No movement of the saddle will affect the length of the band between those two points. The complainant's nut is free and movable. If the strap is so long that setting up the screw does not tighten it around socket and rail, or so short that all the parts of nut, saddle, dasher, and screw-head cannot be brought solidly together, it may be made of right length by moving the nut, which is adjustable to any required length. My conclusion is that there is no infringement, and the bill is dismissed.

DORNAN v. KEEFER.¹

(Circuit Court, E. D. Pennsylvania. January 29, 1892.)

PATENTS—SECRET INVENTIONS—DISCLOSURE.

Methods other than those stated in his specification of carrying an invention into effect are not secret inventions, such as will be protected from disclosure under Rev. St. § 4908, and interrogatories directed to disclose such methods must be answered by a patentee when relevant to the matter in controversy.

Motion to compel a patentee called as witness to answer interrogatories. Interference proceedings in United States patent-office between T. B. Dornan and William B. Keefer, the latter being the patentee of letters patent No. 443,095 for ingrain carpet fabric. Keefer had declined to describe other than by reference to his patent the method of weaving employed to produce a fabric offered in evidence as part of the proof of date of Keefer's invention. Motion granted.

Henry D. Williams and Witter & Kenyon, for the motion.

A. B. Stoughton, opposed.

BUTLER, District Judge. The court's jurisdiction is admitted by counsel; and that subject need not therefore be considered. The witness declines to answer on the ground that the questions propounded are not proper cross-examination, are irrelevant to the subject in controversy, and that they seek the disclosure of a secret discovery or invention—such as is protected by section 4908 of the Revised Statutes. Neither ground can be sustained. I need not discuss the subject. It is sufficient to say that the interrogatories seem to arise out of the examination in chief; and the information sought appears to be connected with the subject in controversy. The courts do not refuse their aid to compel answers on the ground of irrelevancy except where the answers are clearly impertinent or immaterial; it cannot be known in advance of trial whether a particular matter which seems to have even a remote connection with the general subject involved, will be relevant or not. It seems clear that the witness is not entitled to the protection of section 4908. If he has a secret which is likely to be disclosed by the inquiry, it is one involved in his patented discovery; and which he has no right, therefore, to withhold from the public. In applying for the patent it was his duty to disclose the most available method known to him of carrying the discovery into effect—in other words, of manufacturing his new fabric. This information, which may be used by others after his patent has expired, is an important part of the compensation which the public obtains for the temporary monopoly granted him. If he could withhold it, disclosing an inferior method simply, which he does not employ, the discovery would never become available public property, as the patent laws contemplate it shall. He would have a monopoly after his patent had expired, which would continue so long as he could

¹Reported by Mark Wilks Collet, Esq., of the Philadelphia bar.

conceal this material part of his discovery. I do not say that such disclosure was essential to the validity of his patent, (that question is not before me,) but that the information withheld does not constitute such a secret as the section, or equity, protects. See 1 Rob. Pat. p. 63; 2 Rob. Pat. pp. 75, 76; *Carr v. Rice*, 1 Fish. Pat. Cas. 201; *Johnson v. Root*, 2 Fish. Pat. Cas. 301. The usual order requiring the witness to answer may be prepared.

THE WEATHERBY.¹

SPRECKELS v. THE WEATHERBY.

(District Court, E. D. Pennsylvania. February 2, 1892.)

ADMIRALTY—COSTS.

Costs will not be placed on libellant, in whose favor a final decree has been made, on account of the decree not exceeding the amount which was admitted by respondent's answer, although all questions in controversy were decided in respondent's favor, and the expenses of the suit were greatly increased by the large sum originally claimed by libellant.

In Admiralty. Libel by Claus Spreckels against the steamer Weatherby. Motion by respondent to place the costs on libellant. The libel as filed claimed \$97,000, proceeds of sale of damaged cargo, damaged without fault of the ship. Respondent in answer admitted \$52,000 due, subject to deduction for general average. For this amount admitted, the final decree was made, which was opened and further reduced on account of difference in rate of exchange. See 48 Fed. Rep. 734. The expenses of suit had been greatly increased by requiring a stipulation for \$110,000, which was reduced under a survey and appraisement of the steamer to \$75,000. Motion denied.

Morton P. Henry, for libellant.

Curtis Tilton, for respondent.

BUTLER, District Judge. While the court has control over the subject of costs, and may impose them on either party, as in equity, they generally follow the event of the suit—always indeed except where something unusual appears, which renders it just to impose them on the other side. I do not find anything in this case which would justify a departure from the general rule. The suggestion that a part of them, at least, should be borne by the libellant was made at an earlier stage in the proceedings, and the subject was reserved for consideration until this time. I have considered it fully in the light of the facts invoked by the respondent's counsel, but cannot adopt his views respecting it.

¹Reported by Mark Wilks Collet, Esq., of the Philadelphia bar.

PETTIE v. BOSTON TOW-BOAT CO.

(Circuit Court of Appeals, Second Circuit. December 14, 1891.)

1. TOWAGE—LOSS OF BARGE IN TOW—INCOMPETENCE OF PILOT.

A barge, while being towed through a channel with a hawser 100 fathoms long, sheered from the course of the tug, and struck on submerged rocks, causing her to sink. The pilot of the tug was unfamiliar with the obstructions of the channel, and allowed the tug to go too far to westward of the safe course. *Held*, that the loss of the barge was properly found to be due to the negligence of the tug.

2. SAME—SALVAGE—REMISSNESS OF OWNER.

The owner of the barge gave the underwriters notice of abandonment, and that he should claim a total loss. They sent a contracting salvor to the wreck, who made an examination, to ascertain whether the barge could be raised or her cargo of coal recovered, and reported that the barge was not worth raising, and that the expense of recovering the coal would equal its value. *Held*, that the owner of the barge, in seeking to recover for her loss, was not chargeable with remissness, in making no attempt to raise the barge or save her cargo.

3. SAME—WEAKNESS OF LOST TOW—APPORTIONMENT.

There having been no concealment of the weak condition of the barge in order to induce the towage contract, and her loss having been in no wise brought about by that condition, the fact that she was too rotten about the decks to admit of her being raised did not affect the owner's right to recover; nor was respondent entitled to an apportionment of the loss on the ground that, but for the weakness of the barge, the loss would have been comparatively small.

4. SAME—FRAUDULENT OVERVALUATION—COSTS.

A libellant who is entitled to recover for the loss of a barge through the negligence of a tug having her in tow, but who, being an expert, falsely testifies as to her value, and procures other witnesses to make statements as to her value which he knows to be incorrect, for the purpose of enhancing the amount of his recovery, should be required to pay the costs of a reference to ascertain such value.

44 Fed. Rep. 382, modified.

Appeal from the District Court of the United States for the Southern District of New York.

In Admiralty. Libel by Charles A. Pettie against the Boston Tow-Boat Company to recover for the loss of a barge. Decree for libellant. Respondent appeals. Modified.

George Bethune Adams, for appellant.

Edward H. Hobbs, for appellee.

Before WALLACE and LACOMBE, Circuit Judges.

WALLACE, Circuit Judge. The barge *Richmond Talbot*, while being towed by the tug *Joseph Bartram*, on a voyage from Stonington to Boston, struck the rocks in Lloyd's channel, about three miles out from Stonington, and near the east end of Wicopesset island, and was so injured that she sank immediately. Her owner filed this libel against the respondent, the owner of the tug, to recover the value of the barge and her cargo, on the theory that the loss was the consequence of the negligent navigation of the tug. Among other things, the libel alleged that the barge was of the value of \$5,500. The answer, among other things, alleged that the accident was solely due to the carelessness of those in charge of the barge, in allowing her to sheer from the course of the tug. Upon the original hearing in the district court, the questions principally litigated were whether the tug was guilty of negligence in taking a course too near the

rocks on the westward side of the channel, and in providing too long a hawser for the proper control of the barge under the conditions of the channel and the tide, or of negligence in either respect, or whether the disaster was caused by the improper navigation on the part of the tug. There was an interlocutory decree for the libelant, and a reference to a commissioner to ascertain and report the amount of the libelant's damages. A protracted hearing took place before the commissioner, and a large amount of testimony was introduced by both parties respecting the value and condition of the barge at the time of the loss, and upon the question whether the libelant was entitled to recover the whole value of the barge and her cargo, or was negligent in not attempting to raise her or save the cargo. The libelant testified, among other things, that he knew the value of such vessels, and that her value was \$6,500 at the time she was started on the trip in question, and that just previous to going on this trip he was offered \$5,500 for her by a ship-broker in New York city, whose name he did not remember. Twelve witnesses were introduced by the libelant and thirteen by the respondent, who were examined solely on the question of the condition and value of the barge. The commissioner reported the value of the vessel at the time of her loss at \$3,000, and the value of her cargo at \$3,315.85; and that the libelant's damages were the whole value of the vessel, \$3,000, and the value of her cargo, \$3,315.85. Exceptions were filed by the respondent to this report, and upon the hearing of the exceptions the district court ruled that the libelant's damages were the whole value of vessel and cargo, although the loss was in part a consequence of the weakness and rottenness of the barge, which rendered raising her impracticable, and she was so weak and rotten about her deck and water-ways she could not lie in a moderate tide, even in mild weather, without partially breaking up. The court sustained the exception of the respondent as to the value of the vessel, and ruled that her value did not exceed the sum of \$1,750. Thereupon the respondent moved the court that the libelant be charged with the costs of the hearing before the commissioner, or some part thereof; but the court denied the motion. The final decree of the district court, thereafter entered, awarded the libelant the full amount of the value of the barge, and of her cargo and pending freight, at the time of the loss, and full costs of the action. The respondent has appealed.

The assignments of error which raise the question whether the barge was sunk by the negligence of the tug, or in consequence of her own negligence, may be disposed of briefly. We agree with the learned district judge that the tug was in fault in going so far to the westward in the channel, and bringing the barge so near the submerged rocks on which she struck; that the barge was not in fault, but was navigated with reasonable care and skill by those in charge; and that the disaster was solely attributable to the fault of the tug. The pilot, Sheffield, had never taken a tow through Lloyd's channel, had never but once gone through there with a steamer, and was not sufficiently familiar with it to undertake to navigate a tug, in an ebb-tide, having in tow a barge

drawing 19 feet of water, on a hawser 100 fathoms long. The law imposes upon the towing vessel the obligation to exercise reasonable skill and care to avoid bringing the tow into collision with a well-known obstruction, and her owner is responsible for the consequences of a disaster resulting from a want of proper knowledge of the perils of the service. When the tug has the control of the navigation of both vessels, those in charge must know the channel, the depth of the water, the currents, the tides, and the ascertained obstructions in the locality where they attempt to go. *The Lady Pike*, 21 Wall. 1; *The Margaret*, 94 U. S. 494; *The Sydney*, 27 Fed. Rep. 123. It has been sought in the present case to shift the responsibility of the tug upon the barge, upon the theory that the pilot in charge of the navigation of the tug was selected by the master of the barge. There is no merit in this contention. The master of the tug requested the master of the barge to assist him in finding a pilot to take the vessels out of Stonington, and the latter went with him to find a pilot. The master of the barge took no part in selecting the pilot, and the evidence does not reasonably indicate that he intended to assume any responsibility in that behalf, or that the master of the tug expected him to do so.

Although the barge was weak and rotten about her deck and waterways, there was no concealment of her condition as an inducement to the towage contract, and it is not shown that she was unfit for the proposed voyage. If the accident had happened in consequence of the infirmity of the barge, or if her condition had been in any respect a contributory cause,—as, for instance, if the shock would not have otherwise caused her to sink,—it might properly be urged that the damages for the loss should be divided. Upon the facts as they are, there is no room for that contention. She was laden with nearly 800 tons of coal, and was carried upon the rocks so that she struck, rebounded, and struck again, at a speed of 5 or 6 miles per hour.

Other assignments of error raise the question whether the libellant should have been allowed to recover the whole value of the barge and her cargo. It appears that he made no attempt to raise the barge or save any part of her cargo. On the day of the accident he gave notice to the underwriters of abandonment, and that he should claim a total loss under his policy, by which he was insured for \$3,000 on the barge. The next day, at the instance of the underwriters, the wreck was visited by a contracting salvor, with a diver, men, and equipment, and an examination made to see if it was practicable to raise the vessel or remove her cargo of coal. The wreckers had no facilities for raising the vessel, but were prepared to pump out the coal of which her cargo consisted. The contractor reported to the underwriters that the vessel was not worth raising, and that the cost of raising the coal would probably equal its value. There is no reason to doubt that this was an honest conclusion, based upon intelligent investigation. Upon these facts it is quite unnecessary to consider whether it was incumbent upon the libellant to endeavor to raise the vessel or save the cargo. It is undoubtedly the duty of the owner of a vessel, which has been sunk by the negligent

act of another, to endeavor to raise and repair her and save her cargo, if, under the circumstances of the case, there is a reasonable probability that he can thereby mitigate his loss. *The Baltimore*, 8 Wall. 377; *The Columbus*, 3 W. Rob. 161; *The Falcon*, 19 Wall. 75. If, under such circumstances, he does not do so, he will not be permitted to profit by his own remissness. No principle in the law of damages is better established than that indemnity does not include damages which arise in consequence of the inactivity of the complaining party. *Bagley v. Rolling-Mill Co.*, 21 Fed. Rep. 159; *Warren v. Stoddart*, 105 U. S. 224; *Wicker v. Hoppock*, 6 Wall. 94; *Taylor v. Read*, 4 Paige, 561. This principle has often been applied in admiralty, and to encourage reasonable endeavor on the part of those who have sustained loss, to mitigate the consequences, the courts have allowed to the owner of a vessel sunk in a collision the cost of raising her, besides her value before the wreck, when it was necessary to raise her to ascertain whether she was worth repairing. *The Empress Eugenie*, Lush, 138. In the present case, however, it is manifest that, if the libelant had done all in his power to minimize the loss, nothing would have been accomplished. No part of it, therefore, is attributable to his own remissness.

It has been ingeniously argued that the loss should be apportioned, because it would have been comparatively small except for the weakness of the barge. Doubtless the loss would have been less if she had been a strong vessel, strong enough to bear sinking without going to pieces. But the libelant is entitled to indemnity for his actual loss. He would not be compensated by indemnity for what he would have lost if his vessel had been more staunch or had been so strong that she would not have been wounded at all. It might as well be contended that the wrong-doer, who strikes down a cripple or runs over a woman in the family-way, is only responsible to the same extent as though he had injured a man or woman normally sound or well; or that he who sets fire to another's house is not to pay for the furniture, because, if it had been a stone house instead of a wooden one, the furniture would not have been destroyed.

The appellant insists that the libelant should not have been awarded the costs of the reference before the commissioner, and urges that he was guilty of oppressive and fraudulent conduct upon the reference. We are satisfied by a careful examination of the record that the libelant corruptly attempted, by his own testimony, and by the testimony of witnesses in his behalf, whose statements he did not himself believe to be correct, to exaggerate the value of the barge, and obtain an inordinate compensation for her loss. He was an expert, thoroughly qualified to judge of the value of such a vessel. He knew what she had actually cost, and the appraisal placed upon her for insurance just before she was lost. His own testimony was false in respect to matters as to which he could not well be mistaken. Among other statements, it was untrue that he had ever received the offer for the barge to which he had testified. His recklessness in disregarding even the appearance of candor is shown by his attempt to prove the value of the barge at

\$6,500 or \$7,000, although he had alleged it in the libel to be but \$5,500. It must be assumed for present purposes that she was worth only \$1,750. It would serve no useful purpose to enter upon any recapitulation or analysis of his testimony, and that of his witnesses, before the commissioner. It suffices to say that we are unable to consider his misstatements, and those of several of the witnesses produced by him, as venial errors which can be reconciled with integrity of purpose by attributing them to honest, but mistaken, estimates in matters of opinion. In deciding questions of costs, courts frequently apportion them so as to cause the costs of one part of the suit to fall upon one party, and those relating to another part to fall upon the other. It is the practice of courts of equity and admiralty, where the conduct of the successful party has been improper, to deny him costs, and in some cases to impose them upon him. *Harvey v. Mount*, 8 Beav. 439; *Purrow v. Rees*, 4 Beav. 25; *The Marinin*, 28 Fed. Rep. 667. If all the testimony taken before the commissioner had related only to the question of the value of the barge, we should have no hesitation in charging the libellant with the taxable costs of the respondent upon the reference. As it is, we think it just and salutary that he be disallowed his costs of the reference. We are not reviewing as an appellate court a question of discretion, but are hearing an appeal which is a new trial, and must therefore deal with questions of costs as though they were original questions. The decree is reversed, and the cause remitted, with instructions to decree in conformity with this opinion.

THE IVANHOE v. THE CUTLER.¹

THE MASCOT v. SAME.

(District Court, E. D. Pennsylvania. February 9, 1892.)

SALVAGE—PUMPING CHARGES.

An ordinary pumping charge, made by a tug for pumping out, during the time between the night and day tides, a sinking barge, that had been run up in front of the flats above Philadelphia, will be allowed when the tug could not run the barge sufficiently high on the flats for safety at the night tide, and continuous pumping by the tug was necessary to keep the barge afloat.

In Admiralty. Libel by the tugs Ivanhoe and Mascot against the barge Cutter and her cargo to recover compensation for pumping services. Decree for \$262.20.

John F. Lewis, for libelants.

J. G. Lamb and Thos. Hart, Jr., for respondent.

BUTLER, District Judge. On July 16, 1890, the respondent, while lying at Port Richmond, on the Delaware, sustained an injury, which

¹Reported by Mark Wilks Collet, Esq., of the Philadelphia bar.

produced a serious leak and subjected her to the danger of sinking. The tug *Ivanhoe*, being near by, went to her assistance, and by vigorous pumping kept her afloat. The only apparent means of saving her was by continuance of the pumping until the tide arose, and then running her on the flats, higher up the river. Later in the evening other tugs came to her aid, but she was left in charge of the *Ivanhoe*, with the understanding that the latter would put her on the flats at high tide—about midnight. When this time came, however, the *Ivanhoe* deemed it unwise if not impracticable to move her in the night without assistance. The injury was found to be so serious and the leak so great as to make it necessary to continue pumping while she was being moved. The *Ivanhoe* could not tow and pump at the same time, and no assistance was at hand. Even with assistance, however, it is doubtful whether it would have been wise to attempt placing her on the flats at night. The pumping was therefore continued until next morning by the *Ivanhoe*, when the *Mascot* came to her aid and kept it up until the tide arose in the afternoon. The barge was then run upon the flats—one of the tugs pulling and the other pumping. The charge is for the time occupied in pumping, alone, at the ordinary price per hour. The only defense stated in the answer is, in substance, that the barge should have been placed on the flats at night, and the necessity for further pumping avoided.

It is admitted as I understand, that the sum charged is not excessive, if the continued pumping until the next afternoon was necessary. It does not seem, indeed to be seriously contended that the barge could have been moved with safety earlier than she was, without assistance. I deem it entirely clear that the *Ivanhoe* alone could not have moved her; and it is doubtful whether she could have done so safely at night, even with assistance. The claim must therefore be allowed—which with interest amounts to \$262.20. A decree may be prepared accordingly.

THE JOHN KING.

HAMILTON *et al.* v. THE JOHN KING *et al.*

(*Circuit Court of Appeals, Second Circuit.* December 14, 1891.)

1. COLLISION—MUTUAL FAULT—EVIDENCE.

A propeller, when passing up North river opposite Eighteenth street, New York city, observed a ferry-boat leaving her slip at Twenty-Third street, sounded two blasts of her whistle to the ferry-boat, indicating her intention to cross the bows of the ferry-boat, as required by rule 1 of the supervising inspectors, and put her helm somewhat to the starboard, and, after running a short distance under her starboard helm, sounded two more blasts to the ferry-boat. The ferry-boat did not hear any of the signals of the propeller, the last of which was given when the vessels were about a quarter of a mile distant, and therefore did not respond to them as required by rule 2 of the inspectors, but, at the same time with the last signal of the propeller, blew one blast, indicating her purpose to pass to the right of the propeller. Neither vessel changed her course after the giving of these signals, un-

all too late to avoid a collision. *Held*, that the propriety of the course of the ferry-boat was to be determined by the rules of the navigation act, (Rev. St. U. S. § 4233,) and that having the propeller on her starboard side, and being entitled to keep her course as provided by rule 23, and the propeller being required by rule 19 to keep out of the way, the ferry-boat could not be held liable with the propeller for the collision that ensued, even if she had heard the signals of the propeller.

2. SAME—CONFLICT OF LOCAL AND FEDERAL NAVIGATION RULES.

The rule of the supervising inspectors governing navigation in New York harbor, that a steam-vessel approaching another on a crossing course, so as to endanger collision, shall signify by a blast or blasts of the whistle what course she proposes to take, cannot be held to deprive the vessel which is on the starboard side of the other of her right to keep on her course, as provided by rule 23 of the navigation act, (Rev. St. U. S. § 4233.)

3. SAME—REVERSING ENGINES—EVIDENCE.

Rule 21 of the navigation act (Rev. St. U. S. § 4233) provides that every steam-vessel approaching another so as to involve risk of collision shall slacken her speed, and, if necessary, reverse her engines. After the propeller signaled her intention to cross the bows of the ferry-boat, there was an interval of 80 seconds, during which the ferry-boat had a right to expect that the propeller would make the proper movement to avoid collision, by altering her course to starboard, in which case it would have been as dangerous to reverse as to go forward. *Held*, that the ferry-boat was not at fault for not reversing her engines until it was clear that the propeller did not intend to alter her course.

Appeal from the District Court of the United States for the Southern District of New York.

In Admiralty. Libel by David M. Hamilton and another against the ferry-boat John King and others to recover for damages to the propeller Thomas McManus, sustained in collision. Decree for libelants. Both parties appeal. *Reversed*.

Rev. St. U. S. § 4233, provides as follows:

"Rule 19. If two vessels under steam are crossing so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other."

"Rule 21. Every steam vessel, when approaching another vessel so as to involve risk of collision, shall slacken her speed, or, if necessary, stop and reverse."

"Rule 23. Where, by rules seventeen, nineteen, twenty, and twenty-two, one of two vessels shall keep out of the way, the other shall keep her course, subject to the qualifications of rule twenty-four."

Peter Cantine, for libelants.

George Bethune Adams, for claimants.

Before WALLACE and LACOMBE, Circuit Judges.

WALLACE, Circuit Judge. The merits of this cause are involved in an irreconcilable conflict of testimony, and the only facts that are conclusively established by the proofs are that on the evening of December 5, 1888, a collision took place in the Hudson river between the propeller Thomas McManus and the ferry-boat John King, both steam-vessels; that the collision took place near the middle of the river, off below Twenty-Third street, and above Twenty-First street; that the lights of each vessel were properly set and burning; that the weather was fair and the tide was at the last of the ebb; and that before the collision both vessels were going at a speed of about 12 knots,—the McManus up the river, bound for Cossackie, and the King across the river westwardly, preparatory to

turning to the southward, going from her slip at Twenty-Third street, bound for her slip in Jersey City. The trend of the river is nearly due north until within about half a mile below the place of collision; from Twenty-First street its trend for several miles is north-north-east, and the width of the river at the point of collision is about three-quarters of a mile.

The libel alleges, in substance, that while the McManus was proceeding about in the middle of the river, but heading a little to the westward, and when about opposite Twentieth street, she observed the John King leaving her slip, and thereupon blew two whistles to the ferry-boat; that the ferry-boat made no reply; that she then immediately blew two more whistles to the ferry-boat, and, receiving no reply, stopped her engines; that the ferry-boat kept on at full headway, and when near the McManus blew two whistles and starboarded her helm; that the McManus then blew three danger whistles; and that the ferry-boat kept on at full speed and struck the McManus abaft of midships on the starboard side. The answer, besides denying the averments of the libel, alleges in substance that, as the ferry-boat left her slip, several sailing-vessels and steam-vessels were proceeding up the river, along the New York shore; that somewhat astern of them, and a little further out in the river, the McManus was observed, bearing a little off her port bow; that her helm from the time of leaving her slip was kept to port in order to pass the vessels and the McManus; that thereupon she blew a single blast of her whistle to the McManus; that the McManus, instead of answering with a proper signal, commenced suddenly to sheer to port, directly across the course of the ferry-boat, and blew several blasts of her whistle; that thereupon the ferry-boat gave two whistles, starboarded her helm, and stopped and backed, but that the stern of the McManus swung rapidly towards the ferry-boat until her starboard quarter struck the stem or starboard bow of the ferry-boat.

Without attempting to review the evidence, we think the proofs show that the propeller was on the eastward of the middle of the river, and, in rounding the bend from Fourteenth to Twentieth streets, had swung somewhat to the eastward of the trend of the river; that, when she was about opposite Eighteenth street, she observed the ferry-boat just starting from her slip, and sounded two blasts of her steam-whistle to the ferry-boat, and shortly after put her helm somewhat to the starboard; that after she had run a short distance, and under her starboard helm had regained a course about north-north-east, she sounded two more blasts of her steam-whistle to the ferry-boat; that the ferry-boat did not hear either of those signals from the propeller; that there were several vessels going northward below, opposite and near the slip of the ferry-boat, and in leaving her slip she had to make a *detour* to the starboard to avoid some of them; that when she got out about 1,000 feet into the river, having cleared these vessels and straightened on her course to the westward, and somewhat southerly, she gave the propeller one blast of her steam-whistle; this signal was given at about the same time the second signal of the propeller was given, and the vessels were then about

1,200 or 1,400 feet apart; that the propeller did not hear the signal of the ferry-boat; that neither vessel changed her course after the giving of those signals until the propeller gave alarm signals, and slowed and stopped her engines; and that then the ferry-boat answered the alarm signals of the propeller, and immediately stopped, and reversed her engines and starboarded her helm, but the vessels were then so near that it was too late to avoid collision.

When the second signal of the propeller was given, she had the ferry-boat on her starboard hand, about a quarter of a mile away, and the vessels were on crossing courses, so as to involve risk of collision in case the propeller did not so govern her conduct as to avoid the ferry-boat. It was her duty, under sailing rule 19, to keep out of the way, and the duty of the ferry-boat, under rule 23, to keep her course. The red light of the ferry-boat was plainly visible to the propeller, and there was nothing in the way to prevent the latter from passing astern of the ferry-boat. She had concluded previously to pass across the bow of the ferry-boat, but had received no consent from the ferry-boat to such a course, and there was still time to abandon that purpose and go astern. The latter course was plainly safe, the former doubtful; and, quite irrespective of any rule of the supervising inspectors, common prudence required her to adopt the safe course, and pass astern. She cannot invoke the aid of any rule of the supervising inspectors to justify her departure from duty without showing that her proposition to depart was heard, understood, and accepted by the ferry-boat. If, by her signals, she invited a departure from the ordinary rules of navigation, she took the risk, both of her own whistles being heard, and in turn of hearing the response, if a response was made. *The St. John*, 7 Blatchf. 220; *The Milwaukee*, 1 Brown, Adm. 313. The propeller was clearly in fault.

The learned district judge from whose decision this appeal is brought, thought the first signal from the propeller was given when the two vessels were somewhat further apart than we find them to have been, and was given when the propeller was off about Fourteenth to Sixteenth street, as the ferry-boat was leaving her slip. He found both vessels in fault, and decreed a division of the loss; holding the propeller in fault for undertaking to go to the left, or across the bows of the ferry-boat, instead of to the right, or under her stern, as required by the rules of the supervising inspectors; and holding the ferry-boat in fault for not answering the first signal given by the propeller, or giving any timely signal herself to the propeller to denote her own intentions, as required by rules 1 and 2 of the inspectors.

As we understand the rules of the supervising inspectors, they mean to require steamers at all times, when passing or meeting at a distance within a half mile of one another, to give and answer signals by blasts of the steam-whistle to indicate what course they propose to take; and the signal which indicates a purpose to pass to the right of the other is one blast, and that which indicates a purpose to pass to the left of the other is two blasts; and, when the rules say the other steamer shall promptly answer a signal, they mean that the answer shall be one which indicates her proposed

mean that the answer shall be one which indicates her proposed course. Rule 1 prescribes that the answering steamer "shall answer promptly by a similar blast of the steam-whistle." If this means that she must give a response indicating that she will conform her movements to the proposed course of the other, we think the rule transcends the authority of the inspectors. We do not mean to be understood that the inspectors may not lawfully require a steamer to give a signal to another indicating that she observes her, and proposes to perform her duty properly in passing or meeting; but the inspectors cannot lawfully require the other steamer to assent to a departure from the statute in cases covered by the rules of navigation as enacted by congress, and the inspectors' rules are not to be construed as meaning to do so. When vessels are meeting head on, or nearly so, they are under an imperative obligation to pass to the right, by the law of congress, unless some special circumstances justify a departure pursuant to rule 24; and neither can be obliged to depart from the statute at the request of the other. So, when two steam-vessels are crossing so as to involve risk of collision, the vessel which has the other on her starboard side must keep out of the way, and the other must keep her course, unless a departure is necessary pursuant to rule 24; and the vessel which is required to keep her course cannot be compelled to depart from it at the instance of the other. The rules of navigation enacted by congress are obligatory upon vessels approaching each other from the time necessity for caution begins; and from that time, as the vessels advance, so long as the means and opportunity to avoid danger of collision remain. Until the necessity for precaution begins, obviously, there can be no fault on the part of either vessel,—rules of the inspectors to the contrary notwithstanding,—of which the other can justly complain. If a proposition is given proposing a departure by one vessel, and is consented to by the other vessel, undoubtedly the former is justified in assuming that the other understands that a departure is to be attempted, and will govern herself accordingly.

With this understanding of the inspectors' rules, we cannot see that the ferry-boat was in fault. She did not answer the first signal of the propeller, because she did not hear it; and she was excusable for not hearing it, because her attention was necessarily distracted at the time by the other vessels, which she was obliged to avoid in getting out into the river from her slip. The signal she gave to the propeller when she got out into the river was the proper signal, viz., one blast, to indicate that she proposed to keep to the right. If she had heard the second signal of the propeller, she could have done no more by way of a proper answer, and would have been under no obligation to give a different signal. This signal was given at a time when there was yet opportunity for the propeller to alter her course to starboard and pass astern. If we should assume that she heard the propeller's signal, or ought to have heard it, and should have answered it by two blasts of her whistle, we do not see how the propeller was misled by the conduct of the ferry-boat. We not think, however, that, if the ferry-boat had heard the pro-

pellor's signals, her failure to answer them would have been culpable. The case, in its legal aspects, is quite similar to that of *The B. B. Saunders*, 28 Blatchf. 383, 25 Fed. Rep. 727, in which the court used this language:

"Notwithstanding the inspectors' regulations, therefore, the pilot of the Saunders was not bound to assent to the movement proposed by the Orient unless due regard to the particular circumstances of the situation required a departure from the ordinary rule. Consequently, his failure to answer the signal of two blasts of the whistle from the Orient was not culpable, unless it was apparent that the Orient could not safely pass astern of the Saunders."

In the present case it was not apparent that the propeller could not pass astern of the ferry-boat, but it was apparent that she could do so.

Inasmuch as the ferry-boat knew that the propeller proposed to cross her bows, and that unless the latter changed that purpose the situation involved risk of collision, the question arises whether the ferry-boat should not have stopped and backed, in obedience to the requirements of rule 21. As the vessels were nearing each other at a speed of 2,500 feet a minute, there was but little if any more than 30 seconds between safety and collision after the second signal of the propeller. But there was still an interval, during which the ferry-boat had a right to expect that the propeller would make the proper maneuver to avoid her; and, as she could not know that the propeller would not alter her course to starboard, it would have been as perilous for the ferry-boat to stop and back as to proceed. We think that she properly delayed stopping and backing until it became obvious that the propeller was not going to clear her; and, in the short intervening distance, this was not obvious until the propeller gave the alarm signals, and then the ferry-boat did all that she could. The case is one for the application of the rule that a vessel which is primarily in fault for a collision cannot shift its consequences in part upon the other vessel, without clear proof of the contributing negligence or fault of the latter. Her own negligence sufficiently accounts for the disaster. *The Comet*, 9 Blatchf. 323.

There should be a reversal, and a decree dismissing the libel, with costs of the district court and of this appeal to be paid by the libelants. The cause is remanded, with instructions accordingly.

THE C. R. STONE.¹

NEW YORK HARBOR & TOW-BOAT CO. v. THE C. R. STONE.

(District Court, E. D. New York. February 18, 1892.)

COLLISION—BATTERY, NEW YORK HARBOR—ROUNDING TO—INSISTENCE ON RIGHT OF WAY.

The steam-tug Stone, with a tow, was rounding the Battery from the East to the North river, keeping within 200 or 250 feet of the Battery wall. The steam-boat Fletcher had come down the North river, and was rounding to against the ebb-tide, to make her usual landing near the north end of Castle Garden dock. When the Fletcher began to turn towards the dock, she whistled twice, indicating that she would cross the Stone's bow. This signal the Stone heard, but did not heed, though her pilot knew the landing place and purpose of the Fletcher. The Fletcher repeated her signal, to which an answer of two whistles was given by the Stone. The Stone's tow struck the stern of the Fletcher. *Held*, (1) that the Fletcher had the right to make her landing, and the Stone, navigating unnecessarily near the shore, was bound to give way to her, when there was no difficulty in doing so, *i. e.*, by starboarding at the Fletcher's first signal, and she was in fault for not doing so; (2) the Stone was further in fault for her failure to keep any proper lookout, especially when rounding the Battery; (3) but the Fletcher had no right to run into collision for the enforcement of her right of way, and her continuing on without awaiting the Stone's acquiescence in her first signal of two whistles was a fault, which rendered her also liable for the collision.

In Admiralty. Suit by the owner of the William Fletcher to recover for damages by reason of collision between the Fletcher and a barge in tow of the tug C. R. Stone.

Wilcox, Adams & Green, for libellant.

Carpenter & Mosher, for claimants.

BROWN, District Judge. At a little after 6 o'clock in the morning on May 11, 1891, as the side-wheel emigrant steamer William Fletcher was coming down the North river and rounding to against the ebb-tide to make her usual landing near the northerly end of the Castle Garden dock, her stern was run into and damaged by a barge lashed to the port side of the steam-tug C. R. Stone, which had come out of the East river, and was keeping up along the shore at a distance of only 200 or 250 feet from the Battery wall. Before rounding and when a considerable distance from the Stone, the Fletcher gave a signal of two whistles, which was heard but not answered. The signal was repeated, to which an answer of two whistles was given by the Stone. The captain of the Fletcher testifies that being headed previously about south, he did not begin to round until the Stone's answer of two whistles was heard. The pilot of the Stone testifies that when the Fletcher's first signal was given, the Fletcher had already turned towards the Castle Garden dock, and was heading about east and was only 350 feet distant. He further says that he had not noticed the Fletcher until her first whistle was given. The libel and several witnesses state that the Fletcher began to turn after her first whistle and before her second, and of course before any answer from the Stone. But all the witnesses for the Fletcher estimate that the dis-

¹Reported by Edward G. Benedict, Esq., of the New York bar.

tance of the Stone at the time of the first and second signals was much greater than the estimates of the Stone's witnesses.

I am satisfied that both vessels must be held in fault for this collision. It is in the main like the case of *The Susquehanna*, 35 Fed. Rep. 325. When the Fletcher gave her first signal and began to turn towards her landing place, she was about twice as far from the docks as the Stone. Her signal was heard. There was then plenty of time and space for the Stone to go out of the way to the left, as it was her duty to do under the circumstances. Had the Stone then properly starboarded, the collision would have been avoided. The Stone was navigating close to the docks, where she had no right to be. The Fletcher, which was recognized by the Stone, and whose landing place and habits were well known to her, had the right of way to make her landing directly, without any unnecessary delay for the mere convenience of the Stone, since the latter could without difficulty have kept away. The rights of the two vessels were different from those arising on merely passing each other in ordinary navigation. The Fletcher had the right to make her landing; and the Stone, navigating unnecessarily near the shore, was bound to give way to her when there was no difficulty in doing so. In *The Susquehanna*, *supra*, BENEDICT, J., says: "The position of the ferry-boat with relation to the ferry-slip in my opinion cast upon the tug the duty to stop at once, or else, by sheering out in her proper place in the river, to go under the ferry-boat's stern." The Fletcher's first signal of two whistles was not a permission asked to go ahead of the Stone, but notice of a right claimed, and the Stone was bound to heed it and to keep off, if the notice was given in time, and of that I have no doubt. The Stone was in fault for her delay in doing so. The cases cited to the opposite seem to me not applicable. In *The Delaware*, 6 Fed. Rep. 195, the tug could not keep away after the signal was given. In *The Talisman*, 36 Fed. Rep. 600, the tug was from two to three times as far from shore, and had at first no reason to suppose the steamer meant to cross, and stopped as soon as she had notice of that intent.

But the Fletcher had no right to run into collision for the enforcement of her right of way. The course of the Stone was such that collision was pretty certain, unless the Stone acquiesced in the Fletcher's signal and maneuvered accordingly. I am satisfied that the Fletcher did not wait till after the Stone's acquiescence in her second signal, but turned to cross the Stone's bow at once, and continued on till her second signal of two whistles, when it was in fact too late to avoid a collision with the Stone, or else with the vessels moored at the dock. For this the Fletcher was also in fault. *The Susquehanna*, *supra*; *The Fanwood*, 28 Fed. Rep. 373; *The Frisia*, Id. 249, 24 Blatchf. 40; *The John S. Darcy*, 29 Fed. Rep. 644, 648, affirmed, 38 Fed. Rep. 619.

The Stone was further to blame for not keeping any proper lookout, the more especially amid the liabilities to collision in rounding the Battery. This was material because it led the Stone to fatal delay in starboarded. Had a proper lookout been kept by the Stone, the Fletcher's intention to land would have been instantly recognized when her first

signal was given, and no delay would have arisen in properly starboarding at once, instead of waiting for a repetition of the Fletcher's signal; and this would have avoided collision. The libelant is entitled to a decree for half his damages; if not agreed upon, a reference may be taken.

THE VOLUNTEER.

THE SYRACUSE.

McCLELLAN v. THE VOLUNTEER AND THE SYRACUSE.

(District Court, S. D. New York. February 2, 1892.)

1. COLLISION—HELL GATE—STEAMER'S DUTY TO SHEER IN ACCORDANCE WITH SIGNALS—TIDE.

When vessels are approaching in Hell Gate, and signals have been exchanged, it is their duty to sheer to one side or another, in accordance with such whistles. This rule is especially obligatory on a vessel meeting another which is coming with a strong tide.

2. SAME—STATEMENT OF CASE—CROSSING BOWS.

The tug Volunteer, coming from the Harlem river with a car-float, and bound down the easterly channel past Blackwell's island, saw below Horn's Hook the tug Syracuse, with libelant's canal-boat, approaching in the strong flood-tide. The Volunteer blew two whistles, indicating that she would pass ahead of the Syracuse, and then pursued very nearly her usual course down the channel. The Syracuse answered with two whistles, and drew in close to the New York shore. The Volunteer kept very near to the point of the Hook, and owing to her miscalculation as to the speed of the approach of the Syracuse, she did not sheer to port soon enough, nor give room to the Syracuse to pass astern, and the vessels collided. *Held*, that the Volunteer, in crossing the bows of the Syracuse, took the risk of failing to sheer out in time, in accordance with her signal, and was solely responsible for the collision.

In Admiralty. Libel by William R. McClellan against the steam-tugs Volunteer and Syracuse, for the loss of the canal-boat Ethel by collision. Decree for libelant against the Volunteer, and libel dismissed as to the Syracuse.

Carpenter & Mosher, for libelant.

Hyland & Zabriskie, for the Syracuse.

Goodrich, Deady & Goodrich and *Mr. Foley*, for the Volunteer.

BROWN, District Judge. On the 19th of March, 1891, about 2:30 P. M., the tide being flood, as the steam-tug Volunteer having a car-float on her starboard side, was passing Horn's Hook in coming from the Harlem river, and intending to go down in the easterly channel past Blackwell's island, her float came in collision with the libelant's canal-boat Ethel, which was going up river in tow of the steam-tug Syracuse and on her starboard side, and the Ethel soon after sank. The libel was filed to recover the value of the canal-boat and cargo, with the personal effects of those on board.

There is considerable difference in the testimony concerning the precise place of the collision, whether immediately off Horn's Hook at

Eighty-Ninth street, or 200 or 300 feet below that point. But I think this difference is not very material. The pilot of the Volunteer saw the Syracuse quite a distance below the point, and gave her a signal of two whistles, to which the Syracuse immediately replied with two whistles. This imported that the Volunteer would go across the bow of the Syracuse. That would be pursuing her usual course towards the eastward of Blackwell's island. I have no doubt she did pursue very nearly her usual course; that she did not make any such sheer to starboard as to point towards the New York shore, but that she went very near to the shore at the point of the Hook, and that the collision was caused thereby. The evidence leaves no doubt that the Syracuse on the other hand hauled in as near as it was prudent to go to the New York shore, as it was proper she should after the signals, and that she went as near shore as the Volunteer had any right to expect her to go. The Syracuse also slowed, and soon after stopped and backed. The bow of the Ethel struck the car-float near her stern. Several witnesses for the Volunteer place her stern at the time of collision 200 feet from the shore; the witnesses for the Syracuse make her much nearer; and Hommel, an independent witness on the Three Brothers, just astern of the Volunteer, who was in the best place possible to see the position of the Volunteer, says the Volunteer was running only about 100 feet off the Hook, so that he had to change his course and back off.

Without entering further into the details of the conflicting testimony, no reason is shown on the part of the Volunteer why, after she gave her signal of two whistles and received the assenting answer of the Syracuse, which was on the Volunteer's starboard bow, she did not shape her course more to port, so as to give more room for the Syracuse to pass between her and the shore. The Syracuse was coming up with a strong flood-tide, and there was the more reason, therefore, why the Volunteer should give her sufficient room to pass, and not block her way. *The Galatea*, 92 U. S. 439. She had no right to expect the Syracuse to come to a stand-still in such a tide-way as there was there, to enable her to avoid the Volunteer, when the Volunteer, by shaping her course more to the left, could have avoided her. The Syracuse, on the other hand, did have the right to assume that the Volunteer would keep to port enough to let the Syracuse go past, as nothing prevented the Volunteer from doing so. The Volunteer, when she gave her signal of two whistles, was presumed to know what she could do, and on what to calculate; and in giving a signal of two whistles she took the risk of giving the Syracuse sufficient room to pass astern. The collision came from the miscalculation by the Volunteer as to the rapidity of the approach of the two vessels, and from her consequently going too near the point of the Hook.

I cannot find upon the evidence that the Syracuse was dilatory in backing; that is to say, that she did not reverse as soon as she had reason to suppose that the Volunteer was not shaping her course to port sufficiently and in time to allow the Syracuse room to pass. *The Greenpoint*, 31 Fed. Rep. 231; *The F. & P. M. No. 2*, 44 Fed. Rep. 701.

Judgment should, therefore, be against the Volunteer only, against which a decree for the libelant may be taken, with costs; and as respects the Syracuse, the libel is dismissed, with costs.

THE TITAN.

SANBORN v. THE TITAN.

(Circuit Court of Appeals, Second Circuit. January 18, 1892.)

COLLISION—TOW AND STEAMER.

The tug T., moving slowly, with two car-floats along-side, came round the Battery, into the East river, near the New York shore. The steam-boat F. was coming down the East river, with the tide, at a speed of 12 knots. The boats being about end on, the T. ported her wheel, and was about to signal to pass port to port, in accordance with the eighteenth rule of navigation, when the F. signaled her to pass to starboard, and shaped her own course to port. The T. immediately assented, put her wheel hard a-starboard, and stopped; but owing to her previous action, and the effect of the tide on her port bow, she continued to swing to starboard. The F. proceeded on her course to port until within 200 or 300 feet, when she repeated the signal, and altered her course still more to port, but could not do so sufficiently, and collided with the starboard tow of the T. *Held*, that in departing from the statutory rule the F. took the responsibility of passing safely to starboard, and, as the T. did all she could to comply with the signals, she was not in fault. 44 Fed. Rep. 510, affirmed.

Appeal from the Circuit Court of the United States for the Southern District of New York.

In Admiralty. Libel by Albert W. Sanborn against the steam-tug Titan and Car-Float No. 6, Starin's City, River & Harbor Transportation Company, claimant. Libel dismissed. 44 Fed. Rep. 510. Libelant appeals. Affirmed.

Sidney Chubb, for appellant.

Wm. W. Goodrich, for appellee.

Before WALLACE and LACOMBE, Circuit Judges.

WALLACE, Circuit Judge. This is an appeal from a decree dismissing the libel. The libelant seeks to recover for the injuries received by the steam-boat Frances in a collision with a car-float then in tow of the steam-tug Titan, which took place August 11, 1889, in the daytime, in the East river, off pier 3 a distance of 300 or 400 feet. The Titan, having two car-floats in tow,—one lashed on either side,—had rounded the Battery from the North river, and was proceeding to Forty-Fifth street, in the East river. She was proceeding slowly, at a distance of between 200 and 300 feet from the piers, and was about opposite pier 2, when she discovered the Frances. The Frances was bound for pier 26, North river. She had been making for the New York side of the river, and was, when about opposite pier 9 or 10, a little further out from the piers than the Titan, intending to round the Battery at a distance of about two or three hundred feet away. She was going at a speed, with the tide, of about 12 knots. Just before the collision the

Titan struck the ebb-tide of the East river, which was running strong. In rounding the Battery from the North river into the East river, after a vessel has proceeded through the eddy between the tides of the two rivers at that point, upon encountering the ebb-tide of the East river on her port bow, it swings her off to starboard, unless such a movement is counteracted by putting the vessel's wheel to starboard. When the vessels were three or four hundred yards apart the Titan had passed through the eddy, and was heading against the tide on a course about parallel with the ends of the piers; and the Frances had approached, in the mean time, somewhat nearer to the New York shore. At that time the vessels were approaching each other end on, or nearly so, and the Titan put her wheel to port. She was about to signal the Frances with one whistle, when the Frances signaled the Titan with two whistles, indicating her intention to pass the Titan and her tows starboard to starboard, and shaped her course to port. The Titan promptly answered the Frances' signal with two whistles, and hard a-starboarded her wheel, and stopped. She had swung somewhat to starboard under the influence of her port wheel, and, owing to the force of the tide on the port tow, did not recover under her starboard wheel, but kept swinging to port. The Frances proceeded on her course to port until she was within two or three hundred feet of the Titan, when it was apparent that the sheer of the Titan was so serious that a collision was imminent, whereupon the Frances signaled again with two whistles, and altered her course still more to port, but apparently could not do so sufficiently within that distance, against the ebb-tide on her port bow, to avoid collision; and the car-float, which was on the starboard side of the Titan, came in contact with the starboard side of the Frances just aft of the forward gangway.

We think there was no fault on the part of the Titan. When her wheel was put to port the vessels were approaching each other end on, or nearly so; and, under the eighteenth rule of navigation, it was the duty of the vessels to pass each other port to port. The Frances, however, desired to pass starboard to starboard. At the time her proposition to do so was made, and assented to on the part of the Titan, the vessels were sufficiently far apart to permit of their passing starboard to starboard if each of them had governed her own movements properly. The Titan did all that she could to co-operate; but the Frances, not anticipating the sheer of the Titan, did not at first alter her course sufficiently to port to make allowance for it, and, when she altered her course still more to port, it was too late. We think the Frances, in attempting to depart from the statutory rule, took the risk of her ability to pass safely on the starboard hand of the Titan. Of course, by assenting to the proposition of the Frances for a departure, the Titan undertook, on her part, to do nothing unnecessarily to embarrass the maneuver of the Frances. She fulfilled her obligation; and although, had it not been for her sheer to starboard, there would not have been a collision, she was not in fault for the sheer, because she did everything in her power to counteract it. The decree is affirmed.

In re COE et al.

(Circuit Court of Appeals, First Circuit. March 16, 1892.)

APPEALABLE ORDERS—REMANDING CAUSE—CIRCUIT COURT OF APPEALS ACT.

The provision of the judiciary act of August 13, 1888, that no appeal shall lie from an order of the circuit court remanding a cause to a state court, was not repealed by the act creating the circuit court of appeals, (26 St. at Large, p. 826,) which, in section 6, gives it jurisdiction to review all "final decisions" of the circuit courts, "unless otherwise provided by law," and in section 14 expressly repeals all acts inconsistent therewith, since such an order is not a "final decision," within the meaning of the act, and, even if it should be so considered, the act forbidding the appeal has "otherwise provided."

Petition by Ebenezer S. Coe and David Pingree for a writ of *mandamus*. Denied.

Harry G. Sargent, Oliver E. Branch, Henry Heywood, and Everett Fletcher, for petitioners.

Frank S. Streeter and Sanborn & Hardy, opposed.

Before COLT, Circuit Judge, and WEBB and CARPENTER, District Judges.

CARPENTER, District Judge. This is a petition for a writ of *mandamus* to be directed to the Hon. THOMAS L. NELSON, presiding in the circuit court for the district of New Hampshire, requiring him to allow an appeal to this court from an order remanding to the supreme court of the state of New Hampshire the bill in equity between these petitioners on the one side and the Mount Washington Railway Company and others on the other side. The appeal was disallowed, on the ground that by the judiciary act of August 13, 1888, no appeal lies from the decision of a circuit court of the United States remanding a cause removed thereto from a state court. That act provides that, "whenever any cause shall be removed from any state court into any circuit court of the United States, and the circuit court shall * * * order the same to be remanded, * * * no appeal or writ of error from the decision of the circuit court so remanding such cause shall be allowed." 25 St. at Large, p. 435. The petitioners contend that this provision is repealed by the act establishing this court, (26 St. at Large, p. 826.) That act, after defining the cases in which appeals are to be allowed to the supreme court, provides in section 6 that "the circuit courts of appeals * * * shall exercise appellate jurisdiction to review * * * final decision in the * * * existing circuit courts in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law;" and in the fourteenth section, that "all acts and parts of acts relating to appeals or writs of error inconsistent with the provisions for review by appeals or writs of error in the preceding sections five and six of this act are hereby repealed."

The petitioners argue that the decision of a circuit court remanding a cause to a state court was, at the time of the passing of the last-named act, a final decision, because it was a decision from which no appeal

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could be taken, and that, therefore, it comes within the terms of the sixth section as above quoted. They then contend that the case is not taken out of the provision of the statute by force of the words, "unless otherwise provided by law," for the reason that the section above quoted from the act of 1888 prohibits, but does not provide, an appeal. From this it follows, so the argument runs, that the act of 1888 is so far inconsistent with the sixth section of the act of 1891, and is consequently repealed by the fourteenth section of that act. There are, as it seems to us, several defects in this argument. In the first place, an order remanding a cause to a state court is not a final decision in the case, within the meaning of the act. *McLish v. Roff*, 141 U. S. 661, 12 Sup. Ct. Rep. 118; *Railway Co. v. Roberts*, 141 U. S. 690, 12 Sup. Ct. Rep. 123. Compare *Railway Co. v. Wiswall*, 23 Wall. 507; *Morey v. Lockhart*, 123 U. S. 56, 8 Sup. Ct. Rep. 65; *Railway Co. v. Thouron*, 134 U. S. 45, 10 Sup. Ct. Rep. 517. The words "final decision" cannot be held to include a remanding order,—*First*, because it is not a decision, but a "refusal to hear and decide;" and, *secondly*, because it is not final,—that is, it is not decisive of the cause. To say that it is final because no appeal could be taken from it is clearly inadmissible. If the statute were to be so read, then it would include all interlocutory decrees; and the grant of an appeal from such decrees, given by the seventh section of the act, would be superfluous. Still further, even if a remanding order be held to be included in the words "final decision," it is still within the exception of the statute. The words "otherwise provided" do not imply an affirmative provision or grant of jurisdiction. A "provision" of law may be prohibitive as well as permissive. We are therefore of opinion that there was no error in the action of the judge who disallowed the appeal, and that this petition must be dismissed.

NORTHERN PAC. R. CO. v. GLASPELL.

(Circuit Court of Appeals, Eighth Circuit. February 8, 1892.)

APPEAL TO COURT OF APPEALS—APPEAL TO SUPREME COURT PENDING.

Act Cong. March 3, 1891, while it does not confer upon one party the right to carry a cause before two appellate courts at the same time, does not confer upon him the power to defeat the right of appeal by the other party to the circuit court of appeals upon the merits, by taking an appeal or writ of error to the supreme court upon the question of the jurisdiction of the trial court; and, in case of such separate appeals, the cause will be continued in the circuit court of appeals, to await the decision of the supreme court upon the question of jurisdiction.

Error to the Circuit Court of the United States for the District of North Dakota.

Motion to dismiss writ of error for want of jurisdiction. Overruled. For former report, see 43 Fed. Rep. 900.

Edgar W. Camp and Samuel L. Glaspell, for the motion.

John C. Bullitt, Jr., W. F. Ball, and John S. Watson, opposed.

Before CALDWELL, Circuit Judge, and SHIRAS and THAYER, District Judges.

SHIRAS, District Judge. In February, 1885, Albert H. Glaspell brought an action in the district court of Stutsman county, in the then territory of Dakota, against the Northern Pacific Railroad Company, to recover the sum of \$14,000 as damages alleged to have been caused by misrepresentations in regard to the quality of certain lands sold to him by the company. Upon the admission of North Dakota as a state into the Union, the cause was transferred, at the request of the railway company, over the objection of the plaintiff, into the United States circuit court for the district of North Dakota, and, upon a trial had before the court and jury, a verdict was rendered in favor of the plaintiff for the sum of \$1,120, and on June 1, 1891, a judgment was entered upon the verdict. On June 16, 1891, the plaintiff, Glaspell, sued out a writ of error to the supreme court of the United States for the purpose of presenting the question of jurisdiction, his contention being that the transfer of the cause from the state to the federal court was without warrant of law. The record was duly certified and filed in that court. On the 30th day of July, 1891, the defendant company, alleging errors occurring on the trial of the case upon the merits, sued out a writ of error to this court, and in due time the record was filed with the clerk. On the 28th of January, 1892, the plaintiff, Glaspell, filed in this court a motion to dismiss the writ of error, on the ground that this court is without jurisdiction, for the reason that the action is pending before the supreme court upon the writ of error taken upon the question of jurisdiction, which was duly issued and served before the writ to this court was allowed. In support of the motion, counsel cite the case of *McLish v. Roff*, 141 U. S. 661, 12 Sup. Ct. Rep. 118, in which it is held that under the provisions of the act of congress of March 3, 1891, an appeal or writ of error upon the question of jurisdiction cannot be taken to the supreme court until after final decree or judgment in the trial court; that, when such final determination is had, then the defeated party must elect whether he will rely alone upon the question of jurisdiction, and take his appeal or writ of error to the supreme court, or carry the whole case to the court of appeals. It is clear that the supreme court had in mind, in this construction of the statute, only the question whether one party could carry a case into two appellate courts at the same time, and was not giving the rule that is to obtain when, as in the case before the court, the one party seeks an adjudication on the question of jurisdiction, and the other upon questions affecting the merits of the controversy. If it should be held that the suing out a writ of error to the supreme court upon the question of jurisdiction by the one party bars the right of the other to bring the case to this court upon the other questions involved, then it is possible to defeat in every case an appeal to this court. All that is needed is to raise, by proper plea, a question of jurisdiction, and then the party who is successful in the trial on the merits can at

once assign error on the point of jurisdiction, and thus carry the cause to the supreme court, and retain it there until the time for appeal to this court has expired, and so defeat the main purpose for which the act of March 3, 1891, was enacted. In our judgment, each party may exercise the right of appeal created by the statute.

Before the enactment of the act of March 3, 1891, in all cases coming within the jurisdiction of the supreme court, double appeals could be taken; that is to say, each party could prosecute an independent appeal or writ of error in the same cause, and the one did not defeat the other. True, the cause upon both appeals or writs would be before the same appellate court; but the fact that the case may, upon different issues, be pending before two courts at the same time, is not an insuperable objection to taking jurisdiction. Under the provisions of section 7, Act March 3, 1891, an appeal may be taken to this court from an order granting or continuing a preliminary writ of injunction, and the proceeding in other respects remains in the circuit court, which has the right to stay the cause or not, as it may deem best. In such cases the cause is pending in two courts at one and the same time, not, however, upon the same question or issue; and the taking jurisdiction by the one court of a question properly determinable by it does not necessarily bar or defeat the jurisdiction of the other court.

If the contention of the counsel for Glaspell is correct, then it would follow that, if the railway company had sued out its writ of error to this court before he had taken the case to the supreme court, his right to present the question of jurisdiction would have been lost, because the railway company does not bring up that question, and Glaspell could not have based a writ of error to this court upon that point. The act of March 3, 1891, is to be construed reasonably, and in such a manner as to secure to litigants the rights of appeal which it was clearly the purpose of the statute to confer upon them. Is it not clear if one party should bring a case into this court upon errors affecting the merits of the controversy, and, after the jurisdiction of this court had attached, the other party should sue out a writ of error to the supreme court upon the question of the jurisdiction of the trial court, that the later proceeding would not defeat the right of this court to hear, at the proper time, the errors assigned touching the merits; and, on the other hand, ought the fact that the one party had rightfully brought the case to this court on errors assigned touching the merits be allowed to defeat the right of the other party to present the question of jurisdiction to the tribunal which the statute makes the final arbiter of such questions? The act of March 3, 1891, as is expressly ruled in *McLish v. Roff*, does not confer upon one party the right to carry a cause before two appellate courts at one and the same time; neither, in our judgment, does it confer upon one party the power to defeat the right of appeal upon the merits secured by the statute, by taking an appeal or writ of error upon the point of the jurisdiction of the trial court. All practical difficulties can be avoided by giving to each party the right to appeal to the court having the jurisdiction of the question or questions he desires to have reviewed; but

when the appeals have each been perfected, and the rights of each litigant have in this respect been secured, then it will be for this court to determine whether it will allow a hearing before it until the question of jurisdiction has been adjudicated by the supreme court.

Entertaining these views, we hold that this court is not without jurisdiction in the case, and the motion to dismiss is therefore overruled, at cost of the defendant in error, and the cause will be continued awaiting the decision of the supreme court upon the question of jurisdiction.

SARGENT v. KINDRED, (two cases.)

(*Circuit Court, D. North Dakota. March 8, 1892.*)

1. ADMISSION OF TERRITORIES—TRANSFER OF CAUSES.

The proviso to the enabling act of February 23, 1889, (25 St. c. 180, § 23,) admitting North Dakota, South Dakota, Montana, and Washington into the Union, that transfers of actions pending in the territorial courts shall not be made to the federal courts except upon written request of one of the parties filed in the proper court, and, in the absence of such request, such cases shall be proceeded with in the proper state court, was intended to permit parties to proceed in the state courts in all cases where such courts have concurrent jurisdiction, unless one of the parties invoked the jurisdiction of the federal courts in cases of a federal character.

2. SAME—APPLICATION.

The "proper court" in which to file a request for a transfer is the court where the files and records of the case are found at the time the request is to be filed.

3. SAME—TIME OF MAKING.

The request for a transfer cannot be filed at any time before trial, but must be made before the party making the request has voluntarily and actively invoked the jurisdiction of the state court. Defendant, by submitting to the state court a motion for continuance, and an order setting the cause for trial at a following term, loses his right of transfer.

At Law. Two actions. Motion to remand. Granted.

W. F. Ball, for plaintiff.

Seth Newman, for defendant.

Before THOMAS, District Judge.

THOMAS, District Judge. At the time the state of North Dakota was admitted into the Union, on the 2d day of November, 1889, these two actions at law were pending and at issue between the above-named parties in the territorial district court in and for Cass county, D. T. Both actions were regularly upon the jury calendar for trial in the state court. The district court in and for Cass county, state of North Dakota, became the successor of said territorial court for the trial and determination of such cases as were properly transferable to that court by operation of law. From the transcript of these cases, filed in this court, it appears that both of the cases were properly upon the jury calendar for trial in the state court after the admission of the state, and that at the June term of the state court for 1890 the defendant made a motion in each case, based upon affidavits, for continuance over that and to the

next succeeding term. It is admitted that the motions were resisted by the plaintiff, but notwithstanding the court granted the motions, and ordered each case to stand on the peremptory call on the first day of the next term. It also appears that at the next term, and before the commencement of the trial, in each case, the defendant filed in open court a request in writing, in due form, for a transfer of said cases to this court, a transcript of the record in each case having been filed in this court, showing that at the time of the commencement of these actions the plaintiff was a citizen of the state of Illinois, and at the time of the filing of said request by the defendant was a citizen of Illinois; that the defendant, Charles F. Kindred, at the time of the commencement of these actions, was a citizen of the state of Minnesota, and at the time of filing the request was a citizen of the state of Pennsylvania; and that the matter in dispute in each case exceeds the sum of \$2,000, as required by statute. The plaintiff now moves to remand the cases to the state court, for the reason that this court has no jurisdiction of the actions, or either of them.

The determination of this matter involves the construction of section 23, c. 180, of the act of congress approved February 22, 1889, entitled:

"An act to provide for the division of Dakota into two states; to enable the people of North Dakota, South Dakota, Montana, and Washington to form constitutions and state governments, and to be admitted into the Union on an equal footing with the original states; and to make donations of public lands to such states."

Section 21 of said act provides for the creation and organization of the district and circuit courts of the United States, and confers upon said courts, and the judges thereof, respectively, the same powers and jurisdiction as are possessed by the circuit and district courts and the judges of the United States courts. Section 22 provides for the disposition of cases pending on appeal or writ of error in the supreme court of the United States and in the supreme court of the territory, and for the prosecution of appeals and writs of error from judgments of the supreme court of the territory rendered prior to the admission of the state. Section 23 provides that the circuit and district courts of the United States, respectively, shall be the successors of the supreme court and district courts of the territory in all cases, proceedings, and matters pending in the supreme or district courts of the territory at the time of the admission of the state into the Union, and arising within the limits of said state, whereof said United States courts might have had jurisdiction under the laws of the United States, had such courts existed at the time of the commencement of such cases. It also provides, in the second clause of said section 23, that the courts created by the state of North Dakota shall be the successors of the supreme and district territorial courts in respect to all other cases, proceedings, and matters pending in the supreme or district courts of the territory at the time of the admission of the state, and arising within the limits of said proposed state. It also provides that all files, records, indictments, and proceedings relative to any such case shall be transferred to said circuit, district, and state

courts, respectively, and the same shall be proceeded with therein in due course of law. It also provides that no writ, action, indictment, case, or proceeding pending at the time of the admission of the state shall abate by such admission. Then comes the proviso, which reads as follows:

"Provided, however, that in all civil actions, cases, and proceedings in which the United States is not a party, transfers shall not be made to the circuit and district courts of the United States except upon the written request of one of the parties to such action or proceeding, filed in the proper court; and, in the absence of such request, such cases shall be proceeded with in the proper state court."

This proviso is peculiar to this enabling act. I do not find it, or a similar provision, in any other enabling act. In order to ascertain the meaning of congress in adding this proviso, we may look to the defects, if any, in other acts, relative to the admission of states, and the remedy proposed. A late expression of the law of congress relating to the disposition of pending cases in territorial courts, on the admission of the territory into the Union, is found in the act of congress of June 26, 1876, in respect to the administration of justice in Colorado. 19 St. p. 61. That act was the most perfect and specific, relating to the disposition of pending cases, of any that had been passed by congress up to that time. The enabling act for the admission of this state, with the other states named therein, relative to the administration of justice and the disposition of pending cases at the time of the admission of the state, is modeled after the Colorado act of June 26, 1876, but is more specific in its terms. Section 8 of the Colorado act was specific as to the disposition of cases of a federal character, and is substantially the same as the first clause of our section 23. Upon a careful reading of our section 23, it will be found that section 8 of the Colorado act is embodied in it, in terms, and in addition specific provision is made in said section 23 for the disposition of cases not of a federal character, and also specific provisions for the purpose of preventing the abatement of any writ, action, indictment, case, or proceeding at the time of admission. Nothing in section 23 of our act, down to the proviso, is left for construction, as was the case in the Colorado act relative to cases not of a federal character, and the survival of actions. Section 23, together with sections 21 and 22, embodies all of the provisions of the Colorado act of June 26, 1876, and expresses in clear terms provisions relative to pending cases not of a federal character, which seem to have been implied and left to the construction of the courts in the Colorado and prior enabling acts. *Benner v. Porter*, 9 How. 235; *Ames v. Railway Co.*, 4 Dill. 252.

What was the purpose of congress in adding to section 23 the proviso above quoted? By the Colorado act of June 26, 1876, all cases of a federal character were at once, on the admission of the state, transferred to the United States courts. Cases of a federal character may be such by reason of parties, as where the United States or federal corporations are a party, or because they arise under the constitution or laws of the United States, or because of citizenship, without respect to subject-matter.

Ames v. Railway Co., *supra*. If the federal character of the case appeared in the pleadings or record, under the Colorado act, no discretion was left to the parties as to the tribunal to which they would submit pending cases, although both parties might desire to have their cases tried in the state court, where such court had concurrent jurisdiction with the federal courts. The purpose of congress in adding this proviso to section 23 was to remedy this defect, and to permit parties to proceed in the state courts, in all cases where such courts have concurrent jurisdiction, unless one of the parties invoked the jurisdiction of the federal courts in cases of a federal character. The fact, judicially declared, of an unconditional admission of a territory as a state, and the erection of federal courts therein, and the extension of the laws of the United States over the same, is, *ipso facto*, to extinguish the territorial government, and with it the territorial courts of the general government. *Benner v. Porter*, *supra*; *Ames v. Railway Co.*, *supra*. A provision for the transfer of pending cases in the territorial courts was therefore necessary, upon the admission of the state. Congress made such a provision in and by sections 21-23 of the enabling act for the admission of this state, and the state of North Dakota consented to receive jurisdiction of all cases of which its courts have exclusive and concurrent jurisdiction under its constitution and laws. Had this court existed at the time of the commencement of these actions, it might have had jurisdiction thereof; the plaintiff being a citizen of Illinois and the defendant then a citizen of Minnesota, the matter in dispute in each case exceeding \$2,000. *Fales v. Railway Co.*, 32 Fed. Rep. 673; *Amsinck v. Balderston*, 41 Fed. Rep. 641; *Burck v. Taylor*, 39 Fed. Rep. 581; *Kansas City & T. R. Co. v. Interstate Lumber Co.*, 37 Fed. Rep. 3. They were proper cases to transfer to this court upon the filing of a written request by either party, in due form, in the proper court.

Two questions are involved in these motions: *First*, were the requests filed in the proper court? and, *second*, were they filed in time?

As there is no express provision of the statute defining the proper court, the meaning must be determined by construction, in view of the other provisions of the statute. I am of the opinion that the "proper court" is that court where the files and records of the case are found at the time the request is to be filed; that court whose clerk has the custody of the files and records, and who can transfer the same to the federal court; and that the requests in this case were filed in the "proper court." It was evidently the intention of congress to allow either party to an action of a federal character to transfer the case to the United States court upon compliance with the statute; and it must be presumed, in the absence of any expressed intention to the contrary, that congress intended that parties should have a reasonable time and opportunity to file such requests. If a party is compelled to file such request in the territorial court, or, upon failing to do so, submit to the jurisdiction of the state court which is made the successor of the territorial court, his time is unreasonably and unnecessarily limited, whereas, if he may file his request in the state court, he is afforded a fair and reasonable time and oppor-

tunity of making his election between the state and federal courts. This view seems reasonable, and consistent with the spirit and reason of the statute, and is adopted by this court, in harmony with the implied opinion in *Ames v. Railway Co.*, *supra*, and the decisions in *Carr v. Fife*, 44 Fed. Rep. 713; *Kenyon v. Knipe*, 46 Fed. Rep. 309.

Were the requests in these cases filed in time? There is no express limitation of the time in the proviso or in the statute. The statutes relative to the removal of causes from the state courts are not applicable to this class of transfers. By the enabling act the survival and disposition of all cases pending in the territorial courts were provided for. The laws of the United States were given force and effect immediately upon the admission of the state, and the federal courts created and established. By the constitution of the state of North Dakota, such courts were created and established. The laws of the territory were adopted as the laws of the state, so far as applicable, and the consent of the state given to receive and accept jurisdiction of pending cases by these courts, to the extent of their jurisdiction. By the operation of law, these cases were immediately transferred to the state district court in and for Cass county; and in the absence of a request, duly filed, to transfer the same to this court, by either party, that court had jurisdiction to proceed and determine. The federal character of these cases does not appear in the pleading made and filed in the territorial court, or as they were in the state court, prior to the filing of the request to transfer to this court. But, as now appears by the transcript of the record filed in this court, they are of a federal character, and this court might have had jurisdiction thereof, if it had existed when these actions were commenced. It was proper to make clear and show by written requests, as was done in both of these cases, that they were in fact of a federal character. *Kenyon v. Knipe*, *supra*. But the question recurs, when must the request be filed? Can it be filed at any time before the trial, as contended by defendant's attorney, although the party so filing the request has, prior thereto, voluntarily and actively invoked the jurisdiction of the state court in the action? I cannot accept this contention of the learned counsel for the defendant. At the time of the admission of the state, this defendant had the right to submit to the jurisdiction of the state court, or file a proper request and have the cases transferred to this court; but he could not do both. He was then placed in a position where he must, before taking active steps in these actions, determine to which tribunal he would submit. Silence or passive inaction in such cases, for a reasonable time, perhaps, would not have estopped him; but any decisive action by which he actively invoked the jurisdiction of the state court, with knowledge of his rights and of the fact, must necessarily have determined his election to remain in and submit to the jurisdiction of that court. This well-recognized common-law principle is peculiarly applicable in the construction of the statute in question, in relation to the point here involved. The case of *Ames v. Railway Co.*, *supra*, construing the Colorado act of June 26, 1876, decided by Judge DILLON, and concurred in by Justice MILLER, is in point. On June 26, 1876, a bill was filed in the territorial court of Colorado, by

Ames et al., for the foreclosure of a mortgage and the appointment of a receiver. An answer by the defendant and a replication by the plaintiffs were also filed in the territorial court. The motion was made in the territorial court for the appointment of a receiver, which was resisted. The motion was pending and undecided when the state was admitted, on the 1st day of August, 1876, and was decided by the state court early in August, and a receiver appointed by that court. The receiver was unable to obtain possession of the property; and the state court, on application of the plaintiffs, ordered out a writ of assistance to put the receiver in possession. The pleadings did not show citizenship of the plaintiffs, and for that reason it did not appear to be a case of federal character. On October 24, 1876, the plaintiffs caused to be filed with the clerk of the state court an affidavit showing citizenship of plaintiffs, and the solicitors for plaintiffs gave notice to the clerk that the case was transferred to the federal court; and it would appear from the opinion of Judge DILLON that the files and records were transferred to the federal court. A motion to docket the case in the federal court was made before Judge DILLON. The court dismissed the motion upon the ground that the plaintiffs had, by invoking the action of the state court in obtaining an order for the appointment of a receiver, and subsequently procuring a writ of assistance, elected to remain in the state court, and that such election was irreversible. On this point Judge DILLON said:

"If the federal character of a pending cause does not thus appear, the court in which it is pending may rightfully proceed therein after the admission of the state, at least until it is shown to the court that it is one of federal cognizance. In the present cause the pleadings did not show that it was one of federal character, as there was no averment in the bill of complaint of the citizenship of plaintiffs. As the cause was in the court, and the court was in existence, and the federal character of the cause did not appear, it follows that the court had jurisdiction to act therein after the admission of the state. It is contended by the defendant company that the complainants have elected to remain in the state court, and that, having done so, they are bound thereby, in virtue of the common-law principle that an election once deliberately made is binding and irreversible. In other words, after the 1st day of August, the plaintiffs could have taken steps to show the federal character of the cause, and arrested all further action of that court. Instead of doing this, they invoked the continued exercise of the jurisdiction and powers of that court, and obtained in August an order appointing a receiver, and subsequently procured an order for a writ of assistance, which was issued. After having, with knowledge of all the facts as to jurisdiction, done this, can they afterwards change the forum? And, if so, what limitation in point of time exists, and can it be exercised down to the time of final hearing? It is my judgment, in a case whose federal character does not appear of record, that the party who, with knowledge of all the facts, wishes the case to go to the federal court, under section 8 of the act of June 26, 1876, must take his election before voluntarily invoking the action and power of the court; otherwise, he is concluded from afterwards electing to reveal its federal character, and have a transfer by virtue of the last-mentioned act. The case, by his consent and action, has become one belonging to the local court, and can only be removed therefrom, if at all, under the removal acts applicable generally to the transfer of causes from the state to the federal courts. It may be true that the plaintiff can, like other suitors elsewhere, have the benefit of the removal

acts, if he can bring his case within them; but it is not necessary to determine this point. The result of these views is that, as the plaintiffs, after the admission of the state, not only voluntarily submitted to the action of the local court, but invoked it and obtained it, they could not afterwards transfer the cause on affidavits filed with the clerk of that court, in the manner here attempted."

I am unable to distinguish this case, on principle, from the cases at bar. In that case the plaintiffs had a right to show the federal character of their case before they invoked the jurisdiction of the state court, and have the files and records transferred to the United States circuit court. But they made their election to remain in the state court, and lost the right to invoke the jurisdiction of the federal court by actively invoking the jurisdiction of the state court. If the pleadings in that case had shown that it was a case of federal character, it would have been transferred to the federal court by operation of law, but, because the pleadings failed to show the federal character of the case, it went to the state court; and Judge DILLON holds that the state court had jurisdiction of the case. If the plaintiffs in that case had shown that the case was of a federal character in the state court, before actively invoking the jurisdiction of that court, they might have had their case transferred to the federal courts; or in other words, upon showing in the state court that the case was in fact of a federal character, the case would have gone to the federal court. There is no difference in principle between that case, upon the facts disclosed, and the case at bar. Plaintiffs had an election to remain in the state court, or make a proper showing and invoke the jurisdiction of the federal court. The proviso in section 23 of our act makes specific provisions for, not only cases of that character, but of all cases where the state court has concurrent jurisdiction with the federal court; and either party may make, by virtue of that proviso, in the state court, the proper showing before actively invoking the jurisdiction of the state court, and have his case transferred to the federal court, if it is in fact of a federal character, and request the state court to transfer it to the federal court. In the case at bar the defendant had the right to make the proper showing, and file his request and have these cases transferred to this court. He elected to remain in the state court, and lost the right of transfer, by actively invoking the jurisdiction of the state court, knowing his rights and the facts, and by submitting to the state court the motions for a continuance at the June term for 1890, and submitting to the order made by that court for a continuance and the setting of the cases for trial upon the peremptory call at the following term of that court.

These views are in accord with the following decisions: *Wing v. Railway Co.*, (S. D.) 47 N. W. Rep. 530; *Murray v. Mining Co.*, 45 Fed. Rep. 387.

It follows that both of these cases must be remanded to the state court; and it is accordingly so ordered.

HINCHMAN v. KELLEY *et al.*

(Circuit Court, D. Washington, W. D. February 16, 1892.)

EQUITY—JURISDICTION—SUIT TO DECLARE TRUST.

A suit in equity to declare a trust, not evidenced by any writing, and to establish a claim of title to land, by a vendee of the *cestui que trust* of a vendee named in an executory contract to convey the land, commenced after the death of both parties to said contract, cannot be maintained; because (1) sufficient evidence to prove the averments of the bill as to the interest of the plaintiff's grantor must necessarily be lacking; (2) equity will not aid one who buys a lawsuit on speculation.

In Equity. On demurrer to bill. Sustained.

C. S. Fogg, for plaintiff.

Gakisha Parsons and J. C. Stallcup, for defendants.

HANFORD, District Judge. I have considered the demurrer to the bill in this case, and I think it is well taken. It is difficult to determine from the bill the nature of the suit. The averments are such as are ordinarily framed to support a bill for the specific performance of a contract, or to declare the existence of a trust in regard to the ownership of property; but the prayer asks for no such relief. The prayer is appropriate to a bill of peace, or a bill to remove a cloud from the title to real estate. I am satisfied, however, upon consideration of the bill as a whole, that the complainant is not entitled to either form of relief. The prayer cannot be granted, because the bill shows affirmatively that the complainant is not the owner of the legal title to the property which is the subject of the suit. He has, therefore, no foundation for a suit in the nature of a bill of peace, and he has no title which can be clouded. Only the owner of the legal title can maintain a suit in equity for such relief, either according to the forms and rules of equity practice, or the Code procedure of this state. Formerly a suit could only be maintained by an owner who was in possession, but now, under a statute of this state, a suit to determine adverse claims to real estate can be maintained if the property is not in the possession of any one; but the plaintiff, to have a standing in court, must show that he has a legal title to the property. This bill sets forth as the foundation of the right which the complainant claims an executory contract for the conveyance of the title to certain real estate, made in 1872, which contract was never performed. The vendor in the case has since died; the persons whom the bill alleges were the real owners of the property, and for whom the vendor in the contract was a mere trustee with power to sell, have died; and the vendee named in the contract has died. It is claimed that this vendee was also but an agent and trustee for another party. There is in the bill no averment that any of the persons interested, while living, gave any information as to the existence of this secret trust, or did any act to perpetuate evidence of the existence of such a trust; and it is only a vendee of the *cestui que trust*, who now appears as complainant, asking to have the trust declared,—a trust that is not evidenced by any writing, and which could

only have been known at the time of its creation to persons who are now dead. I think it is impossible to prove the averments of this bill by any legal evidence, and on that ground the suit must fail. I hold also that the court ought not to hear a party who comes before it as a purchaser of a mere right to sue. The purchaser of a legal right may by his purchase become entitled to protection and aid from a court of law, and, if entitled to it, he can obtain appropriate relief in a court of law; but courts of equity will render no assistance to any scheme of speculation depending for success upon its determination of any controversy. In other words, equity will not aid the purchaser of a lawsuit in an endeavor to derive profit from such an investment.

GASQUET v. CRESCENT CITY BREWING Co.

(Circuit Court, E. D. Louisiana. February 5, 1892.)

1. MASTER'S REPORT—TIME OF FILING.

The term "month," as used in equity rule 83, giving one month from the time of filing a master's report to file exceptions thereto, means a calendar, and not a lunar, month; therefore, where the report is filed on May 28th, a confirmatory order, made June 28th, is premature.

2. SAME—WITHDRAWAL OF EXCEPTIONS—CONFIRMATION.

The formal withdrawal by an exceptor of an exception to a master's report on the order-book and in a paper filed by the exceptor in the cause is a sufficient withdrawal of the exception, although no order of discontinuance is allowed by court, and the report will stand confirmed, under equity rule 83, after the lapse of time fixed therein.

3. MASTER'S REPORT—EXCEPTIONS—CONFIRMATION.

Where a receiver, not in his capacity as trustee, but for himself, and against the trust-estate, provokes, adversely to all others in interest, a contest, by presenting to the court a claim for compensation, and the matter is referred to a master, his report, so far as exception thereto is concerned, falls within equity rule 83, providing that the report shall stand confirmed on the next rule-day after a month has expired without the filing of exceptions; and equity will not hear exceptions made thereafter, unless the party was prevented from making them in time through accident, surprise, mistake, or fraud.

In Equity. On exceptions to master's report.

Richard De Gray and F. B. Thomas, for petitioners.

E. Howard McCaleb and Frank L. Richardson, for respondent.

BILLINGS, District Judge. The court allows the amended and enlarged statement of the testimony to be filed, for the filing of which leave was asked by the solicitors of the petitioners. Indeed, it may be doubted whether the practice in this district, under rule of May 22, 1880, whereby it is required that each party shall file a note of evidence, giving by specific reference all the testimony which is relied upon, does not do away with the objection for want of fullness of reference to the testimony which, in districts where that rule does not obtain, would be good.

As to the meaning of the term "month" in rule 83, I think it is a calendar, and not a lunar, month. It would, therefore, follow that, as

the report was filed on May 28th, and the order confirming the report was made on June 28th, the confirmatory order was premature.

The exception of Bailey was in time. Although no order of court was entered allowing a discontinuance, I think his formal withdrawal of it on the order-book and in a paper filed by him in the cause was enough to cause it to be held as withdrawn by him. As an exception it had ceased to exist in the cause. When, therefore, the successive rule-days after that of August and before that of February, during which month this petition was filed, occurred, the first report of the master, in the language of the rule, was as of course confirmed.

It has been suggested by the solicitor of the petitioners that the fact that the matter in dispute was a fee of the receiver would make it, under the usages of chancery, to be not operated upon by rule 83, but would leave it, notwithstanding the rule and the lapse of time, open to objection by those in interest. I do not think this view can be maintained. It is true that in the chancery practice the receiver's accounts which he has stated—that is, those which involve his receipts and expenditures as trustee—are liable to question at any time before the cause is closed by a final decree. But where, as in this case, the receiver, not in his capacity as trustee, but for himself, and against the trust-estate, provokes, adversely to all others in interest, a contest, by presenting to the court a claim for compensation, and the matter is referred to the master, who files his report, I think it is like any other matter referred to the master and reported upon; and that the report, so far as the time for exception thereto is concerned, falls within the dominion of the rule. It follows that, after the occurrence of the rule-day next following the withdrawal of the exception of Bailey, the report of the master, which had been filed on May 28th, in the language of rule 83, stood confirmed. The effect of such a state of facts, as far as relates to the cutting off of exceptions, is analogous to the effect of a judgment after the term at which it was rendered had terminated; that is, the rule, as a general canon, precludes subsequent exceptions. However, a court of equity would, while the fund is under the control of the court, still hear exceptions from those who had been prevented from making them within the time fixed by the rule through accident, surprise, mistake, or fraud. As to all others the rule is absolute. In *Foot v. Van Ranst*, 1 Hill, Eq. 185, the precise point was passed upon, and the court refused to consider exceptions, because not filed within the time of the rule, and not accompanied by proof of the facts constituting an equity which would take the case out of the rule. There the equity asserted arose from the inadvertence of the exceptor, and could have been shown by simple affidavit. Here the excuse for the delay was claimed to lie in the fraudulent devices or misrepresentations of the receiver, whereby the exceptor was misled into inaction; and therefore, upon the presentation of the petition, the court ordered full investigation before the master, who has found against the petitioners,—that is, that the allegations of fraud have not been sustained by the proofs. The correctness of this finding as presented by the exceptions will first be

considered; for, if the finding is correct, the petitioners, under the operation of rule 83, are concluded.

The charges of fraud or fraudulent practices on the part of the receiver, contained in the petition, or urged in the oral argument, may be summarized under four heads, as follows: (1) That there was a conspiracy between the receiver and the president of the board of directors of the Crescent City Brewing Company, in pursuance of which the latter gave evidence before the master in the receiver's favor, as well as omitted to oppose the receiver's claim; (2) that the receiver, through Mitchell and the other employes of the receiver, caused statements to be made to the stockholders upon the occasion of their being asked to sign a consent to convey the brewing establishment, after its sale by the receiver, to the effect that the stockholders would receive not more than 100 per cent. upon the par value of their shares; (3) that at a meeting of the directors, at which stockholders were present, the receiver stated that the charges for administration of the property in his hands, including his fees and those of the attorneys, would not exceed \$30,000; and (4) that at Baton Rouge, when waited upon by a committee of stockholders within the time allowed for filing exceptions, the receiver misled them by promises to reduce the amount of his fee as allowed by the master. As to the first charge, the master reports, and I think the solicitor for the petitioners admitted at the argument, that it was unsustained by the testimony. As to the other allegations or charges of fraud or fraudulent practices, it is the view of the master that they have not been maintained by the evidence, and in this view I concur. So far as concerns the basis of reopening the matters passed upon in the first report, the case stands thus: after the report of the master had, by virtue of its having been filed, and by the occurrence of several successive rule-days, stood confirmed, the petitioners, who are stockholders, filed a petition, in which were averred matters which, if proven, were sufficient to take the case out from the operation of rule 83, and to have entitled them, even then, to file exceptions to the report. The evidence does not sustain these grounds. The case of the petitioners is therefore decided by the rule itself. Upon general principles it is like a case of a complainant who brings a bill for relief based upon allegations of fraud. If the fraud is not proven, the jurisdiction ceases, and the relief is refused. Evidence most voluminous was taken upon the quantum or amount of fee, and the master, in connection with his report, has presented an elaborate analysis, as well as a concise summary, of the testimony upon that subject. This testimony is in the record, and can be dealt with by the appellate court in case of appeal, and in case that tribunal should take a different view of the effect of rule 83 as applied to the facts of this case. But in my opinion, upon the case as established by the evidence, the rule is a limitation which cannot be disregarded. The decree will therefore be that the petition be dismissed.

GASQUET v. CRESCENT CITY BREWING Co.

(Circuit Court, E. D. Louisiana. February 5, 1892.)

CORPORATIONS—STOCK PLEDGED BY DIRECTORS—ESTOPPEL.

Where stock is issued on the vote of directors, and used by them as a pledge to obtain a loan, the corporation is estopped from setting up that the issue of stock not paid up is prohibited by the constitution, and the holder will be entitled to the same to the extent of the loan.

In Equity. On exceptions to master's report.

W. S. Benedict and Richard De Gray, for petitioners.

E. Howard McCaleb, for respondent.

BILLINGS, District Judge. In this matter there seems to be no question as to the facts. Mrs. Graham claims 400 shares of stock in the defendant corporation under a pledge to repay a debt of \$14,000. The stock was never paid-up stock; and the charter of the corporation prohibited the issuance of stock not paid up. But the directors voted to issue the stock, and it was, with their sanction, used as a pledge to obtain these loans for the corporation from Mrs. Graham, which aggregated \$14,000. In the hands of Mr. Ames the result would have been different, but upon the grounds stated so clearly by the master, and upon the authorities cited by him, I think his conclusion is correct, to-wit, that the corporation is estopped from setting up the want of power to issue the stock; and Mrs. Ames, who has inherited the equities of Mrs. Graham, is entitled to have the pledge maintained or held as valid to the extent of the dividends upon the shares not to exceed the amount loaned. The exceptions are overruled, and the report confirmed.

UNITED STATES v. CALIFORNIA & O. LAND Co.

(Circuit Court of Appeals, Ninth Circuit. March 10, 1892.)

LAND GRANTS—CANCELLATION—FRAUD—BONA FIDE PURCHASERS.

In a suit by the United States to forfeit certain lands granted in aid of a military road, defendant claimed to be a *bona fide* purchaser under a deed which declared that the road company "does hereby alien, release, grant, bargain, sell, and convey" to the grantee, "his heirs and assigns, the undivided one-half of all the right, title, and interest" of the grantor "in and to all the lands lying and being in the state of Oregon, granted or intended to be granted to the state of Oregon by the act of congress approved July 2, 1864, * * * and granted by the state of Oregon" to the grantor by Act Or. Oct. 24, 1864; "and the undivided one-half of the right, title, and interest" of the grantor "to said grant of land under the several acts aforesaid, whether listed and approved or otherwise; also the undivided one-half of all future right, title, interest, claim, property, and demand" which the grantor "may at any time hereafter acquire to any lands by virtue of any further compliance with the requirements of said acts of congress, together with the hereditaments and appurtenances; * * * to have and to hold the lands hereby granted unto" the grantee, "his heirs and assigns forever." *Held*, that this deed shows an intent to grant the lands themselves, and not merely any interest which the grantor may

have therein; and hence that it is not a mere quitclaim, such as deprives the grantee of the right to rely upon the plea of an innocent purchase for value. HANFORD, District Judge, dissenting.

Appeal from the Circuit Court of the United States for the District of Oregon.

Suit under Act Cong. March 2, 1889, to forfeit certain lands granted to the state of Oregon by Act Cong. July 2, 1864, to aid in the construction of a military road, and by the state to the Oregon Central Military Road Company by the act of October 24, 1864.

STATEMENT BY HANFORD, DISTRICT JUDGE, (DISSENTING.)

This cause has been heard twice by the United States circuit court for the district of Oregon, and once by the supreme court of the United States. The opinions of the circuit court on the first hearing and of the supreme court, each containing a full statement of the facts and circumstances from which the case has arisen, have been published, and reference thereto is made for the purposes of this opinion, in lieu of a more extensive and detailed statement. See *U. S. v. Road Co.*, 41 Fed. Rep. 493; *U. S. v. Road Co.*, Id. 501; *U. S. v. Road Co.*, and kindred cases, 140 U. S. 599, 11 Sup. Ct. Rep. 988. After being remanded to the circuit court, the case went to trial upon issues joined by a replication to the pleas and answer of the defendant, the California & Oregon Land Company, denying the allegations of the said defendant that the several promoters and organizers of said company were *bona fide* purchasers of the land in controversy, for the full value thereof, without notice or reason to believe or suspect that there had been any fraudulent act committed or misrepresentation made affecting the title of their vendors, or that the wagon road, in aid of which the lands were granted, had not been wholly, seasonably, and properly completed in accordance with the requirements of the granting acts. The pleadings admit, but only by implication, that the wagon road was never constructed, and that the certificates given by the governor of Oregon were untrue. The only issue of fact in the case is made by the second plea, which is a negative plea, raising simply a question whether the defendant is entitled to the protection which a court of equity gives to *bona fide* purchasers of the legal title to real estate. The circuit court so construed the pleadings, and held the parties strictly within the limits of that issue in the introduction of evidence, and even made a ruling excluding all evidence offered on the part of the government to prove that the wagon road had never been constructed. Upon the final hearing the following decree was rendered by the circuit court:

"This cause was heard upon the bill, the amended pleas, and answer of the defendant, the California and Oregon Land Company, the replication thereto, the testimony and exhibits, and was argued by Mr. Franklin P. Mays, United States attorney, and Mr. Albert H. Tanner, of counsel, for the plaintiff, and Mr. Rufus Mallory, for said defendant; on consideration whereof the court finds that the certificates of the governor of Oregon, declaring the road mentioned in the bill to have been duly constructed, were truthfully made, without fraud or misrepresentation on the part of any one; and that said defend-

ant; the California and Oregon Land Company, is the purchaser of the land described in said bill from the Oregon Central Military Road Company, in good faith, for a valuable consideration, and without notice of any fraud or misrepresentation on the part of said Oregon Central Military Road Company or any one else. It is therefore ordered, adjudged, and decreed that the said plea of said defendant be, and the same is hereby, sustained, and that said bill of complaint be, and the same is hereby, dismissed, as to said defendant, the California and Oregon Land Company."

Franklin P. Mays, U. S. Atty., and *Albert H. Tanner*, Sp. Asst. U. S. Atty.

Rufus Mallory and *W. C. Belcher*, for appellee.

Before HANFORD, HAWLEY, and MORROW, District Judges.

OPINION OF THE COURT.

HAWLEY, District Judge. I am of opinion that the circuit court did not err in finding that defendant was the purchaser of the land in question in good faith, and for a valuable consideration, without notice of any fraud on the part of the Oregon Central Military Road Company or any one else. This finding is, in my opinion, fully sustained by the evidence, and the court was therefore justified in sustaining the defendant's objection to the testimony offered by complainant, after the defendant had rested its case, to show that said road had never been built, and that the certificates of the governor of Oregon that it was built were obtained by misrepresentation and fraud. In *Iron Co. v. U. S.*, 123 U. S. 313, 8 Sup. Ct. Rep. 131, the court said:

"It is fully established by the evidence that there were in fact no actual settlements and improvements on any of the lands, as falsely set out in the affidavits in support of the pre-emption claims and in the certificates issued thereon. This undoubtedly constituted a fraud upon the United States, sufficient in equity, as against the parties perpetrating it, or those claiming under them with notice of it, to justify the cancellation of the patents issued to them. But it is not such a fraud as prevents the passing of the legal title by the patents. It follows that, to a bill in equity to cancel the patents upon these grounds alone, the defense of a *bona fide* purchaser for value without notice is perfect."

Applying the principles therein announced to the facts presented by the record in this case, it necessarily follows that the question whether the road was actually built or not was wholly immaterial, unless it was shown that defendant was a purchaser with notice. Independent of the general principles of law that are always applied by courts where the plea of a *bona fide* purchaser for value is presented, the act of congress authorizing this and other suits to be brought to forfeit the lands hitherto granted expressly preserved the rights of such purchasers in the following language:

"Saving and preserving the rights of all *bona fide* purchasers of either of said grants, or any portion of said grants, for a valuable consideration, if any such there be. Said suit or suits shall be tried and adjudicated in like manner, and by the same principles and rules of jurisprudence, as other suits in equity are therein tried." 25 St. at Large, 851.

Without discussing the evidence, it is perfectly clear to my mind that defendant was a *bona fide* purchaser for value without notice. This must be admitted, unless it be that the deeds from the Oregon Central Military Road Company to Pengra were quitclaim deeds pure and simple, and that a purchaser under a quitclaim deed cannot claim to be a *bona fide* purchaser for value. A full investigation of that question would open up a wide field of inquiry in regard to which I deem it unnecessary to enter at any length. There are numerous and many conflicting authorities upon this subject, which I shall not attempt to review. It is sufficient to say that, in my opinion, the weight of reason and authorities is made to depend upon the real character of the deed, as to whether or not it purports to convey, or does in fact convey, simply the speculative right, title, and interest of the party, or whether or not it purports to convey, and does in fact convey, the lands mentioned. If the deed is a quitclaim in the strict sense of that species of conveyance, then it will not support the defense of an innocent purchaser. "Whether the conveyance be a quitclaim or not is dependent upon the intent of the parties to it, as that intent appears from the language of the instrument itself. If the deed purports and is intended to convey only the right, title, and interest in the land, as distinguished from the land itself, it comes within the strict sense of a quitclaim deed, and will not sustain the defense of innocent purchaser. If it appears that it was the intention to convey the land itself, then it is not such quitclaim deed, although it may possess characteristics peculiar to such deeds. The use of the word 'quitclaim' does not restrict the conveyance if other language employed in the instrument indicates the intention to convey the land itself." *Garrett v. Christopher*, 74 Tex. 453, 12 S. W. Rep. 67. The true character of the deed, and the real intent of the parties, is to be determined by the terms of the conveyance itself. This general idea is fully recognized by the decisions of the supreme court of the United States. In *Van Rensselaer v. Kearney*, 11 How. 322, the court, in speaking of the effect of a deed by way of release or quitclaim of the grantor's right, title, and interest, said:

"But this principle is applicable to a deed of bargain and sale by release or quitclaim in the strict and proper sense of that species of conveyance; and therefore, if the deed bears on its face evidence that the grantors intended to convey, and the grantee expected to become invested with, an estate of a particular description or quality, and that the bargain had proceeded upon that footing between the parties, then, although it may not contain any covenants of title, in the technical sense of the term, still the legal operation and effect of the instrument will be as binding upon the grantor and those claiming under him, in respect to the estate thus described, as if a formal covenant to that effect had been inserted."

The language of the first deed, conveying an undivided one-half interest to Pengra, dated May 12, 1874, is as follows:

"The Oregon Central Military Road Company has aliened, released, granted, bargained, and sold, and does hereby alien, release, grant, bargain, sell, and convey, unto the said B. J. Pengra, the party of the second part, his heirs and assigns, the undivided one-half of all the right, title, and interest of

the said party of the first part in and to all the lands lying and being in the state of Oregon granted or intended to be granted to the state of Oregon by the act of congress approved July 2d, 1864, * * * and granted by the state of Oregon to the said Oregon Central Military Road Company by an act of the legislative assembly of said state of Oregon approved October 24th, 1864, * * * and the undivided one-half of the right, title, and interest of said party of the first part to said grant of land under the several acts aforesaid, whether listed and approved or otherwise; also the undivided one-half of all future right, title, interest, claim, property, and demand which the party of the first part may at any time hereafter acquire to any lands by virtue of any further compliance with the requirements of said acts of congress, together with the hereditaments and appurtenances. * * * To have and to hold the lands hereby granted unto the said party of the second part, his heirs and assigns forever."

From this language, as well as of all other conditions, reservations, and covenants in said deed expressed, it is clear to my mind that the parties intended by this instrument to convey, and did convey, the land itself, and that it is not such a quitclaim deed as deprives defendant of the right to rely upon the plea of an innocent purchaser for value. The second deed contains the same language as the first. The deeds from Pengra to Colby and others are regular bargain and sale deeds of the land in question. From a careful consideration of all the evidence in the record, and of the principles of law applicable thereto, I am of opinion that the decision and rulings of the circuit court were correct. I am authorized to say that Judge MORROW concurs with me in the views I have expressed. The judgment of the circuit court is therefore affirmed.

HANFORD, District Judge, (*dissenting.*) The supreme court reversed the first decree of the circuit court for error in refusing to allow a replication to the pleas, and remanded the cause for the express purpose of having a full investigation and determination of the facts in the light of all the testimony affecting the question of the *bona fides* of the transactions by and through which the defendant has, or claims to have, acquired title to the land. The important questions of law involved in the case, and which were fully discussed in the opinion of the circuit judge, are only referred to in the briefest manner by the supreme court. The supreme court could not, after making the careful and full statement of the case included in its opinion, have passed over these questions through mere inadvertence. Evidently, except in so far as it was intended to reverse the decision made by the circuit judge, the supreme court intentionally refrained from expressing an opinion upon the questions of law, until there could be a full presentation of the case, and a decision of all questions of law and fact, after the introduction of the evidence. The act of congress authorizing the suit expressly mentions as one of the subjects to be adjudicated the question as to the legal effect of the certificates of the governor of Oregon. The circuit judge decided that question, and in deciding it affirmed the validity of the defendant's title to the land; but the supreme court did not by any expression in its opinion approve or criticise the decision of that question. We can

hardly suppose that the court intended to dispose of the case finally by simply reversing the decision of the circuit court, without giving some expression of opinion upon this important question. Therefore we may fairly infer that the question has been reserved for future consideration by that court. The grounds of the supreme court's decision appear in the following extracts therefrom:

"We are of opinion that the circuit court erred in not permitting the plaintiffs to reply to the pleas, and in dismissing the bill absolutely. * * * The decree must be reversed in so far as it dismisses the bill, and the case be remanded to the circuit court, with a direction to allow the plaintiff to reply to and join issue on the pleas. * * * It is manifest that, although the act says that the suits are to be tried and adjudicated in like manner and by the same principles and rules of jurisprudence as other suits in equity, congress intended a full, legal investigation of the facts, and did not intend that the important interests involved should be determined upon the untested allegations of the defendants. * * * The government has had no opportunity to prove the charges of fraud made in the bill, and there is no proof but the allegations of the pleas as to the *bona fides* of the defendants, and as to the amounts expended by them in good faith in connection with the roads or the lands. It cannot be properly held that, under the act of 1889, final adjudication can be made, on such pleadings alone, as to the extensive interests involved in this litigation."

In view of the course which the case has already taken, it seems to be unnecessary, if not improper, for this court at the present time to do more than decide whether, upon the evidence, the defense of a *bona fide* purchase has been made out, and whether the court erred in excluding evidence material for the government. The latter inquiry, being of an incidental and preliminary character, will be first disposed of. The facts as to the completion of the road, or failure to construct it, are important matters of evidence bearing directly upon the question at issue,—as to whether the defendant, at the time of the purchase of the land from the Oregon Central Military Road Company, had notice of the failure of that company to earn the grant by constructing the road. The existence of such an important highway extending from the heart of the Willamette valley to the eastern boundary of the state, if it does exist, must necessarily be a matter of such general notoriety as to be presumably within the knowledge of all business men having the means and disposition to purchase on speculation the lands granted for the purpose of aiding in its construction, and located adjacent thereto; and the non-existence of such highway, if in fact it never was constructed, is such an extraordinary circumstance, when considered in connection with the transfer of the land grant to private individuals, that, without explanation, it is impossible to understand how the purchaser could have failed to have taken notice of it. The reason given for the exclusion of the evidence bearing upon this point is that, by failing to deny them, the pleas and answer admit the averments of the bill as to the non-construction of the road, and the falsity of the government's certificates, and dispenses with the necessity of proof thereof, and that the taking of such proof would impose a grievous burden upon the parties by reason of the amount of it and the great expense and consumption of time nec-

essary for the purpose. The supreme court, however, has held that the case cannot properly be decided until the proofs shall have been taken; and, having remanded the cause for the express purpose of having an investigation of the facts, the trial court is left without discretion, and must proceed according to the mandate.

There is another reason for holding that the circuit court was in error in excluding the evidence offered by the government. It is this: The answer does not deny nor expressly admit the charges made in the bill that the lands were not earned according to the terms of the granting acts, and that the certificates are untrue, and that the same were obtained by false representations and fraud. The plea is a negative plea, and does controvert the averments of the bill, so that proof thereof is required to disprove the plea. Where the plaintiff has replied to a plea which constructively admits the averments of the bill, or the part of the bill to which it refers, he "may rest satisfied with that admission, and need not go into evidence as to that part of his case which the plea is intended to cover, unless the plea is a negative plea; for in that case it will be necessary for him to prove the matter negatived, for the purpose of disproving the plea, in the same manner as he may enter into evidence for the purpose of disproving matter which has been pleaded affirmatively." 1 Daniel, Ch. Pl. & Pr. (5th Ed.) 837.

The answering defendant, in order to prove the allegations of the second plea, was obliged to and did introduce the deeds by which it claims to have acquired title to the land, and to show by other evidence the particulars of the transaction attending the negotiations for and consummation of the purchase from the Oregon Central Military Road Company, from which it is clear that the promoters and organizers of the defendant corporation first bargained with the Oregon Central Military Road Company for an undivided one-half of the lands granted for the price of \$100,000, and the right to purchase the other half at a corresponding price; that, after examining an abstract of the title, and obtaining the advice of eminent lawyers as to the right of said company to sell the land, they paid \$100,000, and thereupon said company, by its deed, granted and conveyed one-half of all the right, title, and interest of said company, and one-half of the right, title, and interest which it might thereafter acquire, in and to said lands, to one P. J. Pengra, who, on the next day after the recording of said deed, by his bargain and sale deed conveyed the lands to the persons who afterwards organized this defendant corporation; and some five months after the conveyance of said one-half interest the other half was conveyed in a similar manner,—that is to say, the corporation first made a deed of merely its right, title, and interest in and to the property to Pengra, and he, by a bargain and sale deed, conveyed the property to the purchasers. This evidence does not sustain the plea. The rule to be applied is this: In equity, a purchaser of real estate from the apparent owner thereof, who, after payment of the reasonable value of the property, receives a conveyance of the legal title, without knowledge of an equitable right to the property existing in another, or notice of facts which would cause an ordinarily prudent person to in-

quire into such existing equitable rights, or who, after making the inquiry, and the exercise of reasonable diligence, has failed to discover an existing defect in his grantor's title, is entitled to the same protection as the purchaser of personal property in market overt. The rule is founded upon the doctrine of estoppel, which does not allow an owner of property who has permitted a concealment of his claim or rights to thereafter assert them to the prejudice of an honest purchaser, unable, by reason of such concealment, to learn of the existence of such claim or rights in time to avoid imposition. As in all cases where rights depend upon the doctrine of estoppel, a defense of this sort requires the clearest proof of all the facts essential to create the estoppel, and equity does not permit a party to derive benefit from his own ignorance of facts which he could have learned by the exercise of ordinary prudence and diligence. This defense is not available to a person who, by the circumstances connected with his purchase, or the form of the conveyance which he accepts, is apprised that his grantor has not intended or is unable to convey a perfect title, without additional proof showing that the purchaser, after due diligence, failed to discover any valid, adverse claim to the property. One who contracts for and pays the price for a particular parcel of real estate, and obtains a deed which, by its terms, purports to convey the title to the property which it describes, occupies a position entirely different from that of the purchaser who is content to receive merely a conveyance of the right, title, and interest of his grantor in and to the property. By many of the adjudged cases he is held to be chargeable with constructive notice, inherent in the deed, of the actual right and title of his grantor, as contradistinguished from what may at the time appear to be, by his visible possession of the property, or muniments of title shown by the public record. *Blanchard v. Brooks*, 12 Pick. 47; *Springer v. Bartle*, 46 Iowa, 688; *Steele v. Bank*, 79 Iowa, 339, 44 N. W. Rep. 564; *Peters v. Cartier*, 80 Mich. 124, 45 N. W. Rep. 73; *Peaks v. Blethen*, 77 Me. 510, 1 Atl. Rep. 451; *Logan v. Neill*, 128 Pa. St. 457, 18 Atl. Rep. 343; *Hastings v. Nissen*, 31 Fed. Rep. 597; *Gest v. Packwood*, 34 Fed. Rep. 372; *Mortgage Co. v. Hutchinson*, (Or.) 24 Pac. Rep. 515; 3 Washb. Real Prop. (4th Ed.) marg. p. 607; 2 Pom. Eq. Jur. § 753; 1 Devlin, Deeds, § 674. This rule, in all its rigor, has been declared and applied by the supreme court of the United States repeatedly. In the case of *Oliver v. Piatt*, 3 How. 333, the question as to the right of the grantee of a right, title, and interest to property to claim protection in equity as a *bona fide* purchaser was elaborately argued by able counsel, and received careful consideration. The opinion of the court was written by Mr. Justice STORY, wherein he expressed the view of the court as follows:

"Another significant circumstance is that this very agreement contains a stipulation that Oliver should give a quitclaim deed only for the tracts; and the subsequent deeds given by Oliver to him accordingly were drawn up without any covenants of warranty, except against persons claiming under Oliver or his heirs or assigns. In legal effect, therefore, they did convey no more than Oliver's right, title, and interest in and to the property; and under such circumstances it is difficult to conceive how he can claim protection, as

a *bona fide* purchaser for a valuable consideration without notice, against any title paramount to that of Oliver, which attached itself as an unextinguished trust to the tracts."

"The general principle is admitted that a grantor conveying by deed of bargain and sale, by way of release or quitclaim, all his right and title to a tract of land, if made in good faith, without any fraudulent representation, is not responsible for the goodness of the title beyond the covenants in his deed. * * * A deed of this character purports to convey, and is understood to convey, nothing more than the interest or estate of which the grantor is seised or possessed at the time, and does not operate to pass or bind an interest not then in existence. The bargain between the parties proceeds upon this view, and the consideration is regulated in conformity with it." (Opinion of Mr. Justice NELSON in *Van Rensselaer v. Kearney*, 11 How. 297.)

"The evidence satisfies us that Cook had full notice of the frauds of Powers and of the infirmities of Dessaint's title. Whether this was so or not, having acquired his title by a quitclaim deed, he cannot be regarded as a *bona fide* purchaser without notice. In such cases the conveyance passes the title as the grantor held it, and the grantee takes only what the grantor could lawfully convey." (Opinion by Mr. Justice SWAYNE in *May v. Le Claire*, 11 Wall. 217.)

The cases of *May v. Le Claire* and *Oliver v. Piatt* are cited to the same point, and the doctrine is reaffirmed, by the supreme court in *Villa v. Rodriguez*, 12 Wall. 323, and *Dickerson v. Colgrove*, 100 U. S. 584. The supreme court has steadfastly adhered to the rule denying the grantee in a quitclaim deed the right to defend as a *bona fide* purchaser against a title paramount to that which his grantor had at the time of executing the quitclaim deed. *Brown v. Jackson*, 3 Wheat. 449; *Hanrick v. Patrick*, 119 U. S. 175, 7 Sup. Ct. Rep. 147.

The authorities above cited are not unopposed. Some of the ablest text-writers and jurists of this country hold to the view that a grantor cannot by any form of deed do more than convey all his right, title, and interest; that a quitclaim will convey a perfect fee-simple title, just as effectually as a warranty deed, if in fact the grantor at the time of executing the deed has such a title; that a quitclaim deed no more implies that the grantor doubts the goodness of his title than a warranty deed implies that the grantee considers the title unsafe without the support of covenants and assurances involving personal liability for damages; and that a purchaser who relies upon the public records showing a clear title in the grantor, even though he takes a quitclaim deed, cannot be denied the character of a *bona fide* purchaser without robbing the recording acts of their virtue. Between these two extremes the true doctrine is to be found, and the trend of opinion in this country, as may be gathered from the most recent decisions and the latest contributions from American law-writers, is in the direction of greater liberality, and to regard with favor the more reasonable rule by which the actual good faith of the purchaser is made the test of his right in equity; and the question of actual good faith is chiefly one of fact. So that there is no such thing as a conclusive presumption of *mala fides* from the mere acceptance of a quitclaim deed. A purchaser who makes diligent and candid inquiry with intent to ascertain the truth concerning his grantor's

title, and who, after such inquiry, pays a fair price for property in the honest belief that the title is perfect, ought to have protection against adverse rights which, notwithstanding his efforts to discover them, remained concealed from him, although he receives only a quitclaim deed; and if a purchaser does, upon inquiry, learn of the existence of adverse rights before consummating the purchase, he ought not to receive protection against such rights, even though his deed is in form an absolute grant of the property, with a general warranty, and full covenants for title. *Merrill v. Hutchinson*, (Kan.) 25 Pac. Rep. 215; 34 Cent. Law J. 174. This is the common sense of the matter, and the only just rule. Nevertheless it is a true and self-evident proposition that, by a quitclaim deed the grantee is necessarily warned. By agreeing to accept that form of conveyance, he avowedly assumes all risk of a bad title as between himself and his grantor, and he may be fairly presumed to have made a timely and sufficient examination of the title. From this it follows that he may be conclusively presumed to have become informed of all facts which could have been discovered by an intelligent and earnest effort, and to have acted in the light of all such facts in making the purchase. Within this modification of the rule to which the supreme court seems to be committed, it is not sufficient for the defendants to show that by reason of their failure to inquire they were ignorant of the failure of their grantor to earn the land grant according to the terms of the act of congress. They must prove that they did inquire, and that, notwithstanding the exercise of ordinary prudence and diligence on their part, they were misinformed and deceived, and that they honestly believed that their grantor had acquired a full and complete title to the land by having constructed and completed the wagon road. This much, at least, is required of them to bring the case within any rule deducible from the cases cited in their behalf upon the argument; and for lack of such proof in the case as it is now before this court the evidence is insufficient to sustain their plea.

The appellee, however, claims protection under cover of the bargain and sale deeds from Pengra, the grantee in the quitclaim deeds from the Oregon Central Military Road Company. But Pengra did not at any time assume to deal with the property as the owner of it. He was a mere medium for the transfer of the title to the individuals to whom the corporation had contracted to convey it. Their negotiations for the purchase were not made with Pengra as the apparent owner, but were with the officers and agents of the corporation; and they were content to finally complete the purchase and receive a conveyance in the same manner as in acquiring the one-half interest in the first instance,—that is, by means of two deeds, some five months after their purchase of the one-half interest. No additional grounds for relief or protection are shown by the circumstance that two deeds were made to effect one transfer of the property. In this particular the case is analogous to the case of *Baker v. Humphrey*, 101 U. S. 494, wherein Mr. Justice SWAYNE, in the opinion of the court, says:

"Chapman conveyed by a deed of quitclaim to the attorney's brother. The attorney procured the deed to be so made. It was the same thing, in view of the law, as if it had been made to the attorney himself. Neither of them was in any sense a *bona fide* purchaser. No one taking a quitclaim deed can stand in that relation."

For the reasons above given, it is the writer's opinion that the decree of the circuit court ought to be reversed, and that the cause should be remanded for a new trial, with directions to admit evidence offered in behalf of either party as to the completion of the wagon road or failure to complete it, and as to any fraudulent acts or misrepresentation by means whereof the certificates of the governor of Oregon were wrongfully obtained.

HAWKINS *et al.* v. WILLS.

(Circuit Court of Appeals, Eighth Circuit. February 15, 1892.)

1. EJECTMENT—EQUITABLE DEFENSES—RES JUDICATA.

In ejectment in the federal court against purchasers at an execution sale by one holding a conveyance from the judgment debtor, prior in time to the lien of the judgment, the fact that the conveyance was executed in fraud of the grantor's creditors is an equitable defense, not available to defeat the action, and defendants may suffer judgment to go against them, and then resort to equity for relief against such judgment, as well as against the deed upon which it is based.

2. JUSTICES OF THE PEACE—ISSUANCE OF EXECUTION—FILING TRANSCRIPT.

Where an action in a justice's court is aided by attachment, it is not necessary that an execution be issued by the justice and returned *nulla bona* before the transcript is filed in the county clerk's office, as required by Mansf. Dig. Ark. § 4101. Such case is governed by section 4126, which does not require the issuance of an execution as a prerequisite to the filing of the transcript in the clerk's office.

3. SAME—NECESSITY OF BOND.

Mansf. Dig. Ark. § 4126, requiring the filing of a bond before the issue by the clerk of an execution on the filing in his office of a transcript of a justice's judgment, is restricted to cases where defendant has been constructively summoned, and does not apply where personal service has been had, or where defendant enters an appearance in the suit before the justice.

4. FRAUDULENT CONVEYANCE TO WIFE—CONSIDERATION.

A debtor owning about \$300 in personal property, and owing debts in excess thereof, conveyed to his wife a tract of 2,000 acres, in pursuance of a prior agreement made with her father to make such transfer in consideration of expenses incurred by the father in taking care of the wife and children. In an action by creditors to set aside such conveyance as to part of the property, as in fraud of creditors, it was attempted to sustain it on the ground of such payment, and also on the ground of payment of subsequent expenses in taking care of the wife and children in a long sickness. It appeared that the wife asserted no claim to the property for 12 years after it was sold on execution against the husband. *Held*, that such conveyance could not be sustained as against creditors.

Appeal from the Circuit Court of the United States for the Eastern District of Arkansas.

In Equity. Bill by A. D. Hawkins and others against Mary E. Wills to restrain the enforcement of a judgment in ejectment, and to set aside a deed to defendant as in fraud of creditors. Plaintiffs appeal from a decree for defendant. Reversed.

D. W. Jones, for appellants.

Oscar D. Scott, for appellee.
Before SHIRAS and THAYER, District Judges.

SHIRAS, District Judge. The facts necessary to be stated for a proper understanding of the issues arising on this appeal are the following: Prior to the 9th day of April, 1878, Charles B. Wills was indebted to A. D. Hawkins in the sum of \$150 and interest, and was also indebted to other parties for amounts aggregating a few hundred dollars. On the 30th day of December, 1879, Hawkins brought suit against Charles B. Wills before a justice of the peace for Little River county, Ark., upon the indebtedness due him, and caused a writ of attachment to be issued and levied upon certain realty situated in Little River county. Personal service of the summons was had upon the defendant, Wills, and on the return-day thereof a judgment in due form was entered up by the justice in favor of Hawkins, and against the defendant, Wills, for the amount due, and also sustaining the attachment and the levy thereof upon the realty. On the 30th day of March, 1880, Hawkins caused a duly-certified transcript of these proceedings to be filed in the office of the clerk of the circuit court of Little River county, in accordance with the provisions of the statutes of Arkansas, and thereupon procured the issuance, by the clerk of said court, of a writ of execution upon said judgment, and the same was levied upon the realty previously attached; and, by due proceedings had, the realty was sold at sheriff's sale, and purchased by the plaintiff in execution, and, after the expiration of the period for redemption, a deed of conveyance thereof was executed by the sheriff, delivered to Hawkins, and duly recorded, as required by the laws of the state of Arkansas. Upon delivery of the deed, Hawkins took possession of the premises, which comprised in all 590.46 acres, and in person, or through tenants and others, to whom he had contracted to sell portions of the land, he has continued in possession, his right so to do not being questioned until in December, 1889, when Mary E. Wills, wife of Charles B. Wills, filed in the United States circuit court for the eastern district of Arkansas an action of ejectment against said Hawkins, and the parties holding under him, claiming to be the owner of said realty, and entitled to the possession. Her claim to be the owner of the property was based upon the fact that on the 9th day of April, 1878, her husband executed a deed, conveying the title of some 2,000 acres of land, including the premises in dispute in this action, to his wife, Mary E. Wills. The validity of this deed was contested by Hawkins on the ground that it was purely a voluntary conveyance, executed without consideration, and for the purpose of defrauding the creditors of the grantor. Not being able to avail themselves of the equitable title held under the sheriff's deed as a defense to the action of ejectment, the parties named as defendants did not appear therein, and judgment by default was entered against them in January, 1890. In May following, the defendants to the ejectment suit filed their bill in equity in the United States circuit court, setting forth the title acquired by Hawkins to the realty, and averring that the conveyance to Mary E. Wills was without consideration, fraudulent as to

creditors, and void as against the superior equities and rights of Hawkins and those claiming under him, and that it created a cloud upon the title acquired by Hawkins, and praying that the deed to Mary E. Wills be declared void, and that she be forever restrained from asserting any claim to the lands in dispute under said deed or under the judgment in the ejectment proceedings, and that the title of the complainants be quieted. Mary E. Wills answered the bill, and the cause went to hearing upon the pleadings and the evidence adduced by the respective parties, the court finding for the defendant and entering a decree dismissing the bill for want of equity, to reverse which the appellants brought the case to this court.

Owing to the fact that no written opinion or finding was filed by the learned judge who tried the cause in the circuit court, we do not know whether the conclusion reached was based upon any failure in the title asserted by Hawkins, or upon the question in regard to the validity of the conveyance to Mary E. Wills. Counsel for appellee argues at some length the proposition that the judgment entered in favor of Mrs. Wills in the ejectment suit is a bar to the relief sought in this proceeding. The ruling of the supreme court in *Johnson v. Christian*, 128 U. S. 374, 9 Sup. Ct. Rep. 87, fully disposes of this question adversely to the position of counsel for appellee, it being therein held that a judgment in ejectment is only a bar to such legal defenses as could be made available in an action at law, and does not preclude a resort to a proceeding in equity, by the defendant in the ejectment suit, to bar the judgment in that action by reason of equities and rights available in equity, but not available at law. As the ejectment suit was brought in the federal court, it was not open to the defendants therein to plead any equitable defense or to assert an equitable title as against the prior legal title seemingly held by Mrs. Wills. The defendants in that suit, to secure their rights, were compelled to invoke the aid of a court of equity, and it was therefore open to them to suffer judgment to go against them in the law action, and then appeal to the equity side of the court for relief against the judgment, as well as against the deed upon which it was based.

We pass, then, to a consideration of the question whether it appears that Hawkins, as against Charles B. Wills, has obtained a valid right and title to the realty in dispute. As already stated, the Hawkins title is based upon the judgment entered in his favor against Charles B. Wills in the attachment suit brought before the justice of the peace in Little River county. From the record it appears that the justice had jurisdiction of the cause; that the attachment was duly issued, levied, and sustained; that personal service of the summons was had on the defendant, Wills, within the jurisdiction of the court,—and therefore the judgment rendered is valid and binding. It also appears that a certified transcript thereof was duly filed in the clerk's office of the proper county, an execution was issued and levied, and the land sold in due course of proceedings, as provided for in the statutes of Arkansas.

The objections taken to the validity of the proceedings on behalf of appellee are twofold: *First*. That it does not appear that an execution

was issued by the justice, and returned *nulla bona*, before the transcript was filed in the clerk's office, as required by section 4101 of Mansfield's Digest of the Laws of Arkansas. That section applies to cases not aided by attachment, and does not include those in which a levy by attachment has been made on realty, which are provided for by section 4126, which does not require the issuance of an execution as a prerequisite to the filing of the transcript in the clerk's office, or the issuance of an execution therefrom. The *second* objection is that it does not appear that a bond was filed in accordance with the proviso contained in section 4126. It is not made to appear that a bond was not filed, and certainly this court will not assume, in a collateral proceeding, that the sworn officer of the circuit court did not observe all the requirements of the statute before issuing the writ of execution. It is expressly held in *Rust v. Reeves*, 24 Ark. 359, that, when it appears that an execution was issued from the circuit court, it will be presumed that a bond was filed in accordance with the provisions of the statute. Furthermore, in *Bush v. Visant*, 40 Ark. 124, it is decided that the provision of section 4126, in regard to the filing a bond, is restricted to cases wherein the defendant has been constructively summoned, and that if due personal service has been had, or the defendant enters an appearance in the suit before the justice, then the giving a bond is not a prerequisite to the lawful issuing of a writ of execution by the clerk of the circuit court. It thus appearing that the issuance of the writ of execution was strictly in accordance with the requirements of the statute, and no exception being taken to the levy and sale made thereunder, it follows that, if the land levied upon was then liable to be seized and sold for the payment of the judgment in favor of Hawkins, he became the owner thereof by virtue of the sale and subsequent execution of the sheriff's deed to him.

This brings us to a consideration of the title held by Mrs. Wills, which, as already stated, is dependent upon the validity of the conveyance made to her by her husband in April, 1878. The evidence clearly shows that at the time this conveyance was made Charles B. Wills was indebted to several parties, including the complainant Hawkins, and that the transfer of the realty, amounting in all to about 2,000 acres, left him without available means to pay his debts. The defendant testifies that at the date of the transfer of the realty her husband had over \$300 worth of personal property, consisting of cattle, a horse, farming implements, and a lot of blacksmith tools; but, assuming that this property was available to his creditors, it was less in amount than his indebtedness at the time, and hence Charles B. Wills was not justified in making a voluntary conveyance of his realty to his wife without first making provision for the payments of his just indebtedness. The rule applicable to the case is fully stated by the supreme court in *Kehr v. Smith*, 20 Wall. 31, in which it is said:

"Surely the voluntary provision for the wife, in such a condition of things, is not sustainable against existing creditors. Nor can it be supported on the theory that the whole estate was worth a few thousand dollars more. Suppose it was, there would still be that extent of embarrassment which would have a

direct tendency to impair the rights of creditors. In such a case a presumption of constructive fraud is created, no matter what the motive which prompted the settlement. Meyer was not only largely indebted, for a person in his situation, but it is easy to see it would have been close work for his creditors to have made their debts, if they had tried to enforce their collection by judicial process,—a surer way of ascertaining the real worth of the property than by the opinions of indifferent persons, as experience has proved that this kind of testimony is often unreliable on such a subject. The ancient rule that a voluntary post-nuptial settlement can be avoided if there was some indebtedness existing, has been relaxed, and the rule generally adopted in this country will uphold it, if it be reasonable, not disproportionate to the husband's means, taking into view his debts and situation, and clear of any intent, actual or constructive, to defraud creditors."

Tested by this rule, it is clearly manifest that Charles B. Wills was not justified in transferring the bulk of his property to his wife, reserving to himself only a small amount of personal property, which if sold would have been wholly insufficient to pay the debts he then owed. A voluntary transfer under such circumstances necessarily results in hindering or defeating creditors in the collection of the claims justly due them, and is therefore in fraud of their rights.

It is claimed, however, that there was a valuable and sufficient consideration for the transfer to Mrs. Wills, growing out of certain advances made by her father in payment of expenses incurred in taking care of Mrs. Wills and her children during periods of time when they were all at her father's house in Indiana. Mrs. Wills testified that in 1875, being then in ill health, she returned to her father's house for medical treatment. That her husband wrote her that he had no means to pay for such treatment. That he would transfer these lands to her, if her father would advance the money needed for her treatment, and that her father knew and approved of the proposition. That she had estimated that the expense would be about \$2,000, but that her husband was to make the transfer whether the amount expended was more or less than the named sum of \$2,000. She further testifies that she returned to her husband in December, 1875, and remained with him until July, 1878, some three months after the execution of the deed to her, when she again went to her father's house, and remained there about two years, with her daughter Mamie. That in January, 1879, another child was born to her, which died the following August. That her daughter Mamie, after the death of the infant, had the scarlet fever, and was ill for some months. From the testimony of the father it appears that he paid the expenses in connection with the sickness of his grandchildren, as well as those resulting from the illness of his daughter, and it is the sum total of all these outlays that is relied upon as making up the sum of \$2,000, named as the consideration in the deed from the husband to the wife. It is manifest that in 1875, when the defendant testifies that she had the understanding with her husband and father in regard to the transfer of the lands to her, she could not possibly have foreseen the expenses that would be occasioned by the birth and death of an infant in 1878 and 1879, and the sickness of the daughter Mamie,

nor indeed of the probability that she herself would, after the lapse of three years, be in such ill health as to require her return to her father's house for treatment. The father does not testify that he agreed or became bound to furnish the means needed for the expenses of his daughter and her children, and from the whole evidence it is clear that the expenditures were made as a voluntary act upon his part, without the expectation that he would be repaid therefor by any one. It may be, as claimed by the defendant, that the fact that these expenses were paid by her father was a persuasive reason for inducing the husband to convey the lands to his wife; but, if that be so, it does not change the fact that the transfer was, in effect, a gift by the husband to the wife. As between the husband and wife, the facts detailed would be deemed a sufficient consideration to sustain the deed; but, when the rights of creditors are involved, it cannot be held that they form a valuable consideration for the transfer, of such a nature as to preclude a successful attack thereon by creditors. The wife paid nothing and the husband received nothing as a consideration for the transfer, the only effect of which was to take the title out of the name of the husband and place it in that of the wife. The subsequent actions of the parties indicate that the transfer was in fact one in form only. It does not appear that Mrs. Wills asserted any rights to the lands in dispute for 12 years after the execution of the deed to her, during which time Hawkins and those claiming under him were in possession of the premises, making improvements thereon. Several parties testify that the husband questioned the validity of the title held by Hawkins, and asserted that the time was coming when he (Wills) would be in position to assert his right to the premises, and that all parties purchasing from Hawkins would lose the amounts paid him. But assuming that, as between the husband and wife, the latter would be the owner of the property, nevertheless she holds it merely as a gift or voluntary conveyance from her husband, which, in view of the circumstances under which it was made, must be held to be void as against creditors.

The decree appealed from is therefore reversed, at cost of appellee, and the cause is remanded to the circuit court, with instructions to enter a decree in favor of complainants, holding the deed to Mrs. Wills void, so far as the same affects the realty in the bill described, and enjoining her from asserting any right or title to said realty, by virtue of said deed or the judgment in the ejectment suit, and further quieting the title to said realty in the complainants.

KINNE *et al.* v. WEBB *et al.*

(Circuit Court, W. D. Missouri, W. D. March 7, 1892.)

1. CANCELLATION OF CONTRACT—LACHES—RESTITUTION.

Complainant, being one of the beneficiaries under the will of her deceased husband in a large estate, consisting principally of mining lands, in April, 1883, entered into a contract of settlement with the other beneficiaries, under which she quit-claimed and released to them all her interest therein, in consideration of a cash payment. In July, 1883, she instituted suit in the state court to set aside such contract on the ground of fraud and deceit, and for an assignment of dower. Subsequently dismissing such suit, in April, 1884, she renewed it, and again discontinued it in December, 1884. In February, 1890, she brought suit in the federal court for the same relief, on substantially the same grounds, but made no offer to return the consideration received. *Held*, notwithstanding undue advantage had been taken of complainant, she was not entitled to relief in equity, for laches and failure to offer restitution. The doctrine of laches has a special application to contracts and transactions affecting mineral lands, which are exposed to the utmost fluctuations in value.

2. SAME.

It cannot be claimed, in excuse of the failure to make restitution, that complainant would be entitled to the amount paid her as a distributive share of the estate, where the amount of her share is but conjectural.

In Equity. Bill by Sarah M. Kinne and others against Elijah T. Webb and others to set aside a contract of settlement, for fraud and deceit, and to have dower assigned. On pleadings and proof. Dismissed.

R. O. Boggess and *I. J. Ketchum*, for complainants.

Karnes, Holmes & Krauthoff, for respondents.

PHILIPS, District Judge. The complainant Sarah M. Kinne is the widow of John C. Webb, deceased, since intermarried with Ezra B. Kinne. On the 13th day of April, 1883, the said John C. Webb died testate at Webb City, Jasper county, Mo., leaving the respondents hereto, with the said Sarah, his sole heirs at law, and beneficiaries under his said will. He died possessed of considerable property, personal and real. The real estate consisted principally of mineral lands containing lead ore. Soon after his death, and prior to the probate of his will, negotiations took place between the widow and his children by a former wife, looking to an immediate adjustment and payment of the interest of the complainant in said estate, which resulted on the 24th day of April, 1883, in a contract of settlement by which, in consideration of the sum of \$15,000 in cash then paid to her, the complainant, by deed of release and quitclaim, conveyed her entire interest and claim in and to the real and personal estate to the respondents, children of said decedent by his first wife. Shortly after the probate of the will the complainant manifested dissatisfaction with the terms of settlement, and, after filing in the probate court her renunciation of the provisions of the will, she instituted suit in the state circuit court of that county to set aside the deed of release, as having been obtained through fraud and deceit, asserting a right of dower in said property, and praying for its assignment. This suit was abandoned by her, and within a year she renewed the same in the same jurisdiction; and again, in December, 1884, she discontinued said

second suit, after taking depositions therein. She took no further action in the matter until the 7th day of February, 1890, when the present suit was instituted in this court.

If this case were to be determined on the merits of the issue, as to whether the complainant ought to be relieved from the contract of settlement on the ground of an undue advantage taken of her, I should encounter serious opposition, in my sense of justice, in holding her to the contract. But there lies at the threshold of this controversy the preliminary question, conceding the *gravamen* of her complaint, has she exercised that degree of diligence, and made offer of restitution, which the established rules of equity exact, to give her a firm foundation in a court of chancery? This being a suit in equity to set aside a contract of settlement and release alleged to have been obtained fraudulently and against good conscience, what is there in its character and attendant circumstances to withdraw it from the operation of the general rules of law and equity governing like actions? Among these settled rules is the requirement that he who would avoid a contract on the ground of fraud or oppression, upon the discovery of the wrong, should act promptly and energetically in demanding restitution before the *status* of the property is materially changed; and, where he seeks a rescission, he should offer to return what he has received under the contract, so as to place the parties *in statu quo* in respect to the subject-matter of the contract. As aptly put by SHERWOOD, C. J., in *Estes v. Reynolds*, 75 Mo. 565:

"If he elects to disaffirm the contract in consequence of deception practiced upon him, such election, in order to avail him, must have the chief and essential element of promptitude, and he must put the other party in the same situation as he was before the contract was made."

Citing *Jarrett v. Morton*, 44 Mo. 275, in which it is said:

"If the plaintiff would repudiate a settlement, he must put the other party in the same condition he was before it was made. He cannot appropriate its benefits and deny its obligations. There never was but one doctrine upon this subject; and the books are full of decisions that, if a party would rescind a contract for fraud or other cause, he must, as far as in his power, put the other party in the condition he would have been in had the contract not been made."

And this rule has recently been emphasized by that court in *Taylor v. Short*, 17 S. W. Rep. 970, in which it is held that, in an action to rescind the original transaction and exchange, the plaintiff waived the fraud by not electing to rescind upon the first discovery of fraud, and that the right to rescind did not revive by a subsequent discovery of some incident of the fraud.

The complainant neither, prior to the institution of this action, tendered back the \$15,000 in money received in execution of the contract, nor does she offer to do so in her bill. Counsel, while conceding the rule, contend that it has reference more particularly to the rescission of ordinary contracts of barter, exchange, and sale, and should not be applied to a case like this, where the complainant would in any event, according to their claim, be entitled to have and hold as her distributive share of

the estate a sum of money equal to \$15,000. This is plausible, but I fail to find any positive authority or precedent for it. The interest of the wife on the vacation of such settlement would be that of a dowress,—a life-estate in one-third of the lands of which the husband died seised, and a child's part in the personalty, the latter subject to debts. Whether the interest thus coming to her would be of the cash value of \$15,000 would depend upon the state of facts existing at the time of the allotment. It might be more or less. What the cash value of her interest in the lands would be at the time of the assignment is but speculative. What her interest in the personalty would be after its administration, could be but conjectural at the time. There were no means of definite ascertainment. It therefore lies within the category of disputable facts. A part of the money she received has since been invested in a house and lot, and whether she has a dollar in money or credit left is unknown. If her interest in the personalty turned out to be less than \$15,000, she would have to account for the excess in money. What, then, becomes of the reason of the rule of restitution in order to entitle one to a rescission? Restitution or offer to return precedes the right of action. The parties are to be placed *in statu quo* in order to secure equality in the chances of new litigation. The rule does not contemplate the taking of evidence after suit brought to enable the court to say whether or not the suitor retains only his dues in any event. The voluntary antecedent act of the party complaining must eliminate such question from the controversy.

The case of *Courtright v. Burnes*, just published in 48 Fed. Rep. 501, aptly illustrates this view of the rule. Burnes was unquestionably indebted to Courtright in a large sum. They made a compromise settlement, which Courtright sought to set aside for fraud and undue advantage alleged to have been taken by Burnes of Courtright's agent. Part—an inconsiderable part—of the property turned over by Burnes to Courtright in execution of the settlement consisted of lands. It was held that Courtright could not maintain the bill to set aside the settlement without tendering a reconveyance of this land. Mr. Justice MILLER, who delivered the opinion, said:

"We do not see how we can get rid of the argument that since Courtright desires this settlement to be set aside the parties must be placed in the situation in which they were before the settlement was made, and the interest in these lands be reconveyed by Courtright to Burnes."

The same rule is announced by the supreme court in *McLean v. Clapp*, 141 U. S. 429, 12 Sup. Ct. Rep. 29, which was a suit in equity to set aside a settlement, in execution of which the complainant had received certain notes from the debtor respondent. Mr. Justice BREWER, for the court, said:

"Now, if he desired to rescind his contract, his duty was at once to return what he had received, and repudiate wholly and forever the transaction. So far from doing this, he did exactly the contrary. He retained the notes and securities received in the settlement, and has never yet returned one of them."

In the recent case of *Ackerman v. McShane*, 43 La. Ann. —, 9 South. Rep. 483, it is held that money received in a compromise cannot be re-

tained, and at the same time the contract annulled. Tender or deposit of the sum is an essential allegation. So long as the plaintiff retains the consideration, and does not tender or deposit the amount received, he is estopped. The complainant here has kept and used as her own all she received in execution of the contract, and seeks to avoid the contract under which she holds it without offering to make restitution. This she cannot do.

Closely allied to what precedes, there is another obstacle in the way of reaching the merits of this case. "Where a party desires to rescind upon the ground of mistake or fraud, he must, upon the discovery of the facts, at once announce his purpose, and adhere to it. If he be silent, and continue to treat the property as his own, he will be held to have waived the objection, and will be conclusively bound by the contract, as if the mistake or fraud had not occurred. He is not permitted to play fast and loose. Delay and vacillation are fatal to the right which had before subsisted. These remarks are peculiarly applicable to speculative property like that here in question, which is liable to large and constant fluctuations in value." *Grymes v. Sanders*, 93 U. S. 62.

While there has been a lack of uniformity in the application of the doctrine of laches, by our state supreme court, noticeable in the following adjudications: *Moreman v. Talbot*, 55 Mo. 392; *Davis v. Fox*, 59 Mo. 125; *Kellogg v. Carrico*, 47 Mo. 162; *Bliss v. Pritchard*, 67 Mo. 181; *State v. West*, 68 Mo. 229; *Landrum v. Bank*, 63 Mo. 56; and *Kelley v. Hurt*, 74 Mo. 561,—there can be no question as to the settled rule in the federal jurisdiction. In cases of concurrent jurisdiction, courts of equity recognize the statutes of limitation governing courts of law; but in cases cognizable alone in equity, while having regard to analogies to like limitations under statutes, on questions of the lapse of time and staleness of the claim and estoppels *in pais*, courts of equity act upon their own inherent doctrine of discouraging slothfulness and disturbing society and private interests after undue acquiescence. They will shorten the statutory period whenever and wherever the interests of justice demand it. "To let in the defense that the claim is stale, and that the bill cannot, therefore, be supported, it is not necessary that a foundation shall be laid by any averment in the answer of the defendants. If the case, as it appears at the hearing, is liable to the objection by reason of the laches of the complainants, the court will upon that ground be passive, and refuse relief. It is competent for the court to apply the inherent principles of its own system of jurisprudence, and to decide accordingly." *Sullivan v. Railroad Co.*, 94 U. S. 807.

In *Oil Co. v. Marbury*, 91 U. S. 592, Mr. Justice MILLER said

"In fixing this period in any particular case, we are but little aided by the analogies of the statutes of limitation. While, though not falling exactly within the rule as to time for rescinding, or offering to rescind, a contract, to one of the parties to it, for actual fraud, the analogies are so strong as to give to this latter great force in the consideration of the case. In this class of cases the party is bound to act with reasonable diligence so soon as the fraud is discovered, or his right to rescind is gone. No delay for the purpose of enabling the defrauded party to speculate upon the chances which the future

may give him of deciding profitably to himself whether he will abide by his bargain, or rescind it, is allowed to a court of equity."

This rule has a pointed and salutary application to controversies like this, regarding mineral lands. Such property is exposed to the utmost fluctuations in value. Its wealth lies beneath the surface. It is hidden from the view. Money, energy, labor, and skill are required to develop it. To-day the indications are full of promise. To-morrow, they are as full of discouragement. The mine which to-day may be deserted and out of consideration, or which, being worked, produces small results, may in a few years, by persistent energy and the expenditure of money, turn out to be vastly productive and valuable. The courts all say, respecting suits to vacate contracts affecting such property, and attempts to reclaim it, the party will be held to the highest diligence and acceleration in his movements. He cannot stand by and speculate on the chances. He cannot delay, and say, by his acts: "It is mine, if it be a good thing. You may keep it, if it be a poor thing." So where parties have waited four or five years, and even a shorter period, after knowledge of the fraud, during which time the property has been improved and its value greatly augmented, the delay constitutes a fatal estoppel. *Oil Co. v. Marbury, supra*; *Clegg v. Edmondson*, 8 De Gex, M. & G. 787; *Prendergast v. Turton*, 1 Younge & C. Ch. 98; *Johnston v. Mining Co.*, 39 Fed. Rep. 304.

The evidence shows that the contract of settlement and deed of release were executed on the 24th day of April, 1883. On the 28th day of July, 1883, she instituted the suit in the state court to set aside this settlement, on substantially the same grounds now taken. Pending that suit her deposition was taken. On March 31, 1884, she discontinued this suit. On the 18th day of April, 1884, she renewed it. On July 18, 1884, the defendant Webb's deposition was taken therein, and on December 2, 1884, she discontinued this suit. Why she did so,—whether from lack of confidence in the merits of her cause, or a lack of fidelity and moral courage in her counsel to confront the local dynasty of the Webb family, or from a perception of their local influence, with their subtle retainers, parasites, and clackers, on the administration of justice in that venue, need not here be inquired into. The fact remains that she passively waited until February 7, 1890, before she renewed the attack in this court,—nearly seven years after her cause of action arose, and more than five years after her last suit was dismissed. During all this time she was under no disability, and the respondents had done no act to lull her into inaction. In the interim she had discovered no new facts of such a character as to alter the legal *status* of her case. True it is, in her supplemental or amended bill, she sets up additional facts which she alleges first came to her knowledge since the filing of the original bill herein. But the weight of evidence contradicting this allegation is so overwhelming as not to leave a pin on which the court can hang a substantial doubt. In the mean while she had surrendered the homestead, applied part of the money arising from the contract of settlement to the acquisition of a new home in her sole right, to which she moved. In the mean time the

condition of the property now sought to be reached greatly changed. Woodlands disappeared before the axe of the tenants; pastures, meadows, and fields appeared where there were outlying waste lands. Permanent homes and tenant houses were built. New leases for mining purposes were made. Abandoned or surface developed mines began to hum with the voices of miners and the ring of the pick and shovel; and shut-down furnaces began to glow with newly-kindled fires. New and costly machinery was bought and put to work on these lands. New mines were opened and worked to unprecedented depths, and unknown mineral wealth was thus developed, at an outlay exceeding \$100,000. Much of this unquestionably was predicated of the assurance that the property was not subject to any claim of dower. The proximity of the complainant during all this time to the property warrants the presumption that she had knowledge of all this work of development, and yet stood mute. Her silence and inaction are fatal to her claim, so far as the real estate is concerned.

As to her claim to a new participation in the personal estate, it is sufficient to say the right of action was barred within five years after the discovery of the fraud; and discovery is deemed in such case to take place from the time the party has notice of the main facts constituting the fraud. 2 Rev. St. Mo. § 6775; *Hunter v. Hunter*, 50 Mo. 445-451; *Thomas v. Mathews*, 51 Mo. 107; *Ricords v. Watkins*, 56 Mo. 553. It results that the bill is dismissed.

NORTHERN PAC. R. CO. v. CANNON *et al.*

(Circuit Court, D. Montana. February 25, 1892.)

1. QUIETING TITLE—ENJOINING FORCIBLE ENTRY AND DETAINER ACTION.
Plaintiff in a suit to quiet title cannot enjoin defendant from bringing an action at law against him for forcible entry and detainer of the premises in question.
2. INJUNCTION—ACTION AT LAW.
Equity will not enjoin an action at law, when the party seeking the injunction has a good defense at law.
3. SAME—CRIMINAL PROCEEDINGS.
Proceedings at law, not of a strictly civil nature, will not be enjoined except where the same right is sought to be substantiated both at law and in equity.
4. FORCIBLE ENTRY AND DETAINER.
Proceedings in forcible entry and detainer are of a *quasi* criminal nature.

In Equity. Suit by the Northern Pacific Railroad Company against Charles W. Cannon and others, to quiet title. Heard on motion for an injunction. Denied. For former reports, see 46 Fed. Rep. 224, 237.

F. M. Dudley and Cullen, Sanders & Shelton, for complainant.

Toole & Wallace and McConnell & Clayberg, for defendants.

KNOWLES, District Judge. Plaintiff commenced an action in this court to quiet title to a certain tract of land in Lewis and Clarke county,

Mont. After the filing of the bill of complaint and the issuing of a subpoena, the defendants commenced an action of forcible entry and detainer against plaintiff, setting forth in their complaint that plaintiff had forcibly obtained and was retaining by force the premises in dispute. The plaintiff then applied to this court to restrain this action of forcible entry and detainer. A restraining order was obtained, and the cause, upon the application for an injunction, set down for a hearing during the present term of this court, and was argued and submitted. Plaintiff claims that this action would interfere with the proceedings in equity to quiet the title of plaintiff. The action of forcible entry and unlawful detainer in no way determines the title to the premises in dispute, or right to the possession thereof. *Parks v. Barkley*, 1 Mont. 514; *Boardman v. Thompson*, 3 Mont. 387. Equity interferes by injunction to restrain an action at law to recover possession of real estate when a person seeking the injunction has an equitable title, and the person sought to be enjoined has a legal title, which has been obtained by fraud or mistake. In such a case the action at law is stayed until the equitable rights of the parties are determined. It is held that upon such a state of facts it would be giving the plaintiff in the action at law an unfair advantage to allow him to proceed and obtain judgment, but in this case the plaintiff has a legal title, and claims actual possession of the premises, the title to which it would quiet. The issue in forcible entry and unlawful detainer in such a case as this is as to whether the defendant in that action by force obtained the possession of the premises from plaintiff, and withholds the same from plaintiff. This is not an issue presented in this case at bar for the consideration of the court. It cannot be called upon to enter any judgment or decree upon such an issue. There is no showing in the application for an injunction herein that plaintiff has not a good and legal defense to the action of forcible entry. It is an established rule in equity that a court will not enjoin an action at law when a party seeking the injunction has a good defense at law. *Grand Chute v. Winegar*, 15 Wall. 373. There are presented no grounds of equitable defense to this action which should be first determined before a proper defense to the action at law could be maintained. Plaintiff has cited some English cases where criminal proceedings in the nature of forcible entry were enjoined: *Mayor, etc., v. Pilkington*, 2 Atk. 302; *Montague v. Dudman*, 2 Ves. Sr. 398; *Attorney General v. Cleaver*, 18 Ves. 220. But it should be observed that these were cases of injunction against the plaintiff, who was proceeding in a civil suit upon the same matter of right as well as in a criminal proceeding. In Story's Equity Jurisprudence (section 893) it is laid down as a general rule that courts of equity "will not interfere to stay proceedings in any criminal matters, or any cases not strictly of a civil nature;" and that learned author says the exception to this is where the party seeking redress by a criminal action or *mandamus* or an information or a writ of prohibition is the plaintiff to an action in equity. The rule is, plaintiff may be restrained if he is seeking to substantiate the same right in both proceedings. The general rule is that proceedings in forcible entry are *quasi*

criminal. *Sheehy v. Flaherty*, 8 Mont. 365, 20 Pac. Rep. 687; 2 Daniells, Ch. Pl. & Pr. 1620. Other cases might be cited to the same effect. Courts of equity, it is held by the supreme court in *Re Sawyer*, 124 U. S. 200, 8 Sup. Ct. Rep. 482, will not restrain criminal proceedings. In regard to the action of forcible entry and unlawful detainer, High on Injunctions (1st Ed. § 65) lays down the rule that, without some special reasons indicating "certain and manifest irreparable injury," a court will not stay an action for the same; and says that when a party comes into court seeking equitable relief he must come with clean hands, and that one who has been guilty of a forcible entry does not so come into a court of equity. Supporting these views are *Crawford v. Paine*, 19 Iowa, 172; *Lamb v. Drew*, 20 Iowa, 15. It is said that allowing this action to proceed might have the effect of ousting this court of jurisdiction to try this cause. I do not say that would be an effect of a judgment in the action of forcible entry and detainer should the defendant recover judgment therein. But if it would, I should still see no reason for granting the injunction. Jurisdiction of a court, obtained by fraud, cannot be sustained. Brown, Jur. § 43, and note 3. The application for an injunction is denied, and the restraining order set aside.

GILCHRIST *et al.* v. HELENA, HOT SPRINGS & S. R. Co. *et al.*

(Circuit Court, D. Montana. February 25, 1892.)

1. CORPORATIONS—INSOLVENCY—UNPAID SUBSCRIPTIONS—SET-OFF.

Where there are a number of different liens upon the property of an insolvent railway company, a stockholder who holds a judgment against the company cannot, of his own motion, or at the instance of one lien-holder, set off the amount thereof against unpaid subscriptions on his stock, since the subscriptions, being a trust for all creditors according to their equities, might be absorbed, in whole or in part, by liens found to be superior to his judgment.

2. SAME.

A stockholder in an insolvent corporation owes nothing on unpaid subscriptions, except so much thereof as may be necessary, together with the other assets, to satisfy the creditors; and hence, before this sum is ascertained and demanded of him, he cannot be compelled to set off the whole unpaid subscription against a judgment held by him against the corporation. *Emmert v. Smith*, 40 Md. 123, distinguished.

In Equity. Bill by Thomas Gilchrist and others, partners, doing business as Gilchrist Bros. & Edgar, against the Helena, Hot Springs & Smelter Railroad Company, the Farmers' Loan & Trust Company, and others, to enforce the lien of a judgment. The Northwestern Guaranty Loan Company, having intervened, filed a cross-bill, and the hearing was upon a demurrer thereto. Demurrer sustained. For former report, see 47 Fed. Rep. 593.

Walsh & Newman, for plaintiffs.

Toole & Wallace, *A. K. Barbour*, and *H. G. McIntire*, for defendants.

KNOWLES, District Judge. Plaintiffs obtained two judgments against the defendant Helena, Hot Springs & Smelter Railroad Company, a corporation organized under the laws of Montana. These judgments, it is claimed, were liens upon the property of said railroad company by virtue of the provisions of section 707, Comp. St. Mont. p. 824. Plaintiffs then brought an action in equity to have their said liens satisfied out of the said property, and to be declared a prior lien to that of the Farmers' Loan & Trust Company, which they made a party to the action. Many other parties who have judgments against said railroad company, claimed to be liens on the property of the same, were made parties. It was prayed, among other things, that a receiver be appointed, etc. The Northwestern Guaranty Loan Company, a corporation organized under the laws of Minnesota, and Erastus D. Edgerton, asked to be allowed to intervene in said action. This petition was granted. The cause was removed from the state court to this. The Northwestern Guaranty Loan Company filed its bill of intervention, setting forth that the Helena, Hot Springs & Smelter Railroad Company made, executed, and delivered to the Farmers' Loan & Trust Company, as a trustee, a mortgage upon its property to secure the payment of some 150 bonds, of \$1,000 each, of said railroad company; that 100 of said bonds, amounting to \$100,000, were sold to said intervener, who is now the owner and holder thereof; that said railroad company has failed to pay said bonds, or the interest thereon, according to their terms, and in accordance with the terms of said mortgage; that the said trustee, the Farmers' Loan & Trust Company, has failed to enforce the rights of the said intervener in the premises, although requested by it in writing, and the proper security for costs and expenses offered, as is required in the mortgage deed aforesaid. Intervener asks to have the said mortgage foreclosed, and the property sold to satisfy said bonds. The bill, also, among other things, sets forth that, in organization of the said railroad company, W. E. Cullen, H. B. Palmer, C. G. Evans, and W. H. Hunt subscribed each, to the capital stock of said company, the sum of \$33,750, and one R. C. Wallace the sum of \$15,000; that the stock subscribed by the said Hunt was for the use and benefit of one William Muth, who is now the owner and holder thereof, to-wit, 337½ shares of said stock; that no payment has been made on said stock subscription. The bill further shows that certain judgments against said railroad company held by W. C. Whipps and W. E. Cox and George Green were purchased by them from the parties who obtained them, for William Muth, who is now, in fact, the owner of the same, and claims them as a lien upon the property embraced in the mortgage. These claims amount to near \$3,000. It is alleged that the said railroad company is insolvent. The bill asks that these claims be canceled or offset by an equal sum of the amount due by said Muth on his unpaid stock subscription. The said Muth demurred to this portion of said bill of intervention, and the question is presented as to whether said unpaid stock subscription should be reduced by the amount of said judgments; that is, so much thereof be offset against said judgments.

The money which the said Muth owes said railroad company for unpaid stock subscription is a trust fund, which should be paid into the treasury of the company for the benefit of all the creditors. The debts which the company owes to said Muth on these judgments is not of this character. In the case of *Sawyer v. Hoag*, 17 Wall. 610, the supreme court said, in a case in which the plaintiff, Sawyer, sought to compel the defendant, Hoag, as an assignee in bankruptcy of an insolvent insurance company, to allow, as a set-off, a certain claim which he held against the insurance company on the amount due from him on a subscription of stock to said company:

"The debts must be mutual,—must be in the same right. The case before us is not of that character. The debt which the appellant owed for his stock was a trust fund, devoted to the payment of all the creditors of the company. As soon as the company became insolvent, and this fact became known to the appellant, the right of set-off for an ordinary debt to its full amount ceased. It became a fund belonging equally in equity to all the creditors, and could not be appropriated by the debtor to the exclusive payment of his own claim. It is unnecessary to go into the inquiry whether this claim was acquired before the commission of an act of bankruptcy by the company, or the effect of the bankruptcy proceedings. The result would be the same if the corporation was in the process of liquidation in the hands of a trustee, or under other legal proceedings. It would still remain true that the unpaid stock was a trust fund for all the creditors, which could not be applied exclusively to the payment of one claim, though held by a stockholder who owed that amount on his subscription."

This rule was affirmed in *Scammon v. Kimball*, 92 U. S. 367; *Scovill v. Thayer*, 105 U. S. 152; and *Patterson v. Lynde*, 106 U. S. 519, 1 Sup. Ct. Rep. 432.

It is evident, from these decisions, that Muth could not himself offset the amount of these judgments against him for unpaid stock due from him to said railroad company. Now, can the company, or a creditor of the company, having a lien upon its property, compel him to credit the amount the company owes him upon these judgments, to the extent of the same? In order that one debt may be offset against another, the debts must be in the same right. But the supreme court, in the cases referred to above, say they are not in the same right. If Muth should be required to pay his subscription of stock to the said railroad company, the amount so paid might not be devoted to paying his debts against the company. It would be devoted to paying the claims of those who had the right to be first paid after the property of the company is exhausted, or to all the claims *pro rata*. There are in this case quite a number of judgments claimed to be liens against the property of the railroad company. Suppose it should turn out that there was not enough property belonging to the railroad company to satisfy the liens which are prior to those it is alleged the defendant Muth owns, then would not the subscription of stock of Muth be devoted to first paying off these liens under the decisions of the supreme court above referred to? I think this must be true. The rule to be established in such a case must be a general one, and apply to all similar cases. If it should appear that there might be

cases in which the unpaid stock, if paid to the company, would not go to liquidating the claims of this stockholder who has not paid his subscription, I am sure there would be no right in any one to have the sum due the company to any extent set off against the debts such company might owe such stockholder. There might be cases where equity would decree such a set-off. If the party owning the claims against the company was notoriously insolvent, and there would be no chance for the unpaid subscription of stock of such a stockholder being liquidated, and hence no fund could arise for the paying of the claims which would be prior to his claims, then a court of equity might decree that these claims of such unpaid stockholder should be treated as a payment upon the unpaid stock subscription. Under such circumstances, a joint claim is sometimes allowed to be a set-off against an individual claim, although they are not held in the same right. Story, Eq. Jur. § 1437, 1437a. How far a court of equity might go, if such a case were presented, I am not now prepared to say. But no such case is here presented. It is not alleged that William Muth is insolvent.

It seems to be the approved practice in the courts of the United States for a creditor of a corporation, who has an unpaid claim against the same, and the property thereof is exhausted, to bring an action in the nature of a creditors' bill to compel a stockholder to pay in his unpaid subscription of stock. *Brown v. Fisk*, 23 Fed. Rep. 228; *Patterson v. Lynde*, 106 U. S. 519, 1 Sup. Ct. Rep. 432. And this action may be brought against one stock subscriber. *Hatch v. Dana*, 101 U. S. 205. This bill is allowed to be filed only after a judgment against the corporation, or when it is known to be insolvent. Then the suit is brought in such a way as to allow all parties who are creditors of the corporation to come in and be parties to the action, and share in its results. It would seem that, in this case, the intervener contemplated some such relief as is provided in a creditors' bill, and yet there is no provision for other creditors to join in asking such relief. There is no allegation that there has been any demand on Muth to pay his unpaid subscription of stock. Undoubtedly this demand can be made by a court of equity in behalf of the creditors, but before any demand can be made there must be ascertained, approximately, at least, how much Muth would be required to pay on his subscription. In the case of *Scovill v. Thayer*, *supra*, the supreme court said:

"The defendant owed the creditors nothing, and he owed the company nothing, save such unpaid portion of his stock as might be necessary to satisfy the claims of the creditors. Upon the bankruptcy of the company, his obligation was to pay to the assignees, upon demand, such an amount upon his unpaid stock as would be sufficient, with the other assets of the company, to pay its debts. He was under no obligation to pay anything until the amount necessary for him to pay was, at least, approximately ascertained. Until then his obligation to pay did not become complete."

There is no allegation that in any way would show that it is yet ascertained how much Muth would be called upon to pay on his unpaid subscription of stock. The requiring him to set off the claims he has

against the company in part liquidation of his subscription of stock would, in effect, be requiring him to pay the company so much of his subscription. I do not think the time has come when this can be done.

It is claimed that the case of *Emmert v. Smith*, 40 Md. 123, is an authority in point justifying the proceedings sought in this case. In that case the property of the corporation had been converted into money under a sale made by trustees in pursuance of an order of court, and the contest was as to the distribution of the proceeds among the creditors. In that case the court says:

"In the distribution of this fund in equity the creditors are severally actors, and each entitled to set up any equitable defense against each other. The provisions of the statute, without undertaking to prescribe any specific mode of recovery, make the stockholders of the company individually responsible to the creditors, and were designed for the relief of the creditors, and to afford them an ample and expeditious remedy before any forum competent to administer the law."

There is no statute in Montana which makes the stockholders of a railroad corporation individually liable to the creditors of the same for unpaid subscriptions of stock. In the case of *Terry v. Little*, 101 U. S. 216, the supreme court say: "The individual liability of stockholders in a corporation is always a creature of statute. It does not exist at common law." It will be seen that, while that was a different proceeding from that now presented in this case, there was also a different element for consideration, namely, the individual liability of a subscriber of stock to a creditor. It would seem, also, that in that case the court did not consider the precise point presented in this,—namely, the right to have an individual claim against a corporation set off against an unpaid subscription of stock,—but whether this could be done without calling in all of the other stockholders who were indebted to the company for unpaid subscriptions of stock, and the liability of each determined, and only the amount each was required to contribute and pay in so as to liquidate the debts of the company determined. The court held that it could. That case, however, I do not consider in point in this case. For these reasons I think the demurrer should be sustained; and it is so held.

CHAFFIN *et al.* v. HULL *et al.*

(Circuit Court, E. D. Missouri, E. D. March 5, 1892.)

1. RES JUDICATA.

In 1840, for a consideration paid by the husband of C., a deed of land was executed to a trustee in trust for C., which by mistake vested only a life-estate in C., remainder to her children, or, in default of children, to her right heirs, the intention being that a fee should be vested. Thereafter an action was brought to reform the deed, in which the trustee and other parties to the deed, but not the contingent remainder-men, were made parties. Before final decree therein, the husband of C. died. *Held*, that the trust became executed by the statute of uses, and the trustee had no further duties to perform, and the decree thereafter entered was not binding on the contingent remainder-men, they not being represented in the action.

2. RESULTING TRUST—FRAUD OF AGENT.

H., while acting as confidential agent in charge of property, both under C. and the trustees under C.'s will, acquired full information of a defect in C.'s title, and the intention of C. and of the trustees to acquire the outstanding title, or to contest its validity, but secretly purchased such title in the name of another, and by his connivance caused the tenants of the property to attorn to the person to whom the outstanding title had been conveyed. *Held*, that he would not be allowed to profit by his purchase, but would be treated in equity as holding the title for his principals.

3. SAME.

Nor will the heirs of an attorney who was jointly interested with H. in the purchase, and conducted all the negotiations with full knowledge of H.'s relations to C., stand in any better position than H.

4. TRUSTEES—DUTIES AND LIABILITIES.

The testamentary trustees under C.'s will were given full power to sell, mortgage, and lease, and reinvest the proceeds, in their discretion. *Held*, that they had power to buy in an outstanding claim as a cloud on their title, and could maintain the action against H. and the others to charge them as constructive trustees, and in such action defendants would be charged with the rents and profits, and credited with all expenditures for taxes, insurance, and improvements, and the sums expended in purchasing the outstanding interests.

In Equity. In the opinion by BREWER, J., on demurrer to the bill, (39 Fed. Rep. 887,) the facts were stated as follows:

"In 1840, one William Myers was the owner of the property in question. For a consideration of \$4,000 paid by Elijah Curtis, a deed was executed by Myers and wife to one Samuel Russell in trust for Mrs. Curtis. The deed, as drawn and executed, vested a life-estate in Mrs. Curtis, and the remainder in her right heirs. It was so drawn and executed through a mistake of the draughtsman; the intent of all the parties being that the fee should be vested, and not a life-estate, and that Russell, who so held the title as trustee for Mrs. Curtis, could, with his *cestui que trust*, convey the fee. After the deed had been so executed and recorded, in 1843, the mistake having been discovered, proceedings were had in the circuit court of St. Louis county to correct that deed. A decree was entered that it be reformed so as to express the intent of the parties, and vest a fee instead of a life-estate. To that proceeding Mr. and Mrs. Curtis, Mr. Russell, the trustee, and Mr. and Mrs. Myers, the grantors, were parties. The heirs of Mrs. Curtis were not made parties. By subsequent conveyances, the title vested in Mrs. Curtis and Mr. Russell, her trustee, passed to one Edward Chaffin, in 1850. He entered, took possession, and remained in possession until his death, in 1883. Thereafter the present complainants, holding under his will, took possession, and retained it until 1886. Mr. Curtis, the husband of Mrs. Curtis, the party who paid the money, died in 1843; but Mrs. Curtis lived until 1884, when she died, leaving no children. Mr. Chaffin during his possession became aware of the fact that, inasmuch as the heirs of Mrs. Curtis were not made parties to that decree of reformation, they had, at least, an apparent title to the re-

mainder. During the years of his possession, at least during the last few years of his possession, he himself having removed to Massachusetts, he employed Leon L. Hull, one of the defendants, as his agent to look after the property, to pay taxes and insurance, to rent the property, and have general charge thereof as his agent. During the years of that relationship he communicated to Mr. Hull his doubts as to the completeness of his title as disclosed by the record, and made several efforts, through him, to ascertain the residence and the names of the right heirs of Mrs. Curtis, with a view of obtaining from them releases of their apparent title to the remainder. Mr. Hull was fully possessed of information in this respect from Mr. Chaffin, his principal. On the death of Mr. Chaffin these complainants, finding Mr. Hull in possession as agent, continued him in that position, and he assumed the same confidential relations to them that he had had to Mr. Chaffin. After the death of Mrs. Curtis, in 1884, Mr. Hull, the agent, conspiring with one William Clark and one Samuel Herman, proceeded to hunt up the right heirs of Mrs. Curtis, and obtained deeds from them, the deeds being made to William Clark, one of the conspirators, of their respective interests in the remainder. While apparently continuing as the agent, and representative of these complainants, in pursuance of this conspiracy he caused legal proceedings to be instituted, which, being carried on collusively, terminated in the dispossession by the defendants of these complainants, and the transfer of possession to Clark, one of the conspirators. This was accomplished in 1886. The charge is that these arrangements and transactions between Clark, Hull, and Herman were a part of a conspiracy, and were a breach of the trust relations existing between the complainants and Hull. All these facts being stated in the bill, the prayer is that this court shall decree that the decree of the St. Louis circuit court, reforming that deed, concludes the right heirs of Mrs. Curtis, and operated to vest the full legal title in Mrs. Curtis and her trustee, and these complainants claiming under her; or, if the court cannot so decree, that it now decree a reformation of that deed, correcting the mistake, and making the deed to-day operative as a transfer of the fee, and therefore cutting off all interests in the remainder in the heirs of Mrs. Curtis or their grantees, or, failing that, that the court decree that the transactions by which Leon L. Hull, with his co-conspirators, obtained the legal title to the remainder were in breach of the fiduciary relations existing between Hull and the complainants, and therefore that the title which they acquired was acquired in trust for the complainants."

Cunningham & Eliot, for complainants.

S. N. Taylor and Joseph S. Laurie, for defendants.

THAYER, District Judge. 1. The court adheres to the views expressed in its decision overruling the demurrer to the bill, (39 Fed. Rep. 887, 890,) that the contingent remainder-men are not bound by the decree entered in the St. Louis circuit court on September 16, 1843, in the case of *Elijah Curtis and Wife v. Wm. Myers et als.* That suit was instituted for the express purpose of reforming the deed of Myers and wife, and thereby destroying the estate or expectancy of the contingent remainder-men. The latter persons were entitled to be heard in defense of their rights, but, in point of fact, their interest was not represented. Before the final decree was passed, the trust originally created by the deed of William Meyers and wife to Samuel Russell, trustee, had been executed by the statute of uses. The trust ended when Mrs. Curtis became discoverd. Thenceforward she had a legal estate for life. The trustee had no further

duties to perform, either as respects the life-tenant or the remainder-men. It was not even necessary for him to execute a conveyance to the remainder-men on the death of Mrs. Curtis, as the statute of uses had already divested him of the legal title. No such conveyance has in fact been made by the trustee since the termination of Mrs. Curtis' life-estate, nor is it pretended that such a conveyance is or was necessary to perfect the title of the remainder-men. *Roberts v. Moseley*, 51 Mo. 282; *Ware v. Richardson*, 3 Md. 505; *Handy v. McKim*, 64 Md. 561, 4 Atl. Rep. 125; *Bacon's Appeal*, 57 Pa. St. 504, 512; *Watkins v. Reynolds*, 123 N. Y. 211, 25 N. E. Rep. 322; *Richardson v. Stodder*, 100 Mass. 530; 2 Washb. Real Prop. 499, 500; *Perry, Trusts*, § 310a, and citations; and see, also, *Doe v. Considine*, 6 Wall. 458, 471, and *Young v. Bradley*, 101 U. S. 782.

As there was no person but Mrs. Curtis before the court, at the time the final decree was entered, who had either a legal or equitable estate in the premises to be affected by the decree, and as the issue to be tried was one in which the interest of Mrs. Curtis, the life-tenant, stood opposed to that of the remainder-men, it is evident that the remainder-men were not represented in the suit to extinguish their expectancy. It is also manifest that there was no real controversy in that suit, for the reason, no doubt, that there was no person before the court having an interest in the property identical with that of the remainder-men, (or having any estate, legal or equitable,) who was interested in making a defense in their behalf. A number of cases have been cited by complainants' counsel in support of the proposition that the final decree of September 16, 1843, was binding on the remainder-men, but the court is of the opinion that they do not sustain the contention. In the case of *Miller v. Railway Co.*, 132 U. S. 662, 10 Sup. Ct. Rep. 206, a decree annulling a will was adjudged to be conclusive as against certain persons in whose favor the will created an executory devise, for the reason that the executor of the will, and an infant son of the testator, who was a devisee in fee of the whole estate, had been made parties to the suit. The interests of the executory devisees and the devisee in fee were clearly identical. The former were accordingly well represented by the devisee in fee and the executor. It may also be admitted that a tenant in tail may well represent succeeding tenants in tail or contingent remainder-men in all litigation affecting the estate where the interest of the tenant who is made a party is identical with that of the persons who are to be bound by representation. It may be conceded that an active trustee can represent beneficiaries of the trust, especially if they are very numerous; and it may also be conceded that, in suits to change investments and in suits for partition, it is generally sufficient to bring before the court all who can be made parties. *Hopkins v. Hopkins*, 1 Atk. 580, 590; *Lorillard v. Coster*, 5 Paige, 172; *Busnett v. Moxon*, L. R. 20 Eq. 182; *Richter v. Jerome*, 123 U. S. 233, 8 Sup. Ct. Rep. 106; *Kerrison v. Stewart*, 93 U. S. 155. See, also, *McArthur v. Scott*, 113 U. S. 400-403, 5 Sup. Ct. Rep. 652.

But these decisions fall short of establishing the contention that the expectancy of a contingent remainder-man can be effectually extinguished when there is no one before the court to represent him but a trustee

whose trust has been executed under the statute of uses, and a life-tenant whose estate is to be made an estate in fee by the operation of the expected decree. The doctrine of virtual representation, as generally understood and enforced in this country, is not applicable to such a case, and will not warrant the conclusion that the contingent remainder-man is barred of his right. *McArthur v. Scott*, 113 U. S. 340, 407, 5 Sup. Ct. Rep. 652; *Moseley v. Hankinson*, 22 S. C. 323; *Covar v. Cantelou*, 25 S. C. 35; *Monarque v. Monarque*, 80 N. Y. 320; *Nodine v. Greenfield*, 7 Paige, 544; *Johnson v. Jacob*, 11 Bush. 646; *Downin v. Sprecher*, 35 Md. 474. In *McArthur v. Scott* it was said that "in every case there must be such parties before the court as to insure a fair trial of the issue in behalf of all."

2. The second controlling question in the case the court decides in favor of the complainants. That is to say, the court holds that defendant Hull acquired the interest of the remainder-men in the property in controversy under such circumstances that a court of equity must treat him as a constructive trustee. Hull was the confidential agent of complainants' testator for many years prior to his death; for at least six years prior thereto he had charge of the particular property now in controversy. During that period he acquired full information of the defect in his principal's title. He became aware of the fact that it was doubtful whether his principal had more than an estate *per autre vie* in the premises in question; that his principal was anxious to remove the cloud upon the title; and that, in any event, he did not intend to surrender the possession of the premises to the remainder-men, on the death of Mrs. Curtis, until there had been an adjudication of the validity of their title, inasmuch as it was doubtful whether their title was valid. It cannot be doubted that Edwin Chaffin, the testator, frequently consulted with Hull concerning the outstanding title, and that Hull was fully advised of his intention to contest its validity if he did not succeed in acquiring it for a fair consideration. The death of the testator did not alter the defendant's relation to the property. He still continued to act as the confidential agent and adviser of the complainants in all matters pertaining to the property, and was fully aware of their purpose to contest the title of the remainder-men, if they did not succeed in acquiring it. The fact that Mr. Hull rendered his accounts of rents collected from the property to the local administrator (Mr. Eliot) is of no significance, so far as his relation to the complainants is concerned, for the reason that the administration in this state was merely ancillary to the administration in Massachusetts. The mere interposition of a local administrator between the defendant and the foreign executors and trustees did not terminate the relation of trust and confidence which existed between them, or lessen the obligation of fidelity which the defendant owed to the executors and trustees. The interest of the remainder-men was purchased by the defendant during the existence of his agency, and was asserted against the complainants in a manner which deserves censure. The negotiations for the purchase were conducted by the defendant secretly, with a view, at first entertained, of acquiring the outstanding

interest, and selling it to the complainants at a profit. The title, when acquired from the remainder-men, was conveyed to a third person for the purpose of concealing the defendant's connection with the transaction. By the intentional neglect of the defendant to discharge his duty to his clients, (if not by his advice and persuasion,) the tenants in possession of the property were induced, during the existence of the agency, to attorn to the person in whom the outstanding title had become vested; and, after the complainants had been thus dispossessed, the defendant, as agent of the complainants, and at their request, brought a suit to recover the possession, without advising them that the tenants had in reality attorned to himself as owner of the outstanding title. In the light of these facts, which are not seriously denied, it is sufficient to say that a court of equity will not allow the defendant to profit by his purchase, but will treat him as holding the title in trust for his principals. The authorities fully warrant the conclusion that an agent in charge of property will not be permitted to purchase and assert against his principal an outstanding claim or interest, which the principal is desirous of acquiring as a means of perfecting his title. Even if it be conceded that an agent may purchase the reversion where his principal is the owner of an interest that is clearly only a life-estate, (*Kennedy v. Keating*, 34 Mo. 25,) yet that rule will not justify an agent in purchasing an outstanding claim of doubtful validity, which the principal intends to contest if he cannot acquire it by purchase, (*Michoud v. Girod*, 4 How. 503, 553; *Ringo v. Binns*, 10 Pet. 269; *Grumley v. Webb*, 44 Mo. 444; *Massie v. Watts*, 6 Cranch, 148; *Baker v. Humphrey*, 101 U. S. 494; *Jamison v. Glasscock*, 29 Mo. 191; *Gardner v. Ogden*, 22 N. Y. 327; *Perry, Trusts*, § 206, and citations.)

3. The heirs of Samuel Herman, deceased, who are parties to the suit, stand in no more favorable attitude before the court than their co-defendant. They are not innocent purchasers for value of the interest of the remainder-men. Their ancestor, Samuel Herman, appears to have entered into an arrangement with the defendant Hull to purchase the interest of the remainder-men for their mutual profit. He was an attorney at law, conducted all the negotiations leading up to the purchase, and appears to have acted as Hull's adviser, both as to the attitude he should assume towards the complainants, the representations he should make, and the facts he should conceal from their knowledge. He was also fully aware of Hull's relation to the complainants. Having acted as Hull's adviser in all of the transactions, with full knowledge of his relation to the complainants, his heirs cannot derive any benefit from the purchase, but must be likewise treated as trustees.

4. Finally, the court is of the opinion that the complainants, as testamentary trustees under the will of Edwin Chaffin, deceased, have the right to maintain this suit for the purpose of charging the defendants as constructive trustees. The point made, that they have no right to prosecute the suit in that aspect, for the reason that the will gave them no power to purchase the outstanding claim of the remainder-men, appears to the court to be without merit. By the will of Edwin Chaffin, they were

vested with the title to all of the testator's real property, (including the property now in controversy,) to hold upon certain active trusts. They were given power to sell, mortgage, or lease all the property committed to their charge, and to reinvest the proceeds as they deemed advisable. It can hardly be doubted that, under the provisions of the will, they had the right to buy in an outstanding claim that was a cloud upon their title, and that a court of equity or probate would allow them to take credit for such an expenditure on account of the trust-estate. But, in any event, an agent of the complainants, who has violated his trust, cannot be permitted to make such a defense. It does not lie in his mouth to say that no relief should be granted because the court will probably grant relief upon conditions with which the complainants have no right to comply. It may be that the rents and profits of the property, while the defendants have been in possession, will be fully adequate to reimburse them for their expenditures in purchasing the interest of the remainder-men, without requiring any expenditure on the part of the trustees.

5. A decree will accordingly be entered in favor of the complainants, adjudging that the defendants hold the legal title to the property in controversy in trust for the complainants, and further adjudging that such title be divested out of the defendants, and vested in the complainants, as testamentary trustees under the will of Edwin Chaffin, deceased. A reference will also be ordered to one of the standing masters in chancery, to take an account of the rents and profits which defendants have received during their occupancy, and in stating such account the defendants will receive credit for all expenditures on account of taxes, insurance, and improvements, as well as for all sums expended in purchasing the interest of the remainder-men.

NORTHERN PAC. R. CO. v. AMACKER *et al.*

(*Circuit Court of Appeals, Ninth Circuit. January 25, 1892.*)

1. QUIETING TITLE—PLEADING—POSSESSION.

A bill to quiet complainant's title to 160 acres of land platted by defendants as an addition to a city averred that complainant "is seised thereof in fee-simple," that eight lots thereof were in possession of two defendants, and the balance "is vacant, unimproved land." *Held*, that the averments should be construed together, and meant that complainant was seised in law and not in fact, and therefore not in actual possession of the land, and, under Code Civil Proc. Mont. § 866, providing that an action may be brought by any person "in possession" to determine adverse claims, that the bill was bad on demurrer.

2. SAME—MULTIPLICITY OF SUITS.

Such bill will not be sustained on the ground of avoiding a multiplicity of suits, it appearing that only two defendants are in possession claiming title and exercising ownership, nor will it be sustained on the ground of the extensive land possessions of complainant under a land grant, and the hardship of taking possession of all such lands before bringing suit.

46 Fed. Rep. 233, affirmed.

V.49F.no.7—34

Appeal from the Circuit Court of the United States for the District of Montana.

In Equity. Bill by the Northern Pacific Railroad Company against Maria Amacker and others, to quiet complainant's title to certain lands. Complainant appeals from a decree sustaining defendant's demurrer to the complaint and dismissing the complaint. Affirmed.

F. N. Dudley, for appellant.

Massena Bullard and Thomas C. Bach, for appellee.

Before HANFORD, HAWLEY, and MORROW, District Judges.

MORROW, District Judge. This is a suit in equity seeking a decree declaring that the defendants have no estate or interest whatever in or to certain lands and premises in Montana claimed by the complainant, that the title of the complainant is good and valid, and that the said defendants be forever enjoined and restrained from asserting any claim in or to said lands or premises adverse to the complainant. The land is described as the W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$, S. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$, and S. W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$, of section 17, township 10 N., of range 3 W., principal meridian of Montana. The complainant claims title to this land under the act of congress approved July 2, 1864, providing for the creation and organization of the Northern Pacific Railroad Company, and granting to the company every alternate section of public land not mineral, designated by odd numbers, to the amount of 20 alternate sections per mile on each side of said railroad line through the territories of the United States, and 10 alternate sections of land per mile on each side of said railroad wherever it passes through any state, and whenever on the line thereof the United States has full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the commissioner of the general land-office.

The bill alleges that the complainant duly accepted the conditions and impositions of the said act, and fixed the general route of its road through the territory of Montana, February 21, 1872, and on July 6, 1882, it definitely fixed the line of its said railroad extending opposite to and past the land in controversy, and thereafter constructed and completed that portion of its railroad along said line of definite location; that the land involved in this suit is within 40 miles of complainant's line of road, and that said land was, at the date of the fixing of the general route on February 21, 1872, and at the date of fixing the definite line of the road on July 6, 1882, public land, to which the United States had full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights. This allegation is modified by the statement that in 1868 certain persons filed declaratory statements under the provisions of the laws of the United States granting pre-emption rights to settlers on the public domain, whereby they made pre-emption claims to the various subdivisions of the land in question; that one A. J. Witter filed one of said

declaratory statements May 13, 1868, claiming the N. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of said section 17; that one William M. Scott filed another of said declaratory statements October 5, 1868, claiming the S. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of said section 17; that one Jerome S. Glick filed another of said declaratory statements November 27, 1868, claiming the W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$, the S. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$, and the S. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 17, and Robert C. Wallace filed another of said declaratory statements December 13, 1869, claiming the S. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of said section 17; but it is alleged that the said claimants did not at any time inhabit or improve the lands so claimed, or erect dwellings thereon; that in February and March, 1868, all the lands in said township 10 N. of range 3 W. of principal meridian of Montana were surveyed by and under the direction of the United States surveyor general of the district of Montana, and return made of the official plat of said survey to the commissioner of the general land-office at Washington, D. C., and on July 23, 1868, the same was regularly filed in the land-office at Helena, Mont., and that by said survey it was determined that said land was agricultural, and not mineral, in character. It is further stated that notice of fixing the general course of complainant's road was not received at the land-office at Helena, Mont., until May 6, 1872, at which date there was received from the commissioner of the general land-office a diagram, showing that portion of the line of general route of said railroad extending through said land-district, together with an order instructing the land-officers to withdraw from sale, pre-emption, or other entry, all public lands in odd-numbered sections within 40 miles on each side of the line of general route of said railroad; that prior to the receipt of said diagram and order of withdrawal at the land-office at Helena, to-wit, on May 3, 1882, one McLean applied under the homestead act of May 20, 1862, to enter the said subdivision of section 17 as a homestead, and he thereupon made an affidavit, as required by law, and filed the same with the register of the land-office and paid the receiver the sum of \$10; but it is alleged that McLean did not then nor at any time reside upon or cultivate said land for the term of five years, or for any time whatever; that in 1879, pursuant to a circular of instructions issued by the commissioner of the general land-office, the register and receiver of the land-office at Helena notified McLean to appear and show cause within 30 days why said entry should not be canceled for failure to make proof of compliance with the provisions of the homestead law; that, McLean failing to respond to said notice, the commissioner of the general land-office, on September 11, 1879, canceled said entry; that about August 20, 1882, McLean died, leaving a widow, Maria McLean, who on March 15, 1883, made application to purchase said land under the provisions of the act of congress approved July 15, 1880; that the commissioner of the general land-office allowed said purchase to be made, whereupon the complainant appealed from said action to the secretary of the interior, who held that the land was excepted from the grant to the Northern Pacific Railroad Company, and allowed the applicant to purchase the land, and thereafter, on or about

June 17, 1887, the United States issued to said Maria McLean its patent for said land; that after the death of McLean, his widow, Maria McLean, married John J. Amacker, one of the defendants in this suit; that the defendants claim title under said United States patent to Maria McLean, and by reason of the issuance of said patent to her the United States refuses to issue to complainant a patent for said land. The complainant alleges that certain of the defendants have caused said land to be surveyed into town-sites, with blocks, lots, streets, and alleys, filed the plat of said town-site in the office of the county recorder for the county of Lewis and Clarke, as an addition to the city of Helena, and dedicated said streets and alleys to the public use, said addition to be known as "McLean Park Addition to Helena;" that two of the defendants are in possession of, and claim title to, eight of said lots, but that the remainder of said land is vacant, unimproved land, and that the complainant is seised thereof in fee-simple; that the premises are of the value of \$30,000.

To this bill defendants demurred, on the ground that by the plaintiff's own showing it was not entitled to the relief prayed for. The court below sustained the demurrer, and dismissed the bill. Plaintiff appealed.

The land grant of the Northern Pacific Railroad Company, under the act of July 2, 1864, was a grant of quantity to the extent of 20 alternate sections per mile on each side of the line of the road through the territories of the United States; and 10 alternate sections of land per mile on each side of the road whenever it should pass through a state. This grant was, however, subject to diminution in quantity within these limits by reason of the fact that when the line should be definitely fixed the United States might not have full title to all the odd-numbered sections within the limits of the grant. These particular sections might not all be free from pre-emption or other claims or rights, and some might be reserved, sold, granted, or otherwise appropriated. This probable loss to the railroad company of land in place within these primary limits was anticipated by congress, and to make good such deficiency, and relieve claimants under the public land laws of the United States from controversies with the railroad company concerning the validity of their claims, provision was made for compensating the company for such loss within the limits of an additional or indemnity grant. It was accordingly provided in section 3 of the act of July 2, 1864, that whenever, prior to the time when the line of the road should be definitely fixed, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands should be selected by said company in lieu thereof, under the direction of the secretary of the interior, in alternate sections, and designated by odd numbers, not more than 10 miles beyond the limits of said alternate sections. By joint resolution of May 31, 1870, these indemnity limits were extended by congress 10 miles further on each side of the road, making what has been known and designated as the "Second Indemnity Limits." The

grant was, therefore, not only one of quantity, but it was also in the nature of a float, to be located within the limits of certain exterior boundaries, containing such a number of odd-numbered sections as would enable the company to obtain by selection within such exterior boundaries the full quantity of land granted.

The title of the company to lands within the primary limits attached to specific odd-numbered sections as soon as they were capable of identification by the fixing of the definite line of the road opposite to them, and the filing of a plat thereof in the office of the commissioner of the general land-office. *St. Paul & P. R. Co. v. Northern Pac. R. Co.*, 139 U. S. 1, 11 Sup. Ct. Rep. 389. The right of the company to lands within the indemnity limits, selected in lieu of lands lost in place within the primary limits, attached at the date of the selection of such lands for that purpose. *Ryan v. Railroad Co.*, 99 U. S. 388. The land in controversy in this suit is part of an odd-numbered section within the primary limits of this grant, and, although it was lost to the complainant, so far as the action of the land department of the government was concerned, by the issuance of the patent to Maria McLean on June 17, 1887, it is nowhere alleged in the bill that this quantity of land has been wholly lost to complainant by reason of such action. This suit was not commenced until September 4, 1890, or more than three years after the patent was issued to Maria McLean. This period certainly afforded ample time to enable the complainant to make selection of a like quantity of land within the indemnity limits, to make good the loss.

It will be observed that the claim of Maria McLean was contested by the complainant before the secretary of the interior, and that the patent was not issued to her until after that contest had been decided by the secretary in her favor, and adversely to the complainant. By reference to the indemnity clause of section 3 of the act of July 2, 1864, we find that selections of land by the railroad company in lieu of lands lost in place are directed to be made under the direction of the secretary of the interior. The same officer who determined that this land did not belong to the complainant is charged with the duty of withdrawing from other disposition a sufficient quantity of lands within the indemnity limits to make good those lost in the granted limits. *Prest v. Railroad Co.*, 2 Dec. Dep. Int. 508. Pursuant to this authority, the secretary of the interior has from time to time directed the commissioner of the general land-office as to methods of procedure that would secure the adjustment of complainant's grant at the earliest possible time, and provide for the opening to settlement, as speedily as possible, of all lands within the indemnity limits of such grant not actually required to supply the lands lost in place within the original granted limits. 4 Dec. Dep. Int. 90; *Darland v. Railroad Co.*, 12 Dec. Dep. Int. 196. Moreover, congress, by the act of March 3, 1887, directed the secretary of the interior to immediately adjust, in accordance with the decisions of the supreme court, each of the railroad land grants made by congress to aid in the construction of such railroads. These measures have all been taken for the express purpose of expediting the set-

tlement and adjustment of all claims involved in the grants to the railroads, whether within the original or indemnity limits.

We think the acquiescence of complainant with the decision of the secretary of the interior for a period of more than three years, under the pending conditions, raises a presumption that it has made a selection of lands in the indemnity limits in lieu of those described in the patent to McLean. If it has, the most that can be said is that, under the terms of the grant, the complainant has the legal title to the land involved in this suit, and this is not sufficient. In *Lewis v. Cocks*, 23 Wall. 466, it was held "to be the universal practice of courts of equity to dismiss the bill, if it be grounded upon a merely legal title. In such a case, the adverse party has a constitutional right to a trial by jury." But if, on the other hand, no indemnity selection has been made, then the injury complainant has sustained by reason of the loss of this portion of its grant should be made to appear in the bill by proper averment. It is proper to say here that this defect in complainant's bill was not suggested either in the court below or upon the argument in this court. We will therefore proceed to consider whether the bill states facts sufficient in other respects to show a right to appeal to a court of equity for the relief prayed.

The bill alleges that two of the defendants are in possession of eight of the lots in the town-site into which the land has been divided. It asserts, in effect, that the complainant is the owner of the legal title to the whole tract, but it does not claim possession to any part of it, unless the averment that the complainant "is seised thereof in fee-simple" may be construed as alleging such a claim to the remainder of the land not admitted to be in possession of the two defendants. But this averment is qualified by the further allegation that the land to which it refers "is vacant, unimproved land." "There is a seisin in deed, and a seisin in law; and the difference between the two is that in one case an actual possession has been taken, and in the other there is a right like that of an heir upon descent from an ancestor, while the possession is vacant, before he has made an actual entry." 3 Washb. Real Prop. 128. The averments of the complaint, construed together, must be taken as meaning that the complainant is seised in law, and not in deed, and is therefore not in actual possession of the land.

This brings us to a question, whether it is necessary for the complainant in a suit of this character to show by an averment in the bill that he is in possession of the premises. In *Orton v. Smith*, 18 How. 265, the supreme court declared the rule to be that "those only who have a clear legal and equitable title to land connected with possession have any right to claim the interposition of a court of equity to give them peace or dissipate a cloud on title." In *U. S. v. Wilson*, 118 U. S. 86, 6 Sup. Ct. Rep. 991, the suit was in equity to have the conveyance of an adverse title declared fraudulent and void, and removed as a cloud on complainant's title. The court said:

"Having the legal title, then, but being kept out of possession by defendants holding adversely, the remedy of the United States is at law to recover possession. Equity in such cases has no jurisdiction, unless it is required to

remove obstacles which prevent a successful resort to an action of ejectment, or when, after repeated actions at law, its jurisdiction is invoked to prevent a multiplicity of suits, or there are other specified equitable grounds of relief. Bills *quia timet*, such as this is, to remove a cloud from a legal title, cannot be brought by one not in possession of the real estate in controversy, because the law gives a remedy by ejectment, which is plain, adequate, and complete. This is the familiar doctrine of this court."

This doctrine was again declared in *Frost v. Spilley*, 121 U. S. 552, 7 Sup. Ct. Rep. 1129, where the court said:

"A person out of possession cannot maintain such a bill, [a bill to remove a cloud upon title, and to quiet the possession of real estate,] whether his title is legal or equitable; for if his title is legal, his remedy at law, by action of ejectment, is plain, adequate, and complete; and if his title is equitable, he must acquire the legal title, and then bring ejectment."

The case of *Holland v. Challen*, 110 U. S. 15, 3 Sup. Ct. Rep. 495, was a bill in equity to quiet title, founded upon a statute of Nebraska, which provided—

"That an action may be brought and prosecuted to final decree, judgment, or order by any person or persons, whether in actual possession or not, claiming title to real estate, against any person or persons who claim an adverse estate or interest thereon, for the purpose of determining such estate, and quieting the title to such real estate."

The supreme court held that this statute dispensed with the general rule of the courts of equity that in order to maintain a bill to quiet title it is necessary that the party should be in possession, and in most cases that his title should have been established at law, or founded upon indisputable evidence or long-continued possession. The court, in explaining the rule of equity jurisdiction in the absence of such a statute, said:

"A bill of peace against an individual reiterating an unsuccessful claim to real property would formerly lie only where the plaintiff was in possession, and his right had been successfully maintained. The equity of the plaintiff in such cases arose from the protracted litigation for the possession of the property, which the action of ejectment at common law permitted. That action being founded upon a fictitious demise, between fictitious parties, a recovery in one action constituted no bar to another similar action, or to any number of such actions. A change in the date of the alleged demise was sufficient to support a new action. Thus the party in possession, though successful in every instance, might be harassed and vexed, if not ruined, by a litigation constantly renewed. To put an end to such litigation, and give repose to the successful party, courts of equity interfered and closed the controversy. To entitle the plaintiff to relief in such cases the concurrence of three particulars was essential,—he must have been in possession of the property; he must have been disturbed in its possession by repeated actions at law; and he must have established his right by successive judgments in his favor. Upon these facts appearing, the court would interpose, and grant a perpetual injunction to quiet the possession of the plaintiff against any further litigation from the same source. It was only in this way that adequate relief could be afforded against vexatious litigation, and the irreparable mischief which it entailed."

The court further explained:

"A bill *quia timet*, or to remove a cloud upon the title of real estate, differed from a bill of peace in that it did not seek so much to put an end to vexatious litigation respecting the property as to prevent future litigation, by removing existing causes of controversy as to its title. It was brought in view of anticipated wrongs or mischiefs, and the jurisdiction of the court was invoked because the party feared future injury to his rights and interests. Story, Eq. Pl. § 826. To maintain a suit of this character it was generally necessary that the plaintiff should be in possession of the property, and, except where the defendants were numerous, that his title should have been established at law, or be founded on undisputed evidence or long-continued possession."

The statute of Nebraska, as stated by the court, authorizes a suit in either of these classes of cases without reference to any previous judicial determination of the validity of the plaintiff's right, and without reference to his possession; and the bill was sustained on that ground. But there is no such statute in Montana. The only law on the subject appears to be section 366 of the Code of Civil Procedure of that state, which provides:

"An action may be brought by any person in possession, by himself or his tenant, of real property, against any person who claims an estate or interest therein adverse to him, for the purpose of determining such adverse claim, estate, or interest."

This is the language of section 254 of the old practice act of California, adopted in 1851, and the Montana section was doubtless copied from that act; but section 254 of the act of 1851 was superseded by section 738 of the Code of Civil Procedure of California, approved March 11, 1872, which took effect January 1, 1873. The latter section provides: "An action may be brought by any person against another who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim;" the provision relating to possession being omitted. During the existence of section 254 of the practice act the decisions of the supreme court of California were uniform to the effect that an action could not be maintained under its provisions for the purpose of determining an adverse claim to or estate or interest in real property unless the plaintiff, at the time of the commencement of the action, was in the actual possession of the property himself, or in possession by his tenant. *Dunlap v. Kelsey*, 5 Cal. 181; *Ritchie v. Dorland*, 6 Cal. 33; *Mining Co. v. Fremont*, 7 Cal. 319; *Rico v. Spence*, 21 Cal. 504; *Lyle v. Rollins*, 25 Cal. 437; *Ferris v. Irving*, 28 Cal. 645. To the same effect is *Coolidge v. Forward*, (Or.) 2 Pac. Rep. 292. In *Curtis v. Sutter*, 15 Cal. 259, it was held that this section enlarged the class of cases in which equitable relief could formerly be sought in quieting title. It authorized the interposition of equity in cases where previously bills of peace would not lie, and it was explained that under this statute it was unnecessary for the plaintiff to delay seeking the equitable interposition of the court until he had been disturbed in his possession by the institution of a suit against him, and until judgment in such suit had passed in his favor. It was sufficient if, while in possession of the property, a party out of possession claimed an estate or interest adverse to him. It

will be observed that while it was determined that this section enlarged the equitable jurisdiction of the courts in cases formerly reached by bills of peace and *quia timet*, it still required that the plaintiff should be in possession of the property to enable him to seek such relief. Where a different rule has obtained, it has been under a statute similar to the one in Nebraska. Section 738 of the present Code of Civil Procedure of California is such a statute, and under its provisions the plaintiff out of possession, but claiming an estate in real property, is enabled now to proceed in equity to remove a cloud therefrom, or quiet the title to the same, as was decided in *Holland v. Challen*, *supra*, with respect to the statute of Nebraska.

The case of *Southern Pac. R. Co. v. Wiggs*, 43 Fed. Rep. 333, was brought under the provisions of this statute, and, although the question of possession was apparently not in controversy, its existence explains the position taken by the learned judge in sustaining the equitable jurisdiction of the court. But it is urged that the sufficiency of this bill must be considered with reference to the allegation that the complainant can have no adequate relief except in a court of equity. Section 723 of the Revised Statutes of the United States provides that "suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate, and complete remedy may be had at law." It has been decided that this provision is merely declaratory, making no alteration whatever in the rules of equity on the subject of legal remedies, but only expresses the law which has governed proceedings in equity since their adoption in the courts of England.

In the case of *Whitehead v. Shattuck*, 138 U. S. 151, 11 Sup. Ct. Rep. 277, the supreme court said:

"It would be difficult, and perhaps impossible, to state any general rule which would determine in all cases what should be deemed a suit in equity as distinguished from an action at law, for particular elements may enter into consideration which would take the matter from one court to the other; but this may be said: that where an action is simply for the recovery and possession of specific real or personal property, or for the recovery of a money judgment, the action is one at law. An action for the recovery of real property, including damages for withholding it, has always been of that class. The right which in this case the plaintiff wishes to assert is his title to certain real property; the remedy which he wishes to obtain is its possession and enjoyment; and in a contest over the title both parties have a constitutional right to call for a jury."

In the case at bar two of the defendants are in possession of certain subdivisions of the tract in dispute. As against them, upon the facts stated, a suit of ejectment would afford a plain, adequate, and complete remedy. If the remainder of the land is unoccupied, as alleged, we see no reason, as was said by the learned judge in the court below, why the complainant cannot take possession of the same, and then bring the appropriate action to determine the title to the same. The extensive land possessions of the complainant, and the hardship of taking possession of its lands before bringing such an action, cannot properly be considered in this case. The land involved in this suit amounts to about 160

acres. There can hardly be any difficulty in taking possession of an unoccupied tract of land of such dimensions, located as this is; and we are not at liberty to import into this case considerations respecting other tracts that may be involved in like controversy and embraced in complainant's grant of 45,000,000 of acres.

It is further argued, in favor of the equitable jurisdiction claimed for this case, that it will avoid a multiplicity of suits. But it appears that only two of the defendants are in possession, claiming title and exercising ownership as to eight lots. It would certainly not require more than one suit to determine their right of possession, and indeed the law is well settled that, under the practice act adopted in Montana, the plaintiff in an action in the nature of ejectment may join any number of defendants without regard to the extent or character of their possessions. *San Francisco v. Beideman*, 17 Cal. 461. It appears, therefore, that the bill does not present a case coming within the equity jurisdiction of the court.

The decree of the circuit court is therefore affirmed.

UNION PAC. RY. CO. v. O'BRIEN.

(Circuit Court of Appeals, Eighth Circuit. February 8, 1892.)

1. INJURY TO EMPLOYEE—OPINION EVIDENCE.

In an action for the death of plaintiff's husband, a locomotive engineer, alleged to have been caused by the faulty construction of a portion of defendant's railroad, an engineer, testifying for plaintiff as to the faulty condition, should not be allowed, on cross-examination, to state that the engineers on the road were all aware of such condition, it being a mere inference.

2. SAME.

Ordinary care in the construction of a railroad through a cut in a mountain side, which was alleged to be faulty in not providing a culvert under the track to carry off the washings from a natural gully, cannot be shown by the opinion of a witness that the cut was constructed and the water run out of it exactly as others are ordinarily constructed on roads running through such places.

3. WITNESS—IMPEACHMENT.

In introducing impeaching testimony, by showing former contradictory statements, it is within the discretion of the trial court to permit a leading question to be put to a witness where that mode of interrogation is best calculated to elicit the truth.

4. NEGLIGENCE—BURDEN OF PROOF.

In an action to recover for the death of plaintiff's husband, alleged to have been caused by defendant's negligence, a request to charge that the burden is on plaintiff, in the first instance, to show that "plaintiff" was in the exercise of due care, being misleading in the use of the word "plaintiff," is properly refused.

5. SAME—MISLEADING INSTRUCTIONS.

A request for an instruction confusing together two distinct propositions—that relating to the risks assumed by an employee in entering a given service, and that relating to the amount of vigilance that should be exercised under given circumstances—is properly refused, as liable to mislead.

6. INJURY TO EMPLOYEE—ASSUMPTION OF RISK.

Plaintiff's intestate, an engineer in defendant's employ on a division of its railroad constructed along the foot of mountain ranges, was killed by the derailment of his engine by reason of sand and gravel on the track, which, during a storm, had washed down from the mountain side, through a natural gully, into the railroad cut, and, there being no culvert for its escape under the track, was deposited thereon

to the depth of six inches. *Held* that, while intestate assumed the increased hazard of his employment due to the fact that the road was constructed through a mountainous country, he did not assume risks caused by faulty construction and maintenance of the road-bed and track, even though liability to accidents thereby was increased because the road was built in proximity to mountain ranges.

7. SAME—QUESTION FOR JURY.

The question of negligence in not constructing a culvert in the place in question was one for the jury, to be determined on the evidence as to the construction of the road, and the formation of the land. *Tuttle v. Railway Co.*, 7 Sup. Ct. Rep. 1166, 122 U. S. 139, distinguished.

In Error to the Circuit Court of the United States for the District of Colorado.

Action by Nora O'Brien against the Union Pacific Railway Company, to recover for the death of plaintiff's husband, alleged to have been caused by defendant's negligence. Verdict and judgment for plaintiff. Defendant brings error. Affirmed.

John M. Thurston, Willard Teller, H. M. Orahoad, and Edward B. Morgan, for plaintiff in error.

H. E. Luthé, for defendant in error.

Before CALDWELL, Circuit Judge, and SHIRAS and THAYER, District Judges.

SHIRAS, District Judge. In September, 1890, John O'Brien, the husband of the defendant in error, was in the employ of the Union Pacific Railway Company as a locomotive engineer, running an engine upon the South Park Division of the company's line. By a derailment of his engine on the 4th day of September, 1890, the said John O'Brien was killed, and the present action was brought by his wife to recover damages therefor.

The evidence shows that the accident occurred about 1 o'clock in the morning of the day named, at a place known as "Platte Canyon," the deceased being in charge of an engine which was propelling a train of freight-cars, some 23 in number; that the line of railway is built along the South Platte river, and of necessity there are numerous cuts thereon, caused by the intersection of the line with the spurs projecting from the high lands along which the line is built; that the engine was derailed by reason of sand and gravel which had been washed upon the track to the depth of some 6 inches, and to a width of about 15 feet; that this deposit of sand and gravel was in a cut, the river bank of which was 6 or 8 feet high, the other bank being much higher, and sloping up the side of the hill or mountain; that on the hill-side of the cut there was a gully running back for some distance, which in times of rain would bring down sand and other material; that there was no opening or culvert under the railway track, through which the water and the material brought down by it could escape; that there was along-side the road-bed a small gutter, but, if the water coming down was greater in quantity than this ditch or gutter would carry away, then the surplus would run over and upon the track and rails of the railway; that during the evening preceding the accident rain had fallen, and the water, rushing down the gully named, had carried the sand and gravel upon the track to the

extent already stated. The case was sent to the jury upon the issues of negligence on part of the company in not properly constructing the track, in that no outlet was provided for the water which would be liable to come down upon the track, and deposit thereon sand and other obstructions, and of contributory negligence on the part of the deceased; and, upon both issues the jury found in favor of the plaintiff, assessing the damages at \$3,000, and, judgment being entered upon the verdict, the company brings the case to this court.

The first error assigned is based upon the action of the court in sustaining an objection to a question asked by the plaintiff in error in cross-examination of a witness, (William Hall,) who testified that he was a locomotive engineer, and was well acquainted with the line of railway upon which the accident happened; that there are many cuts upon the line; that in August and September rains were usually frequent, and that in rainy weather, on account of the steepness of the mountains, more or less sand would be deposited on the track. Thereupon, counsel for the company asked the question, "Are the engineers all aware of that fact?" which was objected to, and the objection was sustained. It is perfectly clear, from the context, that the purpose of this question was to get the witness to testify to a matter purely of inference from the facts he had previously stated; that is, he had testified that, owing to the surroundings of the railway line, in rainy weather more or less sand would be deposited at various points along the line, and the question objected to was asked with the view of having the witness draw the inference that the frequency of the deposits would necessarily bring knowledge of the fact to all the engineers running on the line. The facts having been fully put in evidence, it was for the jury to determine whether the facts proven would justify inference of knowledge on part of all the engineers; and it was not error, therefore, to sustain the objection to the question proposed.

The second error relied on arises on the refusal of the court to permit the same witness, after testifying to facts tending to show the need of a culvert at the cut, where the accident happened, and that in his judgment a culvert would add to the safety of the road, to answer the question: "You said you thought the culvert would make it much safer; but is not that cut constructed there and the water run out of it exactly as others are ordinarily constructed on roads running through such places?" It is argued on behalf of plaintiff in error that if the company could show that this cut was constructed as cuts in similar places on roads running through a region of like character, it would be evidence tending to show that it had used ordinary care in the construction of this cut. If a bridge upon a line of railway breaks down, the company may show that the bridge is of an improved make or pattern, and is in common use upon other lines of railway, as evidence tending to show that the company was not in fault in using that make of bridge. If the issue is whether the company uses proper precautions to prevent the escape of sparks from its locomotives, it may show that the same are equipped with the appliances in common use upon other roads. If the charge of

negligence is that the company did not use ties of sufficient size or of proper material, or used rails that were not of sufficient weight, then it might be competent to show that upon other roads, carrying on the same kind of traffic, similar ties or rails were in common use, and were found to meet the demands put upon them. In all such cases the inquiry is whether the use of a particular article is justified by the usage of other companies, and there is no danger of the jury being misled as to the exact nature or mode of construction of the article inquired about.

It cannot be claimed that cuts upon railways are made according to a certain recognized pattern. The necessity of a culvert or water outlet in a cut depends upon the surroundings, in which no two are exactly alike. We know from our common knowledge that in many cuts there are to be found culverts, and in others there are none. It would have been of no aid to the jury to have proved that in many cuts no culverts were used, without further showing that the surroundings thereof were substantially similar to that where the accident happened; and this would have required an examination into a number of collateral facts, that would have led away the jury from the issues on trial before them. It is said that the question as put to the witness met this difficulty, in that it asked whether the cut was not the same as the "cuts ordinarily constructed on roads running through such places." This would necessitate one of two results. The witness must, in his own mind, determine whether the places referred to were in fact similar to the one where the accident happened, and the jury must be satisfied to take the opinion of the witness on the fact of the similarity of the respective cuts and their surroundings, or else the witness must describe in detail all the cuts he knew of "running through such places," which could only result in utterly befogging the jury; because, if that line of inquiry should be opened to the one party, the other must be permitted to show the nature of the cuts in which culverts are found, and also to introduce evidence showing the actual nature and surroundings of the cuts which might be described by the witness.

Under all the circumstances, and in view of the fact that the contention of the plaintiff was that the making of an outlet for the water was demanded in this particular cut, by reason of the track crossing a gulch or natural water-way, and not simply because it passed through a cut, which fact is not included in the question asked, and for the reason that if that line of inquiry was entered upon, there was danger of distracting the jury by leading them off upon collateral matters, we cannot hold that it was error to exclude the question.

The third assignment of errors is that the court erred in permitting leading questions to be put to the witness O'Brien. The defendant had called as a witness George Warnick, who testified to matters tending to show that the deceased had not kept a vigilant watch for obstructions on the track, and on cross-examination he was asked whether, shortly after the accident, he did not, in reply to questions put to him by the witness O'Brien, state that neither he nor the engineer were to blame for

the accident. For the purpose of impeaching the witness Warnick, O'Brien was called in rebuttal, and he was asked directly whether he had put certain questions, which were detailed to him, to Warnick, and whether the latter had not answered them "Yes" and "No." When impeaching testimony of this character is sought to be introduced, it is within the discretion of the trial court to permit a categorical or leading question to be put to the witness, where that mode of interrogation is best calculated to elicit the truth. 1 Greenl. Ev. § 435.

It is further assigned as error that the court refused to give the instructions asked by defendant, which were four in number, and read as follows:

"The court is asked to instruct the jury that the burden of proof is upon the plaintiff to show that the accident occurred by reason of the negligence of the defendant, and that the plaintiff was in the exercise of due care at the time of the accident, and that due care in such a case required of the deceased that he be vigilant and watchful to avoid such danger as his experience of the road must have made him aware he must expect in such places as the place where the accident occurred, and under the circumstances detailed by the witnesses, to-wit, at a time when heavy rains had been met with, and that there has been offered no evidence whatever upon that point by the plaintiff, not even a reputation for care, but there has been evidence offered by the defendant that he was not in the exercise of due care; nor has there been any evidence offered as to whether, if the sand had been discovered at the time it might have been discovered, he could or could not have applied the air-brake in time to prevent the accident."

"The court is asked to instruct the jury that a party taking employment as an engineer in running a locomotive assumes the risks that are incident to the employment, and to the running of locomotives over the roads operated by his employer; and if the jury believe that the country through which this road ran and its location was such that sand was frequently deposited on the track, then the deposit of sand on the track when heavy rains occurred must be taken as one of the ordinary risks of his employment, and the duty of the engineer was to be vigilant in avoiding it; and, if the jury believe that the lack of such vigilance on the part of the deceased contributed to the accident, then the plaintiff cannot recover."

"The court is asked to instruct the jury that the duty that an employer owes to the employe is to exercise ordinary care in providing the employe a safe place in which to work; and what is ordinary care is such care as men of ordinary prudence use in similar circumstances in the same employment."

"The court is asked to instruct the jury that there is no evidence to show that the construction of a culvert at the place where the accident happened would have avoided, or would probably have avoided, the accident."

The first instruction is faulty, in that it declares that the burden was on the plaintiff in the first instance to show that the "plaintiff" was in the exercise of due care at the time of the accident. It is said that the use of the word "plaintiff" was evidently a clerical error, and that it would be readily perceived that it was intended to charge that it must be shown that the deceased was free from negligence; but, if the charge had been given as asked, it might have misled the jury. As framed, it does not state the law correctly, and therefore it cannot be successfully

maintained that it was error to refuse it, especially in view of the fact that the court did instruct the jury carefully and fully upon the question of negligence on the part of the deceased.

It is claimed on behalf of plaintiff in error that the second instruction asked by the company presents the rule that an employe assumes the ordinary risks of his employment, and cannot recover for an injury resulting therefrom, and that the court did not present this question to the jury. It is doubtful whether the instruction was intended to refer to this rule, for the concluding part thereof only asks the court to rule to the jury that, if lack of vigilance on the part of the deceased contributed to the accident, then the plaintiff could not recover, and it is entirely probable that the trial court understood the instruction to be applicable only to the question of contributory negligence, which was fully covered by the charge of the court.

If the present contention of counsel is correct, then the instruction, as asked, is open to the objection that it confuses together two distinct propositions, to-wit, that relating to the risks assumed by an employe in entering a given service, and that relating to the amount of vigilance that should be exercised under given circumstances; a mode of asking instructions which cannot be approved, as it is liable to mislead the court and to confuse the jury. Granting, however, to the plaintiff in error the benefit of the exception now urged, it does not appear that it was error to refuse the instruction under the circumstances of this case. It is doubtless true, as urged in argument, that persons employed upon lines of railway which are constructed at the foot of mountain ranges are necessarily subjected to greater dangers than those employed upon railways passing through a prairie country, for the reason that there is greater liability to obstructions being thrown upon the track in the one case than in the other; and it is unquestionably true that one who engages as an engineer or other train-hand upon a line running at the foot of a mountain range assumes the increased risk due to this fact. In neither case, however, does the employe assume the risks and dangers that are caused by negligence on part of the railway company. It is the duty of the company to use all such reasonable care, as a corporation managed by prudent men should use, in constructing and maintaining a track and road-bed in such a condition as not to subject its employes to unnecessary risks and dangers. What will be required of a company in the exercise of ordinary care in constructing its track will vary with circumstances. A mode of construction which might be entirely safe in case of a line running through a level country might be wholly unsafe if applied to a line running along a mountain range. The employe has a right to expect that a company operating a line, which by reason of its location is subject to certain hazards, will construct the road-bed and track with due reference to such hazards. If the company has used due care in the construction of its line, having regard to its surroundings, and yet, by reason of its proximity to mountains, rivers, or other natural objects, there exist dangers from land-slides or overflows, or other like casualties, a person entering into service of the company assumes

the risks caused thereby, or, to state the proposition in another form, he assumes the dangers incident to his employment upon a railway track properly and carefully constructed and maintained along a mountain range; but he does not assume the risks caused by the faulty construction and maintenance of a road-bed and track, even though the liability to accidents, by reason of the imperfect road-bed and track, may be increased because the same is built in proximity to a mountain range. In the case at bar the deceased, when he entered the employ of the company, had the right to assume that the road-bed and track which he was expected to use had been constructed properly, and with ordinary care, having due regard to the location of the track and its surroundings; and if such a road-bed and track, so constructed and maintained, were in fact furnished him, then he assumed the risks and dangers due to the fact that the line ran along the foothills, and would, of necessity, be subject to the possibility of obstructions being cast upon the track from the adjacent mountains. The plaintiff's case, however, is not based upon the fact that the proximity of the railway line to the highlands caused danger to the employes, but upon the allegation that the company, in constructing its road-bed over what nature had marked out as a water-way,—to-wit, the gulch upon the hill-side,—did not use due care, and was negligent in that no outlet was provided for the water, which the company was bound to know would in the rainy seasons come down the gulch, bearing with it sand, gravel, and other like material. The question is not other nor different from that which arises in all cases where a railway is constructed over a natural water-way, whether in a prairie or mountainous country. The duty is upon the company to use due care to so construct its road-bed at the place where it crosses the water-way that it may be reasonably safe for use; and if to that end a culvert or other means of escape for the water is necessary, and none is provided, but, on the contrary, the road-bed is built solidly across the water-way, thus subjecting the track to the liability of being covered with sand and gravel, then a jury would be justified in finding that the road-bed was improperly built, thereby sustaining the charge of negligence against the company. If the evidence in this case had shown that, owing to heavy rains, or for any reason, sand, rock, or other obstructions had been washed down the mountain side and upon the track at a place where the company had no special reason to anticipate such an event, then there would be force in the position that the deceased assumed risks of that character; but the facts developed in the evidence did not present the case in that light. The evidence clearly shows that the sand and gravel on the track were washed down the gulch or natural water-way, and the theory of plaintiff's case is that the company was negligent in building a solid road-bed across a natural water-way, and in failing to provide any means for the escape of the water that must be expected to flow down the gulch. Upon this issue the case was sent to the jury, and the giving of the second instruction asked by defendant would not have aided them in reaching a conclusion thereon. Hence, in any view that may be taken of the extent and purpose of this instruction, it was not error to refuse it.

The third instruction was fully covered in the charge given, and the court was not called upon to repeat the same general rule of law in the form adopted by counsel.

The fourth instruction was properly refused, because there was evidence before the jury tending to show that if a culvert or other outlet for the water coming down the gulch at the place of the accident had been provided, the track would not have become covered with sand and gravel.

In order that it may clearly appear that, as already said, it was not error to refuse the several instructions asked by the defendant, because the same, in so far as they are correct statements of the law, are embraced in the charge of the court, it may be advisable to quote at length therefrom. It was stated to the jury by the court that—

"The rules to be applied in determining this controversy, gentlemen, are applicable to all cases in which a person in service may have a right of action against his employer. The circumstance that the defendant is a railroad company does not distinguish the case from others of the same class. In general, a person who receives an injury while in the service of another has no right of action against his employer for such injury. It is only when the person employing him has omitted some duty—failed in something enjoined upon him by the law—that any such right arises. And this right arises only when the person injured is in the discharge of his duty to the extent that it may be said that he is free from fault. The person injured must be without fault, and the employer must be in fault, before any right of action can exist. So in all these cases there is a double aspect. It is *first* to be ascertained whether the person injured was in any way negligent; and, *secondly*, whether the employer was negligent in a manner which caused the injury. These features must co-exist; the person employed must be without fault, the other must be in fault. If the employer had been in fault, and the other has been negligent also, there is no right of action.

"(2) And in this instance, upon the circumstance developed by the evidence, it is especially necessary to consider first, and decide, whether this man who lost his life was in fault at the time of the accident. There is some evidence tending to show that storms in the region of country traversed by this railroad are of frequent occurrence in the fall season of the year, and with the effect often to bring down upon the track considerable quantities of sand and gravel; so that, with a storm prevailing at and before the time of the accident, the circumstances were such as to make it reasonable to expect that some such thing would occur as did in fact occur, in respect to washing down gravel and sand upon the track; and this made it the duty of the engineer to look out for these things very carefully. It was necessary for him, under all the circumstances, to be especially upon his guard in order to avoid injury to his train and to himself. And there is evidence tending to show that he was not in that attitude at the time of the accident. You remember that the fireman who was with him upon the engine states that at the time of the accident he was of the impression that the engineer was asleep. He cannot state this with certainty, only from the position in which he sat, and from his attitude at the time. Now, if that be true, there can be no right of action in the plaintiff here for his death, because all the circumstances required him to be vigilant and attentive to his duties in the place in which he was put. If he had been awake, and looking out for obstructions upon the track, it might be that he would have seen this obstruction in time to stop, or at any rate to check the train, so that the engine would not have been overturned, and thus the injury would not have resulted."

The court then instructed the jury that the plaintiff could not recover on the ground that the sectionmen had not properly watched the track for obstructions, which was one of the matters complained of, for the reason that such negligence, if it existed, would be due to the act of a fellow-servant, for which the company would not be liable, and then gave the following instructions, the giving of which is assigned as error:

"(5) There is, however, another matter which stands in a different attitude, and that is as to the construction of the road at the place where the accident occurred. There is testimony to show that the road at that place was built across the mouth of the gulch or draw, and, if I understand the testimony well, about upon the same level as the mouth of the draw, and that the gap which was made by the draw below the track, and towards the river, on the right-hand side coming this way, was closed up by the earth taken from the cut, or perhaps by the sand which had washed down; and it would seem from all the circumstances detailed in evidence that it would have been practicable to make a culvert under the track at that place, keeping open the channel towards the river, through which the sand might have washed out towards the river, and in that manner obstruction might have been avoided at that place. The testimony is perhaps not as full and complete on this point as it might have been made, but I think, from all that is stated before you, it is fairly open to this construction. Of course, that would depend somewhat upon the size of the opening made in the culvert or channel underneath the track, and upon the quantity of sand and gravel coming down through the gulch; but, looking into all the circumstances, as well as you can understand them from the testimony, if you are of the opinion that the track might have been built in this way with reasonable expense, and so as to avoid the possibility of sand coming upon the track and obstructing it, you are at liberty to say that the company was negligent in respect to the manner of building the track at that place. It seems from the testimony that this track had been obstructed several times; I do not recall just now how often before this time; so that there was enough in the circumstances to call the attention of the company to the fact that there was danger from this source.

"(6) It is true that, in building its road, and as a matter of duty towards persons in its service, the company is only required to exercise ordinary diligence and care,—such care and diligence as men usually bestow upon business of the like nature; so that it is not the highest degree of diligence which you are to demand of the company in this respect, but only such as men ordinarily give to such concerns. Then the question will be in your minds, whether the road at this place was built with ordinary care and diligence, with a view to the protection of the lives of persons in the service of the company. The rule is different when it comes to the case of a passenger. A passenger who is injured may complain of almost anything as a defect in the road and its structure, showing negligence on the part of the company. But in respect to persons who are employed by the company, the rule is somewhat different; that is to say, there is a less degree of care and diligence required by the company in respect to the servants of the company than is required in respect to persons traveling on the road in the capacity of passengers. So, then, gentlemen, if you are able to relieve the deceased, in respect to saying that he was in the fulfillment of his duty, was performing well the duty which was required of him on the occasion, and that the company is negligent in respect to the manner of constructing its road, you may be able to find a verdict for plaintiff; otherwise for the defendant."

"(7) *Mr. Willard Teller.* I would like to ask specially referring to the question of this culvert. I would like to have the court charge the jury that there is no evidence except that of Mr. Hall in respect to whether a culvert would

be safer or not, and that is an opinion of his, that he thought it would be safer; that is the only evidence in respect to it.

"*The Court.* I believe that is true, I think that he is the only witness who testified in that way. I think also, gentlemen, you can consider the matter upon your own judgment and knowledge of such matters; that is to say, having regard to the testimony before you, the situation of the road, and the topography of the ground, the gulch coming down in the way described by the witnesses, you, as men of some knowledge of affairs, may determine in your own minds, quite independently of Mr. Hall's testimony, whether it was practicable to make a culvert there with reasonable cost, which would have the effect to carry away the sand and gravel so it would not be an obstruction; I believe they testify to some rock coming down in the sand; whether it would carry it away so it would not be an obstruction upon the track."

Exception is taken to the portions of the charge wherein it is said that the jury might exercise their own judgment and knowledge, upon the evidence adduced before them in regard to the situation of the road, the topography of the ground, and the existence of the gulch, and determine therefrom whether or not it was practicable to make a culvert at a reasonable cost, which would carry away the sand and gravel, and prevent the same from becoming an obstruction on the track. It does not appear that objection was taken to this evidence when it was introduced, and, if the jury could not properly consider and weigh the same in reaching a conclusion upon the issue before them, it was a useless waste of time to put it before them. Clearly, when the jury was called upon to determine whether a given part of the road was or was not properly built, it was necessary that they should be informed by evidence of the mode in which the track was constructed, of the nature of the ground and its surroundings, in order to aid them in reaching a proper conclusion. If admissible upon the issue, then it would be impossible to prevent a jury from using their own judgment and knowledge in determining what conclusion should be drawn from the evidence. The human mind is so constituted that, in considering and weighing different facts, and endeavoring to apply the same to the solution of a matter in dispute, the conclusion reached will be the result of the facts in evidence, viewed in the light cast thereon by the judgment and knowledge belonging to the deciding mind. There was nothing in the nature of the inquiry involved in the issue submitted to the jury which took it out of the usual rule that the jury must decide the ultimate question in dispute.

Counsel for plaintiff in error cite in argument the decision of the supreme court in the case of *Tuttle v. Railway Co.*, 122 U. S. 189, 7 Sup. Rep. 1166, wherein it was sought to hold the company liable in damages for the death of a switchman, who was crushed between two cars, the draw-heads of which passed or slipped by each other, which in turn was caused by the extreme sharpness of the curve in the line of the railway at the point where the accident happened. The ground of negligence charged was that the curve was so sharp as to render the road unsafe. It was held that there was no rule of law restricting a railway company, so far as its duty to employees was involved, in the character

of the curves it might put in use, and that engineering questions of this character could not be left to the varying and uncertain opinions of juries. It may well be, when it becomes necessary to build a line of railway through a rough and broken country, or to construct side tracks in the narrow limits of a railway yard, that it must be left to the engineer in charge thereof, assuming that he is of competent skill and acquirements, to define the curves that are called for by the exigencies of the situation; and, the road being built in accordance with his directions, that any one entering into the employ of the company must be held to have assumed the risks due to the sharpness of the curves, the existence of which is, of course, open to his knowledge. This principle, however, cannot be carried to the extent claimed in argument by counsel for plaintiff in error. If it was applicable in the broad sense claimed for it, the result would be that the well-established rule that it is the duty of the company to use due care and skill in the construction and maintenance of the road-bed and track, and in the furnishing of proper machinery for the use of its employes, would be wholly abrogated. In one sense, it is a question of engineering skill to determine how a road-bed and track shall be constructed; and, if the conclusion of the engineer in charge thereof is final, and cannot be challenged before a court and jury by one who has suffered injury by reason of defects in the road-bed and track, then it is useless to say that a railway company is bound to exercise due care in the construction of its road-bed, for it could always be prepared to prove that the road was built in accordance with the directions of its engineer. The difference between the kind of knowledge called into action in determining the sharpness of a curve that is needed in running a railway line at a given point and that exercised in determining whether the exigencies of a given situation require that some escape or outlet should be furnished for water liable to come down a natural water-way, intersecting the line of railway, is so great that it renders the rule applicable to the one case, inapplicable to the other. The training and knowledge of an engineer is not needed to enable one to understand the action of water in rushing down a gully or similar water-way, nor to know if an obstruction like a solid railway road-bed is built across a water-way, down which any considerable amount of water may be expected to pass, that, unless an outlet is given to it, it must of necessity collect against the road-bed, and perchance overflow it. Such facts are matters of common knowledge, gathered from the experience and observation of every-day life, and hence a jury is entirely competent to pass upon an issue involving considerations of that nature.

In the instructions given the jury the court very carefully presented the decisive questions involved in the issues, and correctly stated the law applicable thereto. The errors assigned are therefore overruled, and the judgment is affirmed, at cost of plaintiff in error.

BLACK v. ELKHORN MIN. Co., Limited.*(Circuit Court, D. Montana. February 25, 1892.)***1. MINING CLAIM—NATURE OF ESTATE—DOWER.**

A mining claim in the public domain, as defined by Rev. St. U. S. § 2322, is a subject of dower, since the estate is one of inheritance, and the owner has a possessory title of the highest kind.

2. SAME—PATENT—MERGER OF CLAIM.

When a person in possession of a mining claim obtains a patent therefor, after posting notices, making proofs of work, and paying five dollars per acre, as required by Rev. St. U. S. § 2325, the claim, as a separate estate, is merged in the full fee-simple title.

3. SAME—DOWER.

When such a merger takes place, a right of dower in the subordinate estate is extinguished, if the owner thereof has filed no adverse claim in the register's office against the application for a patent.

At Law. Action by Mary A. Black against the Elkhorn Mining Company, Limited, to recover dower in a mining lode. A demurrer to the complaint was overruled. 47 Fed. Rep. 600. The hearing is now upon a demurrer to new matter in the answer. Overruled.

Word, Smith & Word, for plaintiff.

Cullen, Sanders & Shelton, for defendant.

KNOWLES, District Judge. The plaintiff, Mary A. Black, brought this action to have dower assigned her in the A. M. Holter lode, situate in Elkhorn mining district, Jefferson county, Mont. The complaint sets forth that L. M. Black was the husband of plaintiff; that in his lifetime he was seised of an estate of inheritance in the said A. M. Holter lode; that he conveyed the same to one Burton, and that by mesne conveyances the title possessed by him passed to defendant; that plaintiff did not join in this conveyance to Burton, and never at any time relinquished her dower in any way in said premises. The defendant, it appears, is a corporation. It denies all these allegations of the complaint, and then sets up several averments of new matter constituting a defense to the cause of action set forth in the complaint.

The plaintiff filed her demurrer to this new matter. I find myself somewhat perplexed in considering the same. The first ground set forth in this new matter is to the effect that plaintiff ought not be endowed of the property described in the complaint, because L. M. Black, her husband, was not at the time of his marriage with plaintiff, or at any time thereafter, seised of "said tenements, with the appurtenances whereof plaintiff claims to be endowed." This seems something like the averment of a conclusion of law. The third averment of new matter for a defense is that the Elkhorn Mining Company, the grantor of defendant, being seised of the premises and possessed thereof, applied for a patent to said premises from the United States, and that plaintiff filed no adverse claim to this application, and that on the 19th day of November, 1889, the United States issued a patent to said Elkhorn Mining Company for said land. Considering these two defenses together, and the arguments and

briefs of counsel, and it is evident that the two points sought to be presented are: *First*, that there is no dower in an unpatented mining claim; and, *second*, that, if plaintiff had any dower-right in such a claim, it was lost by plaintiff failing to file an adverse claim to the application of the Elkhorn Mining Company to patent the same.

The first of these propositions I will now consider. Is there any dower-right in a mining claim, under the laws of Montana? And in answering this question I am called upon to determine what is the nature of the estate in a mining claim. The 2322d section of the Revised Statutes of the United States provides:

"The locators of all mining claims heretofore or which shall hereafter be made on any mineral vein or ledge or lode situate upon the public domain, their heirs or assigns, when no adverse claim exists on the 10th day of May, 1872, so long as they comply with the laws of the United States, and local regulations not in conflict with the laws of the United States, governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their location, and of all veins or lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically."

I have been unable to find any language similar to this in any deed or other grant. The supreme court, in the case of *Forbes v. Gracey*, 94 U. S. 762, says:

"The use of the word 'mining' or 'mining claims' is evidently intended to distinguish between the case in which the miner is the owner of the soil, and therefore has a perfect title to the mine, and those in which the miner does not have title to the soil, but works the mine under what is known in the 'mining district,' and what is, as we have said, recognized by the act of congress, as a mining claim."

At another place in this opinion the court says of a mining claim: "It is property in the miner of great value." And again: "These claims are subjects of bargain and sale, and constitute, very largely, the wealth of the Pacific coast states." And again: "This claim may be sold, transferred, mortgaged, and inherited."

In all this there is no very clear statement as to the nature of the estate in a mining claim. The only definite proposition is that the miner owning a mining claim does not own the soil embraced within the lines of his claim.

In the case of *Erhardt v. Boaro*, 113 U. S. 527, 5 Sup. Ct. Rep. 560, the supreme court again say:

"The government of the United States has opened the public mineral lands to exploration for the precious metals, and, as a reward to the successful explorer, grants to him the right to extract and possess the minerals within certain prescribed limits."

Again:

"Discovery and appropriation are recognized as the source of title to mining claims."

In the case of *Belk v. Meagher*, 104 U. S. 279, the supreme court holds this language:

"Congress has seen fit to make the possession of that part of the public lands which is valuable for minerals separable from the fee, and to provide for the existence of the exclusive right to the possession while the paramount title to the land remains in the United States."

Again, in speaking of the location of a mining claim, it said:

"When perfected, it has the effect of a grant by the United States of the right of present and exclusive possession."

Taking the statute and these decisions together, and we find that the locator of a mining claim has a "possessory title;" that it is property, in the highest sense of that term; that it may be sold, mortgaged, and inherited; that he may enjoy this possession, and all lodes whose apex lies within the surface lines of his location, through their entire depth, and that he may mine and extract, and appropriate to his own use, all the minerals therein; and that this right comes by virtue of a grant from the United States, the owner of the soil. Let us turn to some of the decisions of state courts, and see how certain language in private grants have been construed. In the case of *Caldwell v. Fulton*, 31 Pa. St. 475, in a conveyance in which this language was used, namely, "also the full right, title, and privilege of digging and taking away stone-coal, to any extent the said George Greer may think proper to do or cause to be done, under any of the land now owned and occupied by the said James Caldwell: provided, nevertheless, the entrance thereto and the discharge therefrom be upon the foregoing described premises," it was held that all the coal beneath the tract of land occupied by said James Caldwell was conveyed as a corporeal hereditament, and that they did not import simply a license. Here the right to be considered is that, in connection with the possession of the lode, the locator had a right to extract and appropriate all ores found therein, to any extent. The right is unlimited. A grant of coal in place is a grant of it as land. *Emery Co. v. Lucas*, 112 Mass. 424; *Manning v. Frazier*, 96 Ill. 279; *Hartwell v. Camman*, 10 N. J. Eq. 128. There is undoubtedly a distinction to be drawn between a grant of coal or minerals in place, and the grant of the right to extract and appropriate to one's own use such articles. Yet, as in this case, where the right to dig and appropriate such ores is an exclusive right, which passes to one's heirs and assigns, and this right extends throughout the entire depth of the mine, it is very difficult to distinguish it from a case where a man receives the title to coal in place. When a man receives a grant of all the beneficial interest in an estate, he receives the estate. The simple right to dig and carry away ores is an entire thing, and cannot be divided, so as to have the same shared by several under the original claimant or proprietor. 2 Washb. Real Prop. 379. There has never been any doubt but that the locator of a mining claim could give any number of men the right to separately dig and carry away ores generally, or to a specific amount.

There is an interest in land called "*profit a prendre*." It is the right of taking soil, gravel, minerals, and the like from the land of another. Washb. Easem. 11. In the case of *Erhardt v. Boaro*, *supra*, the supreme

court held that a minor had the right to extract and possess the mineral found in his location. A *profit a prendre* is an interest in the estate. *Post v. Pearsall*, 22 Wend. 425; *Pierce v. Keater*, 70 N. Y. 419. In many particulars the right of a locator of a mining claim is similar to this right of *profit a prendre*; but the owner of this last right has not, as I have been able to find, any such right as the exclusive possession and enjoyment of the mine from which he takes his ore. It may be that we cannot classify a mining claim under any of the heads which have been used to describe real or personal property, and it may be *sui generis*. In all this western region, where mining for precious metals exists, a mining claim has been considered as real property, as an interest in land. It is sold and conveyed by deed. Actions for the recovery of possession of real estate apply to it; also, actions to quiet title; for trespass upon the same. An action of *quare clausum fregit* applies. They have always been treated as real estate in the succession and distribution of estates of deceased persons. This view was entertained by Judge HALLETT in *Harris v. Mining Co.*, 8 Fed. Rep. 863. It was held to be real estate in *Houtz v. Gisborn*, 2 Min. Rep. 340; *Merritt v. Judd*, 6 Min. Rep. 62; *Belk v. Meagher*, 3 Mont. 79. It is evident, too, that the words "heirs and assigns," in the statute making the grant of a mining claim, are not words of limitation, but are used to designate the estate conveyed as one of inheritance. The words "lands" and "real estate" are used in the statutes of Montana as synonymous terms. The definition of both is the same. See section 202, Comp. St. Mont. p. 648. Plaintiff would then have dower in the property as a mining claim.

The next point for consideration is as to the effect a patent from the United States to the Elkhorn Mining Company of the A. M. Holter lode would have upon this right of dower in the same, as the title to the same existed before patent therefor. Perhaps plaintiff, never having been assigned her dower in said claim, could not file an adverse claim to the application of the Elkhorn Mining Company for a patent therefor; but I think she might have had proceedings for a patent stayed until her dower could have been assigned her, and then she could have presented her rights. Plaintiff claims that the title held by her husband in the A. M. Holter lode was an equitable title, and that the patent title was only a completion of the same. There is no claim that her husband had paid the government price for said land, or performed the other acts which in connection therewith would entitle him to a patent from the United States; but the claim is that the locator of a mining claim has an equitable title to the same from the United States. I do not think this can be maintained. In the case of *Belk v. Meagher*, 3 Mont. 79, the supreme court of Montana held that the title to a mining claim was a legal title. Until a person who has located a mining claim has done everything the United States statute requires upon an application to purchase the same from the United States, and has paid the purchase price thereof, he cannot be said to have any equitable title in that estate not vested by the mining location. The right to purchase from the United States the premises upon which a mineral location has been made by the possessor

of the same is not an equitable estate in the premises. It has been held by the supreme court of the United States that the right which a settler has upon public lands, to pre-empt them, is no estate in such lands, although actually settled upon by him. *Hutchings v. Low*, 15 Wall. 77; *Frisbie v. Whitney*, 9 Wall. 187; *Wirth v. Branson*, 98 U. S. 118. In the case of *Forbes v. Gracey*, *supra*, the supreme court held that the United States had not parted with the title to lands in which minerals were found by the location of a mining claim; and in the case of *Belk v. Meagher*, *supra*, it was held that the paramount title was in the United States to land held as a mining claim. In section 2325, Rev. St. U. S., there is a provision made for the purchase of these lands. While in all of this I do not think there is anything that is inconsistent with the position before maintained, that an estate called a "mining claim" had been carved out of the estate the United States held in these lands, by virtue of a mining location on the same, yet it is apparent that the government has a large estate in such lands, not disposed of by such location. In the estate created by the location, the plaintiff was entitled to dower. In the estate held by the United States, she had no such right. Persons who make the proper application to patent a mining claim, post the proper notices, and make the proper proofs of work, etc., and pay the price of five dollars per acre, are, under the provisions of said section 2325, entitled to a patent; and where no adverse claim appears to this application the language of the statute is:

"If no adverse claim shall have been filed with the register and the receiver of the proper land-office at the expiration of sixty days of publication, it shall be assumed that the applicant is entitled to a patent upon the payment to the proper officer of five dollars per acre, and that no adverse claim exists."

The patent conveys the paramount title to the applicant, and by virtue of the statute the patent is presumptive proof that the applicant was the owner of the mining claim conveyed thereby; and this cannot be controverted except for fraud, or a mistake on the part of the officers of the land department as to the law applicable to the conceded facts in the case. What becomes of the estate called a "mining claim" after a patent issues? As I have said, the presumption created by the patent is that the applicant was the owner of this mining claim. The patent gives the paramount estate. These two meeting in the same party, the lesser estate, which is the mining claim, becomes merged in the greater estate, that is received by virtue of the patent. From the necessities of the case, this must be so. The mining claim is a contingent estate. It is kept alive by the performance of \$100 worth of work each year. If this work is not performed the claim is forfeited, and the land embraced within its bounds becomes public domain. Can it be that, after a patent is obtained, any work can keep this estate, called a "mining claim," alive, and subject it to forfeiture? Take the case in hand. Dower is claimed in two-fifths of the A. M. Holter lode claim. Will three-fifths of this claim merge in the patent title, and two-fifths remain without this merger? It is evident congress had the intent to create this merger by providing for the conveyance of the paramount title to the owner of the

claim, and to no one else. The general rule is that when merger takes place as to two estates in land the inferior perishes. 13 Amer. & Eng. Enc. Law, 313, tit. "Merger." The estate called a "mining claim" in the A. M. Holter lode perished when the Elkhorn Mining Company received a patent for the same. It then ceased to exist. No estate was then left in which plaintiff could claim dower. As I have said, the patent raised the presumption that the mining claim was owned by the applicant, and that this ownership was free from any claim on the part of plaintiff. At the issuing of the patent this mining claim became merged in the paramount title, and perished; and no estate is in the defendant out of which plaintiff can ask to have dower assigned. This case is analogous to that of a base fee. When a base fee is destroyed by the paramount title, dower in the same is lost. *Jackson v. Kip*, 8 N. J. Law, 241; *Toomey v. McLean*, 105 Mass. 122.

I have not considered fully the effect of the statute of Montana which provides that the husband, being a citizen of the territory of Montana, might convey the full title to real estate by his deed, when his wife was not living in the territory of Montana. There may be some question as to when a person could claim to be a citizen of a territory, and when the wife could be said to be living in some other locality than the territory. The practical construction which has been placed upon this statute in Montana, for years, has been that if the permanent residence of the husband was in Montana, and his wife did not make her home with him, but lived in some other state or territory permanently, or without any definite purpose of coming or returning to the territory, the husband could convey his real property so as to exclude dower by his own deed. The truth is that, at the time this statute was enacted, Montana was a new country, and there were many men living therein, actually engaged in extensive business, and purchasing and transferring real estate, who had wives in the states who permanently resided there. Owing to this condition of society, much trouble was experienced in the conveyance of real estate, and many apprehensions for fear that the title to real estate conveyed might some day be incumbered by a claim of dower from some wife, whose existence was unknown at the time of the conveyance. To meet this condition of affairs, this statute was enacted; and to this extent, I think, it modified the common law upon this subject. The subsequent statute of dower did not directly repeal this statute. If it was repealed at all, it was by implication; but where there are two statutes, and one can apply to the subject specified in the statute generally, and the other can be considered as an exception to the general rule established by the statute, both should stand. This, I think, will be found to be the proper construction of the general law upon the subject of dower, and the special statute above referred to. As it appeared to me the former points considered would probably be decisive of the case, I placed most thought upon them. For the reasons assigned the demurrer is hereby overruled.

CRYSTAL SPRING DISTILLERY Co. v. Cox.

(Circuit Court of Appeals, Sixth Circuit. January 16, 1892.)

1. INTERNAL REVENUE—BONDED WAREHOUSE—EXCESSIVE LOSS.

Rev. St. U. S. § 8221, abating the tax on distilled spirits destroyed while in a bonded warehouse "by accidental fire or other casualty," does not include a loss by the warping of barrels from unusual and excessive summer heat, abnormal evaporation, caused by such heat, or the existence of undiscoverable worm-holes in the barrels.

2. SAME—ALLOWANCE FOR LOSS.

When the commissioner of internal revenue regards a loss from such causes as excessive, he has authority, under Act Cong. May 28, 1880, § 4, to order the withdrawal of the spirits from the warehouse before the three years of the bond have expired, and to require payment of the tax on the quantity originally entered, without making any allowance under section 17 of said act for the loss, even though it occurred without the fraud or negligence of the owner.

47 Fed. Rep. 693, affirmed.

In Error to the Circuit Court of the United States for the District of Kentucky.

Petition by the Crystal Spring Distillery Company against Atilla Cox, as collector of internal revenue, to recover taxes paid. A demurrer to the petition was sustained, and the cause dismissed. Plaintiff brings error. Affirmed.

Walter Evans, for plaintiff in error.

Geo. W. Jolly, U. S. Dist. Atty., for defendant in error.

Before JACKSON, Circuit Judge, and SAGE and SWAN, District Judges.

JACKSON, Circuit Judge. The writ of error in this case is prosecuted to revise the judgment of the circuit court sustaining the demurrer to the petition and dismissing plaintiff's suit. The case presented by the petition is in brief this: In 1886 and 1887 the plaintiff, as a distiller in the fifth district of Kentucky, entered for deposit in its bonded warehouse, under and in accordance with the internal revenue laws of the United States, from time to time, 108 packages of whisky, containing by the original gauge made at the date of said entry 4,936 gallons, or over 40 wine gallons to each package. At the respective dates of entering said packages for deposit in said warehouse, plaintiff, as required by law, gave bond, with surety, for the payment of the 90 cents gallon tax thereon due the United States three years thereafter; that being the period under the law during which the whisky could remain in bond, unless its withdrawal was sooner required by the commissioner of the internal revenue. In the summer of 1888, before the expiration of the three years bonded period, the commissioner of internal revenue instructed the defendant, Cox, who was then and during the year 1888 a collector of internal revenue in and for the said fifth district of Kentucky, to require of the plaintiff the immediate withdrawal of said packages of whisky from the warehouse, and the payment of the 90 cents tax upon each gallon thereof, as ascertained by the original gauge made at the time of deposit, and without any allowance for losses occurring while in said warehouse.

Thereafter the commissioner of internal revenue, on July 1, 1888, made an assessment against the plaintiff for the full sum of 90 cents per gallon on the 4,936 gallons of whisky as originally gauged, amounting to the sum of \$4,442.40. This assessment was, in August, 1888, placed in the hand of defendant, as collector of the district, for enforcement and collection, and was paid by plaintiff in November, 1888, under protest and compulsion. From a regauge, made early in September, 1888, at plaintiff's instance, but without authority or direction from the commissioner of internal revenue, it appeared that the loss from said 108 packages up to that time, or between the date of entry for deposit in warehouse and September 6, 1888, was, in the aggregate, 635 gallons. It is claimed in the petition that plaintiff was not properly chargeable with the tax of 90 cents per gallon on this 635 gallons of lost spirits, amounting to \$571.50, which was included in the sum \$4,442.40, which it was required to pay on the whole 4,936 gallons originally entered for deposit. Application to the commissioner of internal revenue to refund said sum of \$571.50 as improperly taxed upon said 635 gallons of lost whisky having been refused, the plaintiff brought this suit against the defendant to recover said amount, with interest from November 24, 1888. It appears from the petition that the action of the commissioner of internal revenue in requiring the withdrawal from warehouse of the 108 packages of distilled spirits was based on the excessive loss therein, and was had under the provision of section 4 of the act of May 28, 1880, (21 St. p. 146.) The plaintiff, in its petition, "states it to be the fact that, while the said losses from each and every one of said packages had been excessive when said instructions [for their withdrawal] were given, yet said losses occurred by the destruction of all of said spirits so lost by accidental casualties, viz., from wastage and injury to the barrels containing said spirits, caused by excessive and unusual heat in the summer of 1887, from abnormal evaporation from said packages, caused by said heat, and from undiscoverable worm-holes in the barrels containing said spirits, all without any fraud, collusion, or negligence of the plaintiff, who was the owner of all of the said spirits, and because of said fact the said commissioner of internal revenue was without power or authority lawfully to give the said instructions, [for withdrawal of the whisky,] or to make the said assessment of said taxes," etc.

On the state of facts thus set forth the plaintiff sought to recover of defendant said sum of \$571.50, with interest, as having been illegally exacted of it on the 635 gallons of whisky, lost without its fault. The defendant interposed a general demurrer, which was sustained by the circuit court, and the petition dismissed, with costs. It is assigned for error that the court erred in sustaining said demurrer and in dismissing the suit. It is claimed for the plaintiff in error that the commissioner of internal revenue had no lawful jurisdiction, power, or authority to compel the withdrawal of the spirits and the payment of the tax thereon until fully three years has elapsed from the time the same were deposited in the warehouse; that, if mistaken in this, still, the plaintiff, being without fault, was entitled to an allowance for the 635 gallons lost under the

facts stated; and that the \$571.50 tax collected thereon was illegal, unlawful, excessive, and unjust, and, having been paid under protest, may be recovered in this action. Whether the commissioner of internal revenue had the authority to require the withdrawal of the whisky before the expiration of three years from date of entry in warehouse, and the payment of the tax thereon according to the original gauge when entered for deposit in the warehouse, without making any allowance for the 635 gallons lost while so deposited from the causes alleged in the petition, must be determined by reference to several sections of the internal revenue law, which should be considered and construed together. By section 3248, Rev. St., distilled spirits are defined, "and the tax shall attach to this substance [thus defined] as soon as it is in existence as such." By section 3251, as amended by the act of March 3, 1875, (18 St. p. 339,) "there shall be levied and collected on all distilled spirits * * * a tax of ninety cents on each proof gallon, or wine gallon when below proof, to be paid by the distiller, owner, or persons having possession thereof before the removal from the distillery bonded warehouse." By section 3293, as amended by the act of May 28, 1880, (21 St. p. 145,) it is required that "the said distiller or owners shall at the time of making said entry [in warehouse] give his bond * * * conditioned that the principal named in said bond shall pay the tax on the spirits as specified in the entry, or cause the same to be paid, before removal from said distillery warehouse, and within three years from date of said entry." The 90 cents per gallon tax being thus fixed on all distilled spirits as soon as the same is "in existence" and entered in bonded warehouse, it was provided by section 3221, Rev. St., that the secretary of the treasury should have authority to make an allowance for certain losses of the spirits while in bond, as follows:

"The secretary of the treasury, upon the production to him of satisfactory proof of the actual destruction by accidental fire or other casualty, and without any fraud, collusion, or negligence of the owner thereof, of any distilled spirits while the same remained in the custody of any officer of internal revenue in any distillery warehouse or bonded warehouse of the United States, and before the tax thereon has been paid, may abate the amount of internal taxes accruing thereon, and may cancel any warehouse bond, or enter satisfaction thereon, in whole or in part, as the case may be."

By the fourth section of the act of May 28, 1880, it is provided:

"If it shall appear at any time that there has been a loss of distilled spirits from any cask or other package hereafter deposited in a distillery warehouse, other than the loss provided for in section 3221 of the Revised Statutes of the United States, as amended, which, in the opinion of the commissioner of the internal revenue, is excessive, he may instruct the collector of the district in which the loss has occurred to require the withdrawal from the warehouse of such distilled spirits, and to collect the tax accrued upon the original quantity of distilled spirits entered into the warehouse in such cask or package, notwithstanding that the time specified in any bond given for the withdrawal of the spirits entered into warehouse in such cask or package has not expired. If the said tax is not paid on demand, the collector shall report the amount due upon his next monthly list, and it shall be assessed and collected as other taxes are assessed and collected. The tax on all distilled spirits hereafter en-

tered for deposit in distillery warehouses shall be due and payable before and at the time the same are withdrawn therefrom, and within three years from date of entry for deposit therein. And warehousing bonds hereafter taken * * * shall be conditioned for the payment of the tax on the spirits as specified in the entry before removal from distillery warehouse, and within three years from the date of said bonds."

The 108 packages of whisky in the present case having been manufactured and entered for deposit in a distillery warehouse since the act of May 28, 1880, went into operation and effect, it must be assumed that the bond or bonds given by plaintiff upon making such entry or entries thereof were executed in conformity with the provisions of said section 4, and were conditioned "for the payment of the tax on the spirits as specified in the entry." It is, furthermore, perfectly clear from the language of said section that plaintiff had no absolute right to the period of three years from date of entry for the withdrawal of such spirits and payment of the tax thereon. The tax was "due and payable before and at the time" the spirits are withdrawn from the warehouse, "and within three years from date of the entry for deposit therein." The manifest meaning and purpose of said section was and is to make the tax on the original quantity of spirits entered due and payable at the time of the withdrawal thereof, when such withdrawal is required by the commissioner of internal revenue under and in pursuance of the authority therein conferred, "notwithstanding that the time specified in any bond given for the withdrawal of the spirits entered into warehouse in such cask or package has not expired." In other words, the tax based or "accrued upon original quantity of distilled spirits entered into the warehouse" is due and payable, without any allowance for diminution in quantity, whenever the commissioner of internal revenue requires its withdrawal because, in his opinion, the loss from the cask or packages is excessive, provided such loss does not come within the provisions of section 3221, Rev. St., above quoted. If the loss has arisen from "the actual destruction by accidental fire or other casualty, and without any fraud, collusion, or negligence of the owner thereof of any distilled spirits" while in any distillery or bonded warehouse, the commissioner of internal revenue has no authority, however great such loss may be, to instruct the collector of the district in which the loss has occurred to require the withdrawal of such spirits, and the payment of the tax thereon as specified in the entry thereof. But if the loss from casks or packages while in warehouse has not been caused "by accidental fire or other casualty," and in the opinion of the commissioner is excessive, the withdrawal of the spirits and payment of the tax on the quantity originally entered for deposit may be directed and required under the authority conferred upon the commissioner of internal revenue by said section 4 of the act of May 28, 1880. So that the controlling, if not the sole, question presented is whether, under the allegations of the petition, the loss in the 108 packages of whisky entered for deposit in warehouse by the plaintiff can properly be treated and regarded as an "actual destruction by accidental fire or other casualty," within the provision of

section 3221, Rev. St. There is no controversy as to the fact that the loss from the package while in warehouse was excessive when the immediate withdrawal of the spirits was ordered and directed by the commissioner of internal revenue. It exceeded the limit of the maximum allowance permitted by said act of May 28, 1880, when the loss was without the fault or negligence of the distiller or owner of the spirits; and the petition admitted the fact that "said losses from each and every one of said packages had been excessive when said instructions [for their withdrawal] were given," but claimed that such losses were "occasioned by the destruction of all of said spirits so lost by accidental casualties, viz., from warpage and injury to the barrels containing said spirits, caused by excessive and unusual heat in the summer of 1887, from abnormal evaporation from said packages, caused by said heat, and from undiscoverable worm-holes in the barrels containing said spirits, all without any fraud, collusion, or negligence of the plaintiff, who was the owner of said spirits." Are the alleged causes of the admitted excessive loss, as thus stated, covered by said section 3221, Rev. St.? We think not; for it cannot be properly said that losses resulting from either excessive and unusual summer heat or undiscoverable worm-holes in barrels constitute "actual destruction by accidental fire or other casualty," within the true meaning of said terms as employed in section 3221, Rev. St. We are clearly of the opinion that the court below was correct in its holding that "other casualty," as used in said section, meant an accidental destruction by some cause of like character and operation as fire; such as lightning, floods, cyclones, storms, or other uncontrollable force, which ordinary foresight and prudence could not guard against or prevent. The loss from undiscoverable worm-holes, or the warping of barrels from excessive summer heat, causing greater evaporation of spirits, is not the destruction by "other casualty" contemplated by said section 3221, Rev. St. In *Welles v. Castles*, 3 Gray, 325, Chief Justice BIGELOW, speaking for the court, says that "'unavoidable casualty' signifies events or accidents which human prudence, foresight, and sagacity cannot prevent." In *Mills v. Baehr*, 24 Wend. 254, there was a provision in a lease that the rent should cease if the premises became untenable by "fire or other casualty." The building became untenable in consequence of the greater portion of it being taken down to conform to an order of the city corporation for the widening of the street on which it was situated. Chief Justice NELSON, in delivering the opinion of the court, said:

"The term 'other casualty' refers to some fortuitous interruption of the use. This is clear, not only upon the import of the words, but from the connection in which they are found. No casualty has intervened. On the contrary, whatever has taken place has been in pursuance of established law, and might have been and probably was anticipated."

The policy of the government, as declared in the provisions of section 3248, Rev. St., being to have its excise tax attach to distilled spirits as soon as the same are in existence, and according to the original quantity entered for deposit in warehouse, the exception to the general

rule provided for by section 3221, Id., as amended by section 6 of the act of March 1, 1879, (20 St. p. 327,) cannot, under the principle of the foregoing decisions, or by any proper construction, be extended so as to cover excessive losses arising from such causes as those alleged in plaintiff's petition.

It is urged on behalf of plaintiff in error that, inasmuch as the loss of the 635 gallons while the 108 packages were in warehouse occurred without fault on its part, an allowance should have been made therefor under section 17 of the act of May 28, 1880, which provides that, "whenever the owner of any distilled spirits shall desire to withdraw the same from the distillery warehouse or from a special bonded warehouse, he may file with the collector a notice giving a description of the package to be withdrawn, and request that the distilled spirits be regauged; and thereupon the collector shall direct the gauger to regauge the same, and mark upon each package so regauged the number of gauge or wine gallons and proof gallons therein contained. If upon such regauging it shall appear that there has been a loss of distilled spirits from any cask or package without the fault or negligence of the distiller or owner thereof, taxes shall be collected only on the quantity of distilled spirits contained in such cask or package at the time of the withdrawal thereof from the distillery warehouse or special bonded warehouse: and provided, however, that the allowance which shall be made for such loss of spirits as aforesaid shall not exceed" a certain number of proof gallons in each cask or package of 40 or more wine gallons capacity for designated periods of two or more months. The loss in question exceeded the maximum allowance covered by the proviso of said section 17. While we do not mean to decide that it was the intention of congress by the fourth section of the act of May 28, 1880, to limit and restrict the authority of the commissioners of internal revenue, in requiring the withdrawal of spirits to cases in which the loss is greater than that allowed by the seventeenth section of said act, we are of the opinion that, even upon that construction of the two sections, as applied to the present case, the order directing the withdrawal of plaintiff's 108 packages because of excessive loss therein was clearly within the power and jurisdiction conferred upon the commissioners by and under said fourth section of the act, and that the plaintiff cannot properly claim the benefit of the allowance to the extent provided for in and by the seventeenth section. The manifest object and purpose of the fourth section of the act was to enable the commissioner of internal revenue to protect the government's lien on the spirits for the tax due thereon in cases where there was an excessive diminution of the security without fraud or negligence on the part of the owner from causes other than those excepted by section 3221, Rev. St.

Under well-settled rules of construction the courts must give such interpretation to the revenue act of May 28, 1880, as will allow both sections 4 and 17 to stand. There is in fact no conflict between them. The case made by the petition comes directly within the provisions of section 4 of said act, and the conclusion is inevitable that, the loss being

excessive, the commissioner of internal revenue had full authority to require the withdrawal of the whisky, and the payment of the tax on the original quantity entered for deposit in the distillery warehouse. In the case of *Thompson v. U. S.*, 12 Sup. Ct. Rep. 299, (decided January 11, 1892,) the supreme court say of section 3293, Rev. St., as amended by the fourth section of the act of May 28, 1880, already referred to, that "the evident intention of congress, to be gathered from those provisions, is that the tax shall attach as soon as the spirits are produced, and that such tax shall not be evaded except upon satisfactory proof, under section 3221, of destruction by fire or other casualty." We concur fully with the lower court in the view that the loss in the present case, as described in the petition, is not covered by section 3221, Rev. St., and that plaintiff was not entitled to any allowance as claimed on the 635 gallons lost while in warehouse, but was properly taxed thereon. We do not deem it necessary to consider or decide the question whether, under the principle laid down in the cases of *Erskine v. Hohnbach*, 14 Wall. 613; *Haffin v. Mason*, 15 Wall. 674; and *Harding v. Woodcock*, 137 U. S. 46, 11 Sup. Ct. Rep. 6,—the plaintiff could maintain its said suit against the defendant under the facts alleged. The judgment of the circuit court is affirmed, with costs.

LOUISVILLE PUBLIC WAREHOUSE CO. v. COLLECTOR OF CUSTOMS.

(Circuit Court of Appeals, Sixth Circuit. January 16, 1892.)

1. CIRCUIT COURT OF APPEALS—JURISDICTION—REVENUE APPEALS.

The fifth section of the act creating the circuit court of appeals enumerates the cases in which appeals shall still be taken direct to the supreme court, and the sixth section declares that the circuit court of appeals shall have appellate jurisdiction of all other cases, "unless otherwise provided by law." *Held*, that this gives the latter court jurisdiction of an appeal from a judgment rendered by the circuit court in reviewing a decision of the board of general appraisers under the revenue act of June 10, 1890.

2. SAME.

The fact that section 15 of the latter act authorizes the circuit court, when it deems the question of special importance, to allow an appeal to the supreme court, cannot be considered as having "otherwise provided by law," as such a construction would extend the direct appellate jurisdiction of the supreme court beyond the classes of cases specifically enumerated in section 5 of the act creating the circuit court of appeals, and would in fact deprive the latter court of all appellate jurisdiction; for prior to that act there was "provision by" law in respect to appeals or writs of error in all cases.

3. CUSTOM DUTIES—REIMPORTED WHISKY—WITHDRAWAL FROM BOND.

The tariff act of October 1, 1890, (26 U. S. St. p. 624,) provides in section 23 that on the reimportation of an article manufactured in the United States, and once exported without paying an internal revenue tax, it shall pay a duty equal to the internal revenue tax on such article. Section 50 declares that any merchandise deposited on bond before the date of the act may be withdrawn for consumption on payment of the duties in force before the act; when such duties are based upon the weight of the goods, the weight shall be taken at the time of the withdrawal. *Held*, that while, under the internal revenue laws, the proof of spirits is determined by weight, yet the tax is always assessed upon the gallon measurement, whether the spirits are above or below proof, and hence reimported whisky, when withdrawn from bond, must pay according to the number of gallons at the time of importation, and not at time of withdrawal.

On Appeal from the United States Circuit Court for the District of Kentucky.

Application by the Louisville Public Warehouse Company for a review of the decision of the board of general appraisers, affirming the action of the surveyor of customs in exacting certain duties on bonded whiskies. A demurrer to the application was sustained, (48 Fed. Rep. 372,) and the court allowed an appeal. Affirmed.

Augustus E. Willson, (*Willson & Thum*, of counsel,) for appellant.

Geo. W. Jolly, U. S. Dist. Atty., for appellee.

Before JACKSON, Circuit Judge, and SAGE and SWAN, District Judges.

JACKSON, Circuit Judge. The question of law presented by the record in this case is whether the duty on reimported whisky, once exported, of the product or manufacture of the United States, should be levied and collected on the quantity thereof imported and entered into a customs warehouse under bond, or upon the quantity actually withdrawn from such warehouse. The material facts of the case on which this question arises are the following: Five barrels of whisky, having the serial numbers 1168, 1169, 1170, 1171, and 1172, and manufactured in the United States, were exported to a foreign country before any internal revenue tax had been assessed and paid thereon. This whisky was reimported into the United States on January 6, 1890. The importers executed a warehousing bond, as required by law, and the spirits were entered into the customs bonded warehouse at Louisville, Ky., in January, 1890. The 5 barrels, as gauged by the customs gauger at or about the time of such entry in the warehouse, were found to contain 162 taxable gallons. The appellant, as the importer and consignee thereof, withdrew said 5 barrels of whisky from the bonded warehouse on November 28, 1890, and was required to pay the tax on 162 gallons, the original quantity entered into warehouse, at 90 cents per gallon, amounting to \$145.80. The actual quantity in the 5 barrels at the time of the withdrawal was 155 gallons, 7 gallons having evaporated or been lost while in the customs warehouse. The appellant, as the importer, insisted that it was not liable to any tax or duty except on the 155 gallons shown by the regauge to be in the 5 barrels at the date of their withdrawal. The surveyor of the port at Louisville, acting as the collector of customs, decided that appellant should pay duty on the 162 taxable gallons originally entered into the warehouse, and that it was not entitled to any deduction or allowance on account of the loss of the seven gallons between the date of entry and withdrawal of the whisky. The appellant paid the tax or duty of 90 cents per gallon on said 7 gallons of lost spirits under protest, claiming that the exaction was unauthorized and illegal, because the provisions of the Revised Statutes of the United States required the tax to be assessed by the weight of the goods, and by the fiftieth section of the act approved October 1, 1890, known as the "McKinley Bill," it was provided that, when duty is based upon the weight of merchandise deposited in any public or private warehouse, said duty shall be levied and collected upon the weight of said

merchandise at the time of its withdrawal, and thereupon appealed from the decision of the surveyor or collector to the board of United States general appraisers at New York. The protest and papers relating to the matter were transmitted to said board of general appraisers, who, after consideration of the question presented, on March 9, 1891, affirmed the action of the surveyor of customs, the same being in accordance with a decision of said board rendered February 4, 1891, No. 300 G. A. Thereafter on April 4, 1891, the appellant filed in the circuit court for the district of Kentucky an application for a review by said court of the questions of law and fact involved in the decision of said board of United States general appraisers, who, in pursuance of the order of the court, returned to said circuit court the record and evidence of the proceedings taken and had before it in the premises, with a certified statement of the facts involved in the case, and their decision thereon. This proceeding by appellant for a review of the decision of said board of general appraisers was had and taken under the act of June 10, 1890, entitled "An act to simplify the law in relation to the collection of the revenue," (26 St. at Large, p. 131,) the fourteenth and fifteenth sections of which provide, in substance, that, if an importer is dissatisfied with the decision of the collector as to the rate and amount of duty chargeable upon imported merchandise, he may, within a certain time, upon the payment of such duty, give notice in writing to the collector of his objection thereto. Upon such notice and payment the collector shall transmit the invoice and all papers and exhibits connected therewith to the board of three general appraisers at New York, which shall examine and decide the case thus submitted; and, if the importer is dissatisfied with the decision of said board, he may, within 30 days next after such decision, apply to the circuit court of the United States within the district in which the matter arises for a review of the questions of law and fact involved in such decision. The application for such review is required to set forth a concise statement of the errors of law and fact complained of; and upon the filing thereof with the clerk the court is required to order the board of general appraisers to make a return to said court of the record and evidence taken by them, with a certified statement of the facts involved in the case, and their decision thereon; and said return, together with such further evidence as may be introduced by either side to the controversy, "shall constitute the record upon which said circuit court shall give priority to, and proceed to hear and determine, the questions of law and fact involved in such decision, respecting the classification of such merchandise, and the rate of duty imposed thereon under such classification, and the decision of such court shall be final; and the proper collector, or person acting as such, shall liquidate the entry accordingly, unless such court shall be of opinion that the question involved is of such importance as to require a review of such decision by the supreme court of the United States, in which case said circuit court, or the judge making the decision, may within thirty days thereafter allow an appeal to said supreme court."

After said board of general appraisers had, in obedience to its order, made this return to the circuit court as provided by the said act, which,

together with the application, constituted the record upon which said court was to hear and determine the questions of law and fact involved, neither side having offered or desired to introduce any further evidence, the United States attorney for the district of Kentucky appeared on behalf of the United States, and moved to dismiss the proceedings, and also demurred thereto, because upon the facts appearing in the record the appellant or applicant was entitled to no relief. The motion to dismiss was overruled, and the demurrer was sustained. The applicant declined to plead further, and it was thereupon ordered and adjudged by the court that said application be and the same was dismissed with costs; and the court being of the opinion that the question involved was of such importance as to require a review of its decision by the United States circuit court of appeals for the sixth circuit, or by the supreme court of the United States, sustained the applicant's motion therefor, and allowed it an appeal to this court. The opinion of BARR, J., sustaining the demurrer and dismissing the application, is reported in 48 Fed. Rep. 372.

The appellee or attorney for the United States has moved to dismiss said appeal because this court has no jurisdiction to entertain the same. In support of this motion, it is insisted that under the foregoing provisions of the fifteenth section of the act of June 10, 1890, the lower court could only allow the appeal to the supreme court of the United States. Said section did not confer any absolute right of appeal on the part of the applicant for review from the decision of the circuit court; but said court, or the judge making the decision, was authorized and empowered "to allow an appeal to said supreme court" in case the court or judge should be of opinion that the question involved was of such importance as to require a review of the decision by the supreme court of the United States. When said act of June 10, 1890, was passed, and went into operation, appeals could be taken and allowed from decisions of the circuit courts to the supreme court alone. No other court had or possessed appellate jurisdiction in respect to such decisions. By the act approved March 3, 1891, the circuit court of appeals was established and invested with appellate jurisdiction to review by appeal or by writ of error final decisions in the district and circuit courts, in all cases other than those provided for in the fifth section of said act, "unless otherwise provided by law." By the fifth section of said act the cases are defined and enumerated in which appeals and writs of error may be taken from the district and circuit courts direct to the supreme court. It is not claimed that the present is one of the cases therein enumerated, which have to be taken for review to the supreme court; but it is claimed that it does not come within the provisions of the sixth section of said act, because, while not embraced in the fifth section, it is "otherwise provided by law" that the appeal shall be allowed, if at all, to the supreme court,—in other words, that the appeal to the supreme court under the fifteenth section of the act of June 10, 1890, is excepted from the jurisdiction of this court under the sixth section of the act of March 3, 1891, by force of the words, "unless otherwise provided by law." This construction of the two acts would lead to the result of practically depriving this

court of all appellate jurisdiction, because when the act of March 3, 1891, was passed, all appeals and writs of error were "otherwise provided by law." In adopting the new system of appellate courts the clearly-expressed intention of congress was to divide appeals and writs of error into two general classes, one of which should be taken direct to the supreme court, while all others should lie to this court. The enumeration of the former is specific, while the latter is general; and the words, "unless otherwise provided by law," should not be interpreted so as to extend the direct appellate jurisdiction of the supreme court beyond the class of cases enumerated in section 5 of said act creating this court. That the appeal provided for under the fifteenth section of the act of June 10, 1890, has to be specially allowed by the court or judge making the decision, in no way affects the question. When allowed, the appeal stands upon the same footing and in the same position as an appeal in any other case, and must be taken to that appellate tribunal which is given jurisdiction over the subject-matter involved by the act of March 3, 1891. Looking, then, to the nature of the case, to the avowed purpose of the act creating this court, and the appellate jurisdiction therein conferred, we are of the opinion that the motion to dismiss the appeal is not well taken, and should be overruled.

Upon the merits of the case the appellant has assigned the following errors as grounds for reversal of the judgment below, in that the court erred in sustaining the demurrer; in approving and affirming the decision of the collector and board of general appraisers in holding that the customs duty imposed by law upon such whisky is not "based upon the weight of merchandise;" in deciding that the duty upon the whisky should be collected upon the quantity thereof at the time it was entered into bond, and not upon the actual quantity at the time of withdrawal for consumption; and in dismissing the application for review of the decision of the customs officers. These assignments of error involve only the one general question, whether, under the law, the appellant was properly chargeable with the 90 cents per gallon tax on the 7 gallons of the whisky lost between the date of entry into bonded warehouse and the withdrawal of the 5 packages or barrels. While the amount immediately involved is small, it appears that the present is a test case upon the question, which involves large amounts. The general proposition contended for by appellant is that the duty to be levied, collected, and paid upon the reimported whisky in question is to be ascertained by the quantity of taxable gallons thereof at the time of withdrawal, and not at the time of entry into bonded warehouse. By the tariff acts of March 3, 1883, and October 1, 1890, it is provided—

"That upon reimported articles, once exported, of the growth, product, or manufacture of the United States, upon which no internal tax has been assessed or paid, * * * there shall be levied, collected, and paid a duty equal to the tax imposed by the internal revenue laws upon such articles."

The duty on the five barrels of whisky reimported by appellant is thus made "equal" to that imposed by the internal revenue laws; and it is claimed by appellant in support of its position that as, by the provisions

of the internal revenue laws, "tax gallons" of distilled spirits are based upon "proof gallons," which are "based upon the weight" of the merchandise, the taxable quantity of whisky must be determined by the "weight" of such whisky at the time of its withdrawal, under the fiftieth section of the act of October 1, 1890, which provides—

"That on and after the day when this act shall go into effect, (October 6, 1890,) all goods, wares, and merchandise previously imported, for which no entry has been made, and all goods, wares, and merchandise previously entered without payment of duty and under bond for warehousing, transportation, or any other purpose, for which no permit of delivery to the importer or his agent has been issued, shall be subjected to no other duty upon the entry or withdrawal thereof than if the same were imported respectively after that day: provided, that any imported merchandise deposited in bond in any public or private bonded warehouse, having been so deposited prior to the 1st day of October, 1890, may be withdrawn for consumption at any time prior to February 1, 1891, upon the payment of duties at the rate in force prior to the passage of this act: provided, further, that, when duties are based upon the weight of merchandise deposited in any public or private bonded warehouse, said duties shall be levied and collected upon the weight of such merchandise at the time of its withdrawal."

The five barrels of whisky in this case were reimported while the act of March 3, 1883, was in force, and were deposited in bond in the customs warehouse prior to October 1, 1890, and being withdrawn prior to February 1, 1891, were subject to the rate of duty prescribed, not by the act of October 1, 1890, but by the act of March 3, 1883, under the first of the above provisions. It is therefore a question by no means free from doubt whether the second proviso of said section, which may have reference to importations under the act of October 1, 1890, has any application to the present case. But, conceding that it does, the question is presented whether the duty imposed on reimported whisky, either under the tariff act of 1883 or 1890, is based upon the "weight" thereof, within the true import or meaning of said second proviso. Both of said acts contained in almost every schedule thereof numerous articles in respect to which the duty was based upon the weight of such articles, according to the avoirdupois standard, such as pounds, tons, etc. The terms of said provision, "when duties are based upon the weight of merchandise," may therefore find ample subjects of application if taken in their usual and ordinary sense, or if the word "weight" is given in its primary and ordinary meaning, such as the quantity of heaviness, the quality of being heavy, or the degree and extent of downward pressure under the influence of gravity, or the quantity of matter as estimated by the balance or scale.

Counsel for appellant, however, argues with much ingenuity that the words "weight of merchandise," as employed in said proviso, embrace and include all quantity measure depending upon the specific gravity of the matter, article, or thing measured; that, under the internal revenue law, there is a difference between "proof gallon" measure and "gallon" measure, in this: that the latter is a measure by quantity of volume or bulk, while the former is a measure of quantity, not by

bulk or volume, but by specific gravity, which depends for its ascertainment upon weight of the whisky, so as to bring it within the provisions of said proviso. It is not insisted that the duty on reimported whisky is based only on weight, but that the taxable gallon is based upon the "proof gallon," which is to be ascertained by specific gravity,—that is, "weight,"—and consequently brings such imported merchandise within the terms and meaning of said proviso. This proposition is too refined and involves a construction of the fiftieth section of the act of October 1, 1890, and of the internal revenue laws, too strained and technical, to be sustained. It is provided by section 3249, Rev. St., that "proof spirits shall be held to be that alcoholic liquor which contains one-half its volume of alcohol, of a specific gravity of seventy-nine hundred and thirty-nine ten thousandths, (.7939,) at (60°) sixty degrees Fahrenheit;" and in order to ascertain the "proof" of liquors or distilled spirits, or the quantity subject to tax, the use of hydrometers are authorized by sections 2918 and 3249, Rev. St. The hydrometer, as its derivation imports, is a water or volume measure employed to determine the specific gravities of liquids, and hence the strength of spirituous liquors. By section 3251, Rev. St., as amended by the act of March 3, 1875, the rate of internal revenue tax on distilled spirits produced in the United States is 90 cents on each and every proof gallon, or wine gallon when below proof. This tax is to be collected on the whole number of gauge or wine gallons when below proof, and is to be increased "in proportion for any greater strength than the strength of proof spirits" as defined by section 3249. Said tax is to attach to such spirits as soon as the same "is in existence as such." Section 3248, Rev. St. It thus appears that when the distilled spirits are only proof, as defined by section 3249, Rev. St., or less than proof, the tax is to be levied and collected on the wine gallon, by the express terms of section 3251, Rev. St. If the spirits are above proof, as defined by section 3249, Rev. St., then such excess of strength is, by the provisions of the law, to be ascertained, and the tax thereon is to be increased in proportion for any greater strength than "proof" strength. To ascertain whether spirits have a greater strength than "proof," as defined, the hydrometer is ordinarily employed; but by section 3249, Rev. St., and by sections 329 and 330 of the act of October 1, 1890, the secretary of the treasury is authorized, in his discretion, to employ other means of arriving at the strength of imported liquors, such as distillation or otherwise. It admits of no question that the tax on distilled spirits, when only proof or below proof, is based upon the volume as measured and determined by the wine gallon. It is equally clear that, when the spirits are above proof, the tax is to be increased "in proportion for any greater strength than the strength of proof spirits." The mode of ascertaining such excessive strength, and of estimating the taxable gallons thus found to exist, in no way affects the standard of measurement. Under appellant's theory, if reimported whisky is above proof, the duty is based upon and to be ascertained by the "weight" thereof, but, when it is at or below proof, it is dutiable according to

wine gallon or volume measurement. In the latter case the tax would be on the quantity imported and entered into bond; in the former, on the quantity on hand at the time of withdrawal. We cannot yield our assent to this theory. It was certainly not the intention of the law to prescribe one rule for taxing spirits at or below proof, and another for taxing such spirits when above proof; and the argument that because the strength of spirituous liquors is ascertained, under the law and regulations of the treasury department, by means of an instrument to determine the specific gravities of liquors, such ascertainment involves the "weight" thereof, in the sense of the last proviso to section 50 of the act of October 1, 1890, cannot be maintained. "Proof," as defined by Webster, means the act of testing the strength of alcoholic spirits; also, the degree of strength, as high proof, first proof, second, third, and fourth proofs. In the internal revenue law, it is used in the sense of degree of strength. It is said by Webster that formerly a very crude mode of ascertaining the strength of spirits was practiced, called "proof." The spirits were poured on gunpowder and inflamed. If at the end of the combustion the gunpowder took fire, the spirits were said to be above proof. In ascertaining the strength of distilled spirits, as compared with a standard fixed and defined by statute, whether the mode of ascertainment be by use of a water measure, called the "hydrometer," or by distillation, or the former crude gunpowder test, it cannot be properly said that such strength is determined by the weight of such spirits. Specific gravity is defined to be the ratio of the weight of a body to the weight of an equal volume of some other body, taken as the standard or unit. This standard is usually water for liquids and solids, and air for gases. The specific gravity standard is fixed by section 3249, Rev. St., for "proof" spirits, and the volume measure, as the basis of the tax thereon, is also defined. When the spirits are above "proof," this excess in strength, on which to base the increased tax, may be ascertained by a comparison of specific gravities with the standard so fixed, or by other means; but this does not involve the idea or proposition that the tax is based upon the specific gravity or weight, rather than the strength of the spirits. Strength, when above proof, regulates and forms the basis of the tax according to volume measurement. The mode of ascertaining such strength, as by the specific gravity, falls far short of showing or establishing that the tax or duty is based upon the weight of merchandise, within the true import and meaning of the second proviso to section 50 of the act of October 1, 1890.

It is urged that under the authority of *Brown v. Maryland*, 12 Wheat. 447, defining the time when the power of the state to tax imported goods attached, the court should so interpret the customs laws as to make the duty attach at the time of withdrawing the goods for consumption, rather than the date of entry into bonded warehouse. The tariff legislation of congress has not been heretofore so construed by the supreme court of the United States. On the contrary, the general rule has been recognized and enforced that the assessment of duties on im-

ported goods is properly made upon the quantity actually imported and entered at the custom-house. The tariff acts of 1846, 1851, and 1864 all received this construction; and the importers were not allowed for leakage even while detained for appraisement. See *U. S. v. Southmayd*, 9 How. 637; *Lawrence v. Caswell*, 13 How. 488; and *Belcher v. Linn*, 24 How. 508. The fiftieth section of the act of October 1, 1890, by the last proviso thereof, makes an exception to this general and well-settled rule of making the duty chargeable upon the quantity actually brought into the country, by declaring that, "when duties are based upon the weight of merchandise deposited in any public or private bonded warehouse, said duties shall be levied and collected upon the weight of such merchandise at the time of its withdrawal." The appellant's case, as already stated, does not come within this exception, and the whisky imported by it was dutiable, under the general rule, upon the quantity actually imported and entered into bond. The tariff acts of 1883 and 1890 make no provision for any allowance for leakage or evaporation while imported spirits are in a bonded warehouse, like that found in the seventeenth section of the act of May 28, 1880, (21 St. at Large, p. 149.) Allowances for such losses by leakage or evaporation rest upon the express provisions of the statutes; and when not provided for therein the courts can make none, however strong the equity may be. This is the rule laid down recently by the supreme court of the United States in the case of *Thompson v. U. S.*, 12 Sup. Ct. Rep. 299, (decided at the present term, and not yet officially reported.) Upon the whole case, we are clearly of the opinion that the decision of the lower court was correct, and accordingly affirm the judgment below, with costs.

UNITED STATES v. DON ON.

Circuit Court, N. D. New York. November 20, 1891.

1. CHINESE LABORERS—TEMPORARY ABSENCE—RIGHT TO RETURN.

A Chinese laborer was arrested for being in the United States in violation of the exclusion acts, as amended by Act Cong. Oct. 1, 1888. The evidence showed that he had been in this country continuously for 22 years prior to April 1, 1891, but that he was at Kingston, Canada, in the last week of that month. He denied having been there, and there was nothing to show his purpose in going, or his intention as to returning. *Held*, that he was unlawfully in the United States, and should be returned to Canada, as the country "whence he came." *Wan Shing v. U. S.*, 11 Sup. Ct. Rep. 720, 140 U. S. 424, applied; *In re Ah Tie*, 13 Fed. Rep. 291, distinguished.

2. SAME—HABEAS CORPUS—REVIEW—COMMISSIONER'S FINDINGS.

On *habeas corpus* to release a Chinaman ordered by a United States commissioner to be returned to Canada, the commissioner's findings of fact cannot be reviewed.

Petition by Don On, a Chinese laborer, for a writ of *habeas corpus*. Petitioner and one Lee Sing were tried before Edward L. Strong, United States commissioner for the northern district of New York, for being unlawfully in the United States, and were by him ordered to be returned

to Canada. In rendering judgment the commissioner delivered the following opinion:

"The defendants were arrested under the 'Chinese Exclusion Acts,' May 2, 1891, at Clayton, N. Y. The evidence before me shows that Don On and Lee Sing are Chinese laborers, subjects of the Chinese empire, and that they both came to this country from China,—Don On about 22 years ago, and Lee Sing about 12 years ago; that they continuously resided here from that time to April, 1891. It further shows that on the 2d day of April, 1891, Lee Sing was in Toronto, Canada, and in the last week of April, 1891, Don On was in Kingston, Canada. The only question in this case is, did they depart from the United States so as to prevent them from coming back? Defendants' counsel claim that they did not lose the right to return to this country, unless they severed their connections here, and departed from the United States with the intent to make their residence elsewhere; that temporarily going to a foreign country, with no intentions of staying there, is not departing from the United States, in the meaning of the act of congress passed October 1, 1888. Sections 4, 5, c. 126, Laws 1882 of the United States, provide that the collector of the district shall issue to Chinese laborers departing from the United States a certificate, for the purpose of identification, and 'in order to furnish them with the proper evidence of their right to go from and come to the United States of their free will and accord.' Section 2, c. 1064, Laws 1888, repeals the above sections, and declares that no certificate shall be issued, and Chinese laborers, claiming admission by virtue thereof, shall not be permitted to enter the United States. It seems to me clear that the intent of congress was to give Chinamen who were here, prior to 1882, the right to temporarily depart and return to the United States, by procuring the necessary certificate, but that right was revoked by the law of 1888. I think that view of the law is clearly and fully expressed by Justice SAWYER in *Re Chae Chan Ping*, 86 Fed. Rep. 431. Justice FIELD says, in *Re Ah Sing*, 13 Fed. Rep. 289: 'The act even provides for the return of such laborers, leaving for a temporary period, upon their obtaining certificates of identification.' My attention has been called to the *Case of Ah Tie*, 13 Fed. Rep. 291. I have carefully read Justice FIELD's decision in that case, and particularly that part of his decision where he says: 'And we should hesitate to say that it would be lost by the laborer passing through a country in going to different parts of the United States by any of the direct routes, though we are told by counsel of the respondent that a Chinese laborer having taken a ticket by the Overland Railroad from this place, to New York, by the Central Michigan route, which passed from Detroit to Niagara Falls, through Canada, was stopped at Niagara, and sent back, and, on his attempting to retrace his steps, was again stopped at Detroit. The construction which would justify such a proceeding cannot fail to bring odium upon the act, and invite effort for its repeal. The wisdom of its enactment would be better vindicated by a construction less repellant to our sense of justice and right.' This case hardly comes under those remarks. Here both defendants deny being in Canada, or, in fact, out of the United States, since they came here years ago. They both are positively identified as being in Canada in the month of April, 1891. How they got there, what they went for, or how long they expected to remain, or what their intentions were of returning, does not appear. From the evidence before me I find that the defendants, Don On and Lee Sing, are unlawfully within the United States, and that they are not lawfully entitled to be or remain in the United States. I therefore order that Don On and Lee Sing be returned to Canada, as the country from whence they came."

Daniel Magone, for petitioner.

Frank C. Ferguson, Asst. U. S. Atty., for the United States.

COXE, District Judge. The commissioner has found that in the spring of 1891, the petitioner, a Chinese laborer, was at Toronto, Canada, and thereafter came to this country. This finding cannot be reviewed upon this proceeding, and must be taken as an established fact. I have re-examined the law in the light of these facts and am of the opinion that the case of *Wan Shing v. U. S.*, 140 U. S. 424, 11 Sup. Ct. Rep. 729, is controlling upon all questions presented upon the argument. I have read the decision of Commissioner Strong and concur with his conclusions. The petitioner was in Canada and could not legally enter this country. Application denied.

NOTE. The marshal made return that he was unable to execute the judgment of the court for the reason that he had no money with which to pay the "head-tax" charged by the Canadian government. Due notice of this fact having been given to the department of justice, and no funds having been provided, it was afterwards, on motion of the United States district attorney, ordered that the petitioner, Don On, be discharged from custody.

HAY & TODD MANUF'G CO. v. VAN DYKE KNITTING CO. & al.

(Circuit Court, E. D. Wisconsin. March 5, 1892.)

1. PATENTS FOR INVENTIONS—ANTICIPATION—LADIES DRAWERS.

Letters patent No. 357,127, issued February 1, 1887, to William F. Kneip, are for an improvement in ladies' drawers, in which each half of the garment is composed of two pieces, one running the whole length, and being only wide enough at its widest part to encircle the leg, and the other of a strip generally rectangular in form, and attached at one of its longer sides to the vertical rear edge of the body portion of the larger piece, and at its lower end to the front margin of the main piece, thus giving the fullness in the rear rendered necessary by the contour of the figure. *Held*, that the patent was anticipated by the Bradley patent (No. 198,505) for a combination garment, the lower portion of which was constructed in substantially the same manner.

2. SAME—COMBINATION GARMENTS.

Letters patent No. 374,307, issued December 6, 1887, to the same person, claims a combination garment, comprising body and leg portions, made continuous with each other, the garment being separated at the back to a point above the waist line, and having strips inserted in the back, and secured, at one of their longer sides, to the edges of the main part of the garment, at their upper ends to both rear edges of the separated main parts, and at their lower ends to the front edges thereof. The specifications state that the upper ends of the strips are tapering, and attached at both of their tapered edges to the margins of both adjacent edges of the main parts, and that "it is obviously not essential that the top and bottom ends of the inserted pieces should be shaped exactly as shown," and that in practice their form "will be modified to give a desired form to the garment, or to correspond with modifications in the shape of other parts." *Held*, that this part of the specifications was essentially descriptive of the invention, and as the claim, thus broadened, would cover the Bradley patent and also the inventor's prior patent, the same was anticipated by them.

In Equity. Bill by the Hay & Todd Manufacturing Company against the Van Dyke Knitting Company, John H. Van Dyke, and John H. Van Dyke, Jr., for infringement of a patent. Bill dismissed.

Poole & Brown, for complainant.

Van Dyke & Van Dyke, for defendants.

GRESHAM, Circuit Judge. On February 1, 1887, patent No. 357,127 issued to William F. Kneip for an improvement in ladies' drawers; and on December 6, 1887, patent No. 374,807 issued to the same person for improvements in an under-garment of the kind known as combination garments. These patents were assigned to the Hay & Todd Manufacturing Company, and this suit was brought by the assignee against the Van Dyke Knitting Company, John H. Van Dyke, and John H. Van Dyke, Jr., for infringement. While not limited to any particular kind of material, the invention covered by the first patent relates more especially to a construction of ladies' drawers out of fabric knitted flat, and wide enough to fold around the leg, but not of sufficient width to half encircle the lower part of the body. The patent shows a single piece added to the rear edge of the body portion of the material, the lower end extending down to the seam which runs up the inside of the leg, with the under edge attached to the edge of the front upper part of the leg, and the side edge attached to the rear edge of the upper leg and body portion of the main piece. This added piece gives the desired width to the body portion of the garment, and the fullness in the rear rendered necessary by the contour of the figure. Its lower end, forming a gusset or gore at the inner upper end of the leg, gives the garment the required fullness, and enables the front portion of the main part to conform to the front of the figure. The garment consists of two vertically divided halves, united in front, and provided with a string or other fastening at the rear ends of the waistband. The specification thus described the invention:

"In drawers made in accordance with my invention, each side or half thereof is joined at the waistband in front, and is open behind in the usual manner, and each half, including the leg and body portion thereof, consists of two parts. One of said parts forms the main body of the garment, and is formed by a piece of fabric extending the full length of the garment, and having a width at its widest part only sufficient to make the leg or tubular part of the garment, and the other of said parts is a strip of fabric, generally rectangular in form, and attached at one of its longer edges to the vertical rear edge of the body portion of the main part first mentioned; and at its lower end or shorter edge to the lower portion of the front margin of the said main or body part. The said rectangular strip is made of the same length as the free edge of the main portion, measured from the upper end of the leg seam to the waistband, and of such width that, when sewed to the main part, the garment will be sufficiently large at the body or waist portion."

The specification also states:

"A main advantage gained by the novel construction above described is that the fullness in the upper and rear part of the garment necessary to a perfect and comfortable fit is thereby obtained, while at the same time the article consists of but few parts, of simple shape, which can be readily put together. The novel construction comprising my invention has especial advantages as applied to knit goods of that kind made upon a Lamb machine, for the reason that the two parts above described as constituting each half of the garment may be readily and easily made upon a machine of this character. Such machines are not usually adapted for knitting a very wide web, and, by reason of this fact, knit drawers produced by the use of these machines have usually been made of four main parts, each half consisting of

two parts much wider at their upper than at their lower parts, and united at the inside and outside of the leg, as above described."

It is further stated in the specification that the parts of the garment constructed as described may be attached to the waistband, or otherwise connected, as may be convenient or desirable; that the main feature of the invention is found in a garment embracing the two main or body pieces, in combination with the two inserted pieces; and that this construction is claimed broadly, without restriction. The single claim reads:

"The garment herein described and shown, each part or half of which consists of a part, A¹, united at the lower portion of its side margins to form the leg, and a part, A², of generally rectangular shape, secured at one of its longer sides and at its lower edge or end to the said part A¹."

The invention covered by the second patent relates to a combination under-garment intended more particularly for ladies. The body and leg portions are of one piece, having an opening in the rear extending upwardly from the crotch, with pieces attached adjacent to the opening to keep it closed, and thus cover and protect the body. These pieces are elongated, their ends pointed or gore-shaped, and they are secured on one side, throughout their entire length, to the rear vertical margins of the main parts of the garment from a point below the crotch upwardly, while only the tapered ends are secured on the other sides. Inserted, as stated, at their lower ends, these pieces enlarge the diameter of the upper part of the leg, while their free edges, extending across from one side of the garment to the other side, close the opening at the rear.

The specification says:

"The upper ends of the additional strips referred to are made tapering or pointed, and are attached at both of their tapered edges to the margins of both adjacent edges of the main parts of the garment. * * * It is obviously not essential that the top and bottom ends of the inserted pieces, C, C, should be shaped exactly as shown; and, in practice, the form of the said pieces will be modified to give a desired form to the garment, or to correspond with modifications in the shape of the other parts comprising the same."

The patent contains but a single claim, which reads:

"A combination garment, comprising body and leg portions, made continuous with each other, and separated at the back of the garment to a point above the waist line, and strips, C, C, inserted in the back of the garment, and secured at one of their longer sides to the edges of the main part of the garment, said strips being attached at their upper ends to both rear edges of the separated main parts of the garment, and at their lower ends to the front edges of said parts, substantially as described."

If there is any substantial difference between these patents, it is slight. The combination garment covered by the second patent, below the waist line, is substantially, if not identically, the garment described and covered by the first. The lower ends or the added pieces are of the same shape—gore-like—in both patents, and they are inserted in the crotch for the same purpose, and produce the same result. If there is any substantial difference between the inventions, it is found in the attachment of the upper ends of the inserted pieces in the second patent. Mr. Melville E. Dayton, the only expert witness for the complainant, testified that

the upper edges of the added pieces in the first patent overlap as they do in the second; that they are made fast at the waistband by tape; that the only difference between the two inventions is that, in the second patent, the added pieces are made permanently fast, by sewing or otherwise, to one side of the garment, somewhat less than half their length from the top, while the other sides are permanently attached from top to bottom. This attachment of the pieces, causing them to permanently overlap, he thought was the feature of novelty in the second over the first patent. He did not limit the invention to inserted pieces V-shaped at their upper ends. Combination under-garments were old in the art before Kneip obtained either of his patents, and, if Dayton's construction of the second patent is correct, it was anticipated by the Bradley patent No. 198,505, for an improvement in combination garments, and by other patents of the same class. It is true that, in the first Kneip patent, the upper ends of the added pieces are not V-shaped or sharp-pointed, but the second Kneip patent is not limited to pieces so shaped at the top.

"It is obviously not essential," says the specification, "that the top and bottom ends of the inserted pieces should be shaped exactly as shown; and in practice the form of the said pieces will be modified to give desired form to the garment, or to correspond with modifications in the shape of the other parts comprising the same." This language was used, not for the purpose of illustrating or explaining the invention, but as descriptive of it. It clearly manifests an intention not to limit the claim to added pieces gore-shaped or sharp-pointed at their upper ends, but to cover pieces with their upper ends sharp-pointed or square, and attached to the garment by a horizontal seam, as in the Bradley patent. The latter patent shows the added pieces inserted at the crotch, and otherwise attached to the main body parts of the garment, as in the first Kneip patent, which was clearly anticipated, and practically abandoned in the argument. The combination garment, below the waist line, was old in the art. It was shown in the Bradley patent, and the first Kneip patent, and in others. It follows that, if the second Kneip patent is not limited to added pieces sharp-pointed or V-shaped at the top, it, too, was anticipated by the Bradley patent and the first Kneip patent. It is not so limited by its language, and the complaint's expert did not so limit it. The language quoted from the specification was used, not, as above stated, to illustrate or explain the operation of the invention, but to broaden the claim. If this patent were prior to the Bradley patent, it would doubtless be said, and with force, that it was infringed by a garment made in accordance with the latter invention, showing the inserted pieces square at their upper ends, and there secured by a horizontal seam. It is true that language employed in a specification to illustrate or explain the operation of an invention should not be read into the claim to broaden and destroy the patent. But it is also true that statements in a patent, employed, not to illustrate the operation of the invention, but to describe it, are material, and cannot be disregarded in determining the scope and breadth of the claim. The bill is dismissed for want of equity.

THE LA NINFA.

UNITED STATES v. THE LA NINFA.

(District Court, D. Alaska. October 1, 1891.

SEAL FISHERIES—BERING SEA—FORFEITURE OF VESSEL.

Where an American vessel on a whaling voyage has taken seal within the dominion of the United States, in Bering sea, she is subject to forfeiture, under Acts Cong. July 27, 1868, and March 2, 1889, and is not exempted by the fact that, after taking the seal, she is boarded by a United States revenue cutter, served with the president's proclamation, and warned to leave the seas, after which she makes no further attempts to take seal.

In Admiralty.

The vessel was libeled for a violation of section 1956, Rev. St. U. S. This section, as passed July 27, 1868, provided that "no person shall kill any * * * fur seal * * * within the limits of Alaska territory, or in the waters thereof, * * * and all vessels, their tackle, apparel, furniture, and cargo, found in violation of this section shall be forfeited." By an act approved March 2, 1889, the section above quoted was declared "to include and apply to all the dominion of the United States in the waters of Behring sea," and that it should be the duty of the president, at any timely season in each year, to issue his proclamation, and cause the same to be published, warning all persons against entering said waters for the purpose of violating the provisions of said section; and that he should cause one or more vessels of the United States to diligently cruise said waters, and arrest all persons and seize all vessels found to be or to have been engaged in any violation of the laws of the United States therein. 25 U. S. St. at Large, p. 1009. The proclamation above provided for was issued by the president on April 4, 1891. Id. p. 1565. On the 15th day of June, 1891, another proclamation was made by the president, reciting that an agreement had been made "between the government of the United States and the government of her Britannic majesty for *modus vivendi* in relation to the fur seal fisheries in Behring sea, for the purpose of avoiding irritating differences, and with a view to promote the friendly settlement of the question pending between the two governments touching their respective rights in Behring sea, and for the preservation of the seal species." By that agreement this government bound itself to the government of her Britannic majesty to prohibit seal killing until May, 1892, in that part of Bering sea lying eastward of the line of demarcation described in article No. 1 of the treaty of 1867 between the United States and Russia, and on the shores and islands thereof, the property of the United States, in excess of a certain number, and to promptly use its best efforts to insure the observance of this prohibition by United States citizens and vessels. The agreement further provided that "every vessel or person offending against this prohibition in the said waters of Behring sea outside of the ordinary territorial limits of the United States" might be

seized and detained by the naval or other duly-commissioned officers of either of the high contracting parties. The evidence shows that on July 7, 1891, the schooner La Ninfa was boarded in Bering sea, about 30 miles off St. Paul's island, by an officer of the United States steamer Thetis, under orders from the government to board all vessels in that sea, and, if they were engaged in sealing, to give them a copy of the proclamation of the president bearing date June 15, 1891, and a letter of warning to leave the sea at once. The La Ninfa had then on board 19 seals, some of which the captain stated to the boarding officer had been killed in Bering sea. The president's proclamation and letter of warning were delivered by the officer to the captain, and a memorandum to that effect indorsed upon the ship's papers by the officer. Afterwards, on July 14, 1891, two officers of the United States revenue cutter Corwin, acting under the same orders, boarded the La Ninfa in Bering sea, 10 miles or more from and north of St. Paul's island; and it being found that she had a sealing outfit of boats and guns, and 19 fur seals on board, some of which the captain admitted also to these officers had been caught in Bering sea, and that she had been previously warned, as above stated, to leave the sea, the vessel was seized. The log-book showed that 14 of the seals had been killed in Bering sea on July 6th, the day before the vessel was boarded by the Thetis, and the day after she sailed through Unimak pass, into the sea. It is not claimed that after that time any attempt was made to kill seals. The vessel had a complete whaling gear on board, and was bound on a whaling cruise.

C. S. Johnson, U. S. Dist. Atty.

J. G. Heid, for claimants.

BUGBEE, District Judge, (*orally*.) The only contention on the part of the claimant is that the La Ninfa was not liable to seizure or condemnation, because of the facts that after the delivery of the letter of warning and the president's proclamation there was no violation of the law, and that the vessel, being a whaler, had a right to remain in the sea. But it is very plain that the law was violated when fur seals were killed within the domain of the United States in the waters of Bering sea; that is, on July 6th, as shown by the log-book. The La Ninfa had an American register and an American owner. Whatever jurisdiction the United States may have over foreign vessels sealing in Bering sea, American bottoms are governed by the act of congress above cited. If the vessel had not been served with the warning and the president's proclamation she might still have been seized and was liable to condemnation. Indeed, it may be said that the president's proclamation cuts no figure in the case. It aimed at nothing except to proclaim the *modus vivendi*. It could not alter the law. The fact that after the violation of the law the vessel, instead of being seized at once, was warned to leave the sea, gave it no immunity from punishment after the actual seizure. The vessel is therefore declared forfeited.

THE F. H. STANWOOD.¹COOPER v. THE F. H. STANWOOD *et al.*

(Circuit Court of Appeals, Seventh Circuit. March 8, 1892.)

MARITIME LIENS—SERVICES—DAMAGE FOR TORTS—PRIORITY.

A maritime lien for damages arising from a collision caused by negligent navigation has precedence over the lien of the crew of the offending vessel for wages earned by them on board such vessel before the collision, but is subordinate to the lien for such wages earned after the collision.

On Appeal from the District Court of the United States for the Northern District of Illinois.

STATEMENT BY JENKINS, DISTRICT JUDGE.

In Admiralty. The tug F. H. Stanwood, on the 18th day of September, 1890, and within the admiralty jurisdiction, negligently collided with and sank the canal propeller Whale. The crew of the tug consisted of three persons, a pilot, an engineer, and a fireman. On the 20th of September, 1890, the owner of the Whale filed his libel in the district court, seeking reparation for the wrong. The Stanwood was arrested, and afterwards, under decree of the court, sold by the marshal, and the proceeds covered into the registry of the court. The claimants of the tug intervened for their interests, and, upon hearing, a decree passed for the libelant sustaining his claim and assessing the damages. On the 4th day of October, 1890, the engineer and the pilot filed an intervening libel to recover their wages, subsequently amended to include the claim of the fireman. These wages were mainly earned prior to the collision; a portion of them subsequently thereto, and before the filing of the libel. On the 23d day of November, 1891, an order of distribution was made directing payment of the claims for wages for the season of 1890 in priority to the claim for damages by the collision. The fund was insufficient to pay the libelant in full. He thereupon appealed from the order of distribution. Reversed.

John C. Richberg, for appellant.

C. E. Kremer, for respondents.

Before GRESHAM, Circuit Judge, and JENKINS, District Judge.

JENKINS, District Judge, (*after stating the facts.*) The record presents for consideration the single question whether a maritime lien arising out of damage done in a collision caused by negligent navigation should be subordinated, with respect to its payment, to the maritime lien of the crew of the offending vessel for wages earned by them on board of such vessel. It is undoubted, as a general rule, that, as against claims arising *ex contractu*, the claim for seamen's wages is preferred. This is stated to arise out of the needed protection extended by the admiralty

¹ Reported by Louis Bolsot, Jr., Esq., of the Chicago bar.

to a class of men improvident, reckless, and exposed to imposition, and also because "by his labor the common pledge for all the debts is preserved." The latter reason is perhaps the better foundation for the rule. Possibly, also, the reason of the rule may, in part, be found in the nature of the service, and in the encouragement supposed thereby to be held out to the crew to "stand by the ship" in all times of peril. Upon whatever foundation it may rest, the rule is not without its exceptions. Thus salvors are awarded priority over wages earned prior to the salvage service, and this upon the equitable consideration that the subsequent service has preserved the subject of the lien. *The Selina*, 2 Notes Cas. Adm. & Ecc. 18; *The Athenian*, 3 Fed. Rep. 248.

The contention that wages should be postponed to the payment of damages by collision is rested upon two grounds: *First*, that the seamen share in the fault of the offending vessel, and from considerations of public policy to discourage negligent navigation; *Second*, that it would be inequitable to permit a fund impounded to compensate a wrong to be diverted to the payment of a participant in that wrong, or to one having a remedy against the owner of the offending vessel denied to the owner of the injured vessel.

We are of opinion that the contention is well sustained. The negligent navigation causing collision and consequent injury was the act of the crew, or of some one or more of them. The negligent act or omission is, in the law, charged upon the vessel so negligently navigated. She is treated as the offending thing. The fault of the crew is visited upon the agent by which the fault became effective, causing injury. It is an instance of imputed guilt, the sin of the crew being attributed to the innocent instrument. So, also, we think that, as to the injured vessel, the crew should share in the fault imputed to the offending vessel. As to the injured vessel, the offending thing and her crew are one. The crew participate in the navigation of the ship. She is the passive instrument of their active co-operation in effecting the injury. Ship and crew constitute the common enemy that has worked destruction. There may be but one directing mind. The others are, however, like the ship, his instruments in the perpetration of the wrong, and, as to the injured vessel, participants in the fault. They are joint tort-feasors. Which one, *inter se*, was directly and immediately responsible for the negligent act or negligent omission is of no moment to the vessel injured through their co-operation. We think it opposed to every principle of natural justice to permit one or more of an offending crew to hold priority over a claim for damages caused, directly or indirectly, by their act, and in the course of a common employment. That would be to reward guilt at the expense of innocence, and to tender premium to negligence. Careful navigation is essential to safety. It should be the constant care of courts of admiralty that no license be given to conduct prejudicial to life or property; that no safeguard to prudent navigation be removed; that no immunity be offered to negligent conduct. With the greatest care, navigation is hazardous. Seamen will not be less vigilant in the performance of duty if, as against the injured and the fund created to

compensate the wrong, they are held sponsors for the crew. They will not be less careful if the *res* charged with the payment of their wages be first subjected to the payment of the injury their fault had occasioned. The wrong done arose from the *delictum* of either the master or crew of the vessel at fault, and should be first compensated. This conclusion, as it seems to us, rests upon and finds support in the highest considerations of public policy. A fund already insufficient to compensate the injury should not be diverted to compensate those who actively, or by inference of law, have occasioned or contributed to the wrong. It is essential to the safety of commerce upon the seas to punish negligent navigation, and to redress the consequent injury, that others may not be encouraged to breach of duty. Careless navigation, reckless conduct of master and crew, avoidable collision, will be less frequent if punishment, not reward, shall surely follow transgression.

The second ground is also controlling. The seamen have a remedy by personal action against the owner of the offending vessel for the wages he has earned. There is no suggestion here of the insolvency of the owner. The insufficiency of the fund to pay the damages awarded is apparent. The owner of the injured vessel has no remedy, except against the offending vessel. Rev. St. § 4283; *Norwich Co. v. Wright*, 13 Wall. 104. It is a settled principle of equity that when one party has several, and the other but one, remedy, the former will be remitted to his additional remedy, and will not be permitted to select that which is the only remedy of the other party, when so to do would absorb or diminish the fund, and leave a just claim unsatisfied. There arises no element of hardship in remanding these seamen to their personal action. The owner is solvent, and able to respond to their just demands. To yield them precedence or equality in the distribution of the fund would be to compensate those who were the cause of the damage at the expense of those who suffered the injury; to so far absolve the owner responsible to those seamen, and whose vessel should make good the injury; to reward the wrong-doer; and to punish the innocent victim of wrong. We cannot bend our judgment to such inequitable conclusion.

The suggestion that the owner of a vessel may insure against collision, and so obtain indemnity, is without merit. Insurance would be the subject of independent contract for the benefit of the insured, not the wrong-doer. In respect to that, there is no privity between the offending crew and the owner of the injured vessel. The insurer, paying the loss, is subrogated to the rights of the insured, and clothed with all his remedies for the negligent injury. The insurer then stands in the shoes of the insured. This works mere change in the ownership of the right to redress. It neither extinguishes nor diminishes that right.

We conceive our views to have the support of the decided weight of authority. In England it would appear to be no longer an open question. Abb. Shipp. (11th Ed.) 621; MacL. Shipp. (3d. Ed.) 703; *The Chimera*, Coote, Adm. 121; *The Benares*, 7 Notes Cas. Adm. & Ecc. Supp. 50, 54; *The Aline*, 1 W. Rob. 111; *The Linda Flor*, Swab. 309; *The Elin*, 8 Prob. Div. 39, affirmed on appeal; Id. 129. In America there

would seem to be some divergence of opinion. The conclusion to which we have arrived is upheld upon one or the other of the grounds upon which it is rested, in *Henry*, Adm. 199; *The Spaulding*, 1 Brown, Adm. 313; *The Pride of The Ocean*, 3 Fed. Rep. 162, 7 Fed. Rep. 247; *The Maria and Elizabeth*, 12 Fed. Rep. 627; *The M. Vandercook*, 24 Fed. Rep. 472; *The R. S. Carter*, 38 Fed. Rep. 515, affirmed on appeal by Mr. Justice BLATCHFORD, 40 Fed. Rep. 331. Some support is also derived from the *dictum* of Mr. Justice BRADLEY in *Norwich Co. v. Wright*, 13 Wall. 104, 122.

In some of the discussion upon the subject, as notably in *The America*, *infra*, the priority awarded the creditor in damage is sought to be rested upon the rule of the admiralty that maritime liens are to be paid in the inverse order of their inception. We think such decision to be lodged upon faulty foundation. That rule relates to liens *ex contractu*, not to those arising *ex delictu*; and it is bottomed upon the obvious and just ground that each foregoing incumbrancer is benefited by means of the subsequent incumbrance, and is applied only to maritime liens of the same class or rank of privilege. It can have no application, as between a damage lien and a prior contract lien. In such case the reason of the rule fails. The lien for damages by collision is injurious, not beneficial, to a prior contract lien.

The cases opposed, or seemingly opposed, to our conclusion, demand consideration. First in order, *The America*, 16 Law Rep. 264, decided by Judge HALL, of the northern district of New York, in 1853, is strongly urged to our attention. It was there held that the lien of the collision claimant was not preferred to, but stood in equal rank with, that of material-men. The learned judge asserts the principle upon which the admiralty has recognized the right to redress for collision, that it is not only a civil indemnification, but a *quasi* penalty for the wrong, always to be enforced, that such wrong may not pass unredressed, inciting others to similar negligence, (page 276;) that the damage claimant is not in equal position to the creditor on mortgage or bottomry, or for materials, the injury to the one being *in invitum*, the extension of credit by the other being at his option; and concludes that, therefore, they stand upon equality, and are to be governed by the general rule of preference stated by him, (page 273,) that maritime liens of the same class or rank of privilege should be paid in the inverse order of the dates of their creation. The decision that was actually made, as we read the case, was that the damage claimant had precedence of the claimant for material previously supplied, because the lien was of later date. The decision was correct enough, but the reason upon which it was bottomed was, as we have shown above, fallacious. With respect to seamen's wages,—and all that is said upon the subject is merely *obiter*, the wages of the seamen having been paid without contention,—Judge HALL asserts the general rule of preference accorded to such claims, and declares, (page 273:)

"In some cases other claims, such as claims in cases of collision and salvage and bottomry claims, have been preferred to seamen's wages; but these

cases proceeded upon the same general principle, the preferred claims having accrued subsequent to the claim for wages."

He also declares (page 277) that "his [the seaman's] demand for wages is preferred to all other demands, for the same reason that the last bottomry bond is preferred to one of prior date." Referring then (page 282) to the case of *The Chimera*, wherein Dr. LUSHINGTON is stated to have held that seamen's wages do not take preference of the damages awarded in a cause of collision, Judge HALL states that, after an examination of the cases of *The Sidney Cove*, 2 Dod. 13, and *The Louisa Bertha*, 1 Law & Eq. Rep. 665, he is inclined to the opinion that seamen's wages for the same voyage should be preferred to the claims of the suitor in damage. The cases referred to, and upon which he seems to base his conclusion, were not cases of collision at all. The contention there was as between seamen's wages and a subsequent bottomry bond. The allowance of priority in such cases rests upon the general rule awarding precedence to seamen's wages over all other liens *ex contractu*. It seems to us that the argument of Judge HALL should have led him to a conclusion directly opposed to that reached by him, respecting the priority of seamen's wages in cases of collision. In *The America*, Judge HALL undertook a wide field of discussion, not involved in the case, as he expressly declares at pages 266, 284. He ventured to declare principles of maritime law in advance of any cause requiring their application. Naturally he fell into error. He failed to consider the principle upon which seamen's wages for prior service should be subrogated to claims for collision. He lost sight of the question of public policy involved, and of the equitable consideration that the seaman has another remedy than that *in rem*, and that, in a case like that now under consideration, the allowance of a claim would permit a solvent wrong-doer, liable for the wages of the seamen, to divert a fund applicable to the satisfaction of the wrong to the payment of his debts at the expense of the injured party. With deference, we are unable to yield assent to the *dictum* or reasoning invoked.

The other cases to which we are referred, as opposing the conclusion to which we have arrived, are, with the exception of *The Daisy Day*, 40 Fed. Rep. 538, cases arising in the eastern and southern districts of New York. *The Orient*, 10 Ben. 620; *The Samuel J. Christian*, 16 Fed. Rep. 796; *The Grapeshot*, 22 Fed. Rep. 123; *The Young America*, 30 Fed. Rep. 789; *The Amos D. Carver*, 35 Fed. Rep. 665; *The Daisy Day*, 40 Fed. Rep. 538; *The Gratitude*, 42 Fed. Rep. 299. With the exception of *The Orient* and *The Carver*, these were cases of damage arising from negligent towage, and the decisions are, with the exception of *The Daisy Day*, predicated upon the express ground that they are claims arising *ex contractu*, for violation of the contract to tow safely, and present *quasi* torts in distinction from cases of pure torts. It may well be doubted whether, in the light of the cases of *The Quickstep*, 9 Wall. 665, and *Norwich Co. v. Wright*, 13 Wall. 104, the distinction can be upheld. Judge SEVERENS, in *The Daisy Day*, expressly repudiates the distinction, and holds that claims in damage outrank claims arising *ex contractu*; but follows the

doctrine of *The Orient* and *The Samuel J. Christian*, so far as to prefer seamen's wages to claims "for such torts as negligence in towage, provided the seaman whose claim is in question was free from fault." With respect to the cases in the district of New York,—or so far, at least, as respects cases of pure torts,—they are expressly overruled by Mr. Justice BLATCHFORD in *The R. S. Carter*, 40 Fed. Rep. 331. Notwithstanding the ability manifested in the discussion of the question in those cases, they are shorn of their power by the later and controlling holding of superior authority. That decision was not rendered when *The Daisy Day* was decided. Had it been otherwise, it is possible that Judge SEVERENS would have held differently. At all events, it may be said that the equitable consideration that the seaman has a double, and the damage claimant a single, remedy was not considered by him in that decision. In *The Gratitude*, Judge BROWN, who had held negatively on the priority of liens for damages by collision, recognizes the binding authority of Mr. Justice BLATCHFORD's decision, but seeks to distinguish between cases of damage done *in invitum* to an independent vessel and damage by negligence under a voluntary contract of towage. As suggested above, the distinction may not be sustainable. We are not, however, here called upon to determine that question. It is proper, also, to add that the decision of Mr. Justice BLATCHFORD seems to have escaped the attention of the distinguished jurist whose ruling is here involved.

In *The Elin*, *supra*, the maritime lien for damage by collision was allowed precedence of the lien of the seamen for wages earned by them since the collision, upon the ground that it would give relief to the owner of the wrong-doing ship in the hands of the court. We are unable to follow the ruling to that extent. That ruling is in forgetfulness of the equitable consideration that the subsequent service has been beneficial to the fund. Like the case of salvage, the service following the collision preserved the *res* for subjection to the lien of the damage claimant, and brings the case, as to such subsequent service, within the rule that he shall be preferred who has contributed most immediately to the preservation of the thing. This rule imposes an equity upon an equity,—an equity not discharged by the consideration that, by inference of the law, the seamen were participants in the prior fault occasioning injury, nor impaired by the fact that they may have personal resort to the owner of the offending ship, the rule in the latter regard not applying to a superior equity. We hold, therefore, that in cases of pure tort, as to precedent wages, the damage claimant has priority, and that wages earned since the collision have precedence over the claim for damage by collision. The decree appealed from will be reversed, and the cause remanded for further proceedings in conformity to this opinion.

BAILEY *et al.* v. SUNDBERG.

(Circuit Court of Appeals, Second Circuit. January 18, 1892.)

1. ADMIRALTY—LIBEL *IN REM*—PUBLICATION OF NOTICE—RES ADJUDICATA.

The owner of a vessel which was sunk by collision with a steamer brought a libel *in rem*, and the steamer was attached, but no notice was given or publication made as required by admiralty rule 9. Subsequently the steamer was released on her owner's giving bond to the libellant for less than her value. *Held*, that a decree dismissing the libel was binding on the libellant only, and would not prevent a new libel by the owner of the cargo.

2. SAME—RES ADJUDICATA.

Where, on a libel *in rem* for collision, the master of the libelee, though not a formal party, takes an active part in the defense, a dismissal on the merits renders the question *res judicata*, as against a subsequent libel *in personam* against him.

3. SAME—PRIVITY.

The master of a vessel is not in privity with her owner, within the rule that binds privies as well as parties to the estoppel of a judgment.

4. ADMIRALTY—LACHES.

In the absence of special circumstances a delay of less than six years in bringing a libel *in personam* for collision will not be considered as laches, since courts of admiralty govern themselves by the analogies of common-law limitations.

44 Fed. Rep. 807, reversed.

Appeal from the Circuit Court of the United States for the Southern District of New York.

In Admiralty. Libel *in personam* for a collision, brought by George Bailey and others against John P. Sundberg, as master of the steam-ship Newport. The libel was dismissed in the district court, (see 43 Fed. Rep. 81 and 44 Fed. Rep. 809,) which decision was affirmed in the circuit court. Libellants appeal. Reversed.

George A. Black, for appellants.

Wm. W. Goodrich and Robert D. Benedict, for appellee.

Before WALLACE and LACOMBE, Circuit Judges.

WALLACE, Circuit Judge. This is an appeal from a decree dismissing a libel *in personam* for collision. The questions presented arise upon the pleadings, and are: (1) Whether a decree in a former suit is *res adjudicata* in the present suit; and (2) whether the claim of the libellants is stale.

The suit is brought by the owners of the schooner Shaw, and the owner by subrogation of her cargo, against Sundberg, to recover their losses sustained in a collision between the Shaw and the steam-ship Newport, of which steam-ship Sundberg was master at the time of the collision. The collision took place February 23, 1884. The Shaw was sunk, her cargo became a total loss, and all the persons on board of her were drowned. April 23, 1884, the owners of the Shaw filed a libel *in rem* in the United States district court for the southern district of New York against the steam-ship to recover the value of the schooner, her freight money, and the personal effects of her master and crew. Process was issued on that day, in the usual form, to the marshal of the court, requiring him to attach the steam-ship, and to give due notice to all persons having anything to say, why she should not be condemned and

sold, to appear in the district court on the 13th day of May then next, and interpose their claims and make their allegations. The process was executed by the marshal only so far as to attach the steam-ship. He did not publish or otherwise give any notice, and there was no proclamation or default on the return-day. Prior to the return-day of the process the owner of the steam-ship appeared and filed an answer. No other person appeared. Upon the owner giving bond with surety in the sum of \$24,000, an order was made by the court, with the consent of the proctor for the libelants, discharging the steam-ship from custody. There was no appraisal of the steam-ship, and her value was more than \$50,000. Proofs were subsequently taken in the cause, and after hearing the parties the court made a decree dismissing the libel, and adjudging that the steam-ship never struck or sunk the Shaw. When the libel was filed Sundberg was no longer master of the steam-ship. He was not named in any way as a party to the cause. He took an active part, however, in the defense of the suit, besides being examined as a witness. The decree dismissing the libel was entered on the 9th day of October, 1886. Subsequently the libelants appealed from that decree to the circuit court; and on October 15, 1888, a decree was made by the circuit court affirming the judgment of the district court. The libel in the present cause was filed on the 5th of February, 1890. It alleged the collision between the two vessels, and that it was caused wholly by the negligence of those navigating the steam-ship. Sundberg, by his answer, interposed as a defense the adjudication in the former suit. Thereupon an amended libel was filed, admitting the former adjudication, and setting up facts in avoidance. Sundberg filed exceptions to the amended libel.

Upon the facts stated we are of the opinion that the decree in the first suit is not an estoppel as to the owner of the cargo. If due service of process had been made, pursuant to admiralty rule 9 of the supreme court, and a default been entered against all parties not appearing at the return-day, doubtless the owner of the cargo of the Shaw, as well as all other persons having any interest in the steam-ship Newport, would have been parties to the suit, and would have been concluded by the decree from litigating again any issue which was necessarily involved in the decision. The privilege or right of one who has sustained loss by a collision against the guilty vessel is inchoate from the moment of collision, although process *in rem* is essential to enforce it; and it is not displaced by a sale of the vessel to a *bona fide* purchaser without notice, or by the death of the owner, or by bankruptcy. It is more than a right to sue. It is a right in the thing itself, constituting an incumbrance upon the property, and existing independent of the process used to enforce it. *The Young Mechanic*, 2 Curt. 404; *Vandewater v. Mills*, 19 How. 82.

A suit *in rem* is, in substance, a suit against all parties in interest in the *res*, to the extent of their interests; and all such parties are parties to the suit, because they can intervene and make themselves actual parties, and bring their rights before the court. Consequently, all persons having any interest in the thing in controversy are concluded by the de-

creed in the suit; and of course all the rest of the world are concluded by the decree, because the judgment binds and settles the rights of all those who have any interest in the property. The cargo-owners in the present case might, therefore, if the suit had been conducted according to the rules which give to proceedings *in rem* their conclusive effect, have intervened and become actual parties, and without becoming actual parties would have been parties in interest, and bound by the decree. The decree necessarily determined that any right or interest claimed by any party as arising from the alleged collision was without merit. "The decree of the court in such case acts upon the thing itself, and binds the interest of all the world, whether any party actually appears or not. If it is condemned, the title of the property is completely changed, and the new title acquired by the forfeiture travels with the thing in all its after progress. If, on the other hand, it is acquitted, the taint of forfeiture is completely removed, and cannot be reannexed to it. The original owner stands upon his title, discharged of any latent claims with which the supposed forfeiture may have previously infected it. A sentence of acquittal *in rem* does, therefore, ascertain a fact as much as a sentence of condemnation. It ascertains and fixes the fact that the property is not liable to the asserted claim of forfeiture." STORY, J., in *Gelston v. Hoyt*, 3 Wheat. 246.

The supreme court, by authority of the laws of the United States, prescribes and regulates the mode of procedure in suits in admiralty by promulgating rules therefor. Rev. St. U. S. §§ 913, 917. Admiralty rule 9 requires process *in rem* to be served, not only by arresting the property, but by giving notice by publication of the arrest, and of the time assigned for the return of the process and the hearing of the cause. Under this rule the notice is as indispensable as the arrest to confer jurisdiction upon the court to adjudicate upon the rights of those interested in the property, and those who do not appear are not bound by the decree. Cooley, Const. Lim. 403. The rule has the force of a law of congress, and, in effect, declares that publication as well as seizure is essential to constructive notice of the proceeding to all those who have a right to be heard. In the first suit, not only was there no such service of process as the rule prescribes, but no default was entered upon the return of monition, and the property arrested was released upon giving security sufficient to satisfy the claims of the owners of the Shaw against the arrested steam-ship. Thus the suit was prosecuted and conducted throughout as one in which the only parties in interest were the formal parties to the suit,—the owners of the schooner and the owner of the steam-ship. We think neither party can invoke the decree which was rendered in it as an estoppel, beyond the extent to which it would operate as such if the suit had been an action *in personam* by the owners of the Shaw against the owner of the steam-ship. *Cooper v. Reynolds*, 10 Wall. 309; *Durant v. Abendroth*, 97 N. Y. 133; *McCall v. Carpenter*, 18 How. 297; *Windsor v. McVeigh*, 93 U. S. 274; *Pennoyer v. Neff*, 95 U. S. 714. In this view it is obvious that the cargo-owner is not concluded by it from re-examining the question whether the loss was caused by the

alleged collision between the schooner and the steam-ship. *Litchfield v. Goodnow*, 123 U. S. 549, 8 Sup. Ct. Rep. 210.

Inasmuch as the present action was commenced within six years from the time when the cause of action accrued, and there are no special circumstances to charge the cargo-owner with laches, we think there is no equitable bar to the suit upon the ground of delay. Where there is nothing exceptional in the case, courts of admiralty govern themselves by the analogies of common-law limitations. *The Sarah Ann*, 2 Sum. 206; *Southard v. Brady*, 36 Fed. Rep. 560; *Joy v. Allen*, 2 Woodb. & M. 303.

The owners of the schooner are precluded from re-examining the question whether the steam-ship was the instrument which caused the collision, if the adjudication between them and the owner of the steam-ship is an estoppel as between them and Sundberg. The general rule is familiar that there cannot be an estoppel which is not mutual; that is, which does not conclude the party invoking it as well as the other party. Consequently Sundberg cannot invoke the former adjudication as an estoppel unless, had it been decided that the steam-ship was the instrument of collision, it could have been invoked against him, so as to preclude him from re-examining that question in a subsequent suit against him by the owners of the schooner. He was not in privity with the owner of the steam-ship, within the rule that binds privies as well as parties to the estoppel of a judgment. Privity denotes mutual or successive relationship to the same rights of property, or, as is said in *Bigelow*, Estop. p. 142, "the ground of privity is property, and not personal relation." In view of the facts in the present case, it would seem that if there had been a decree against the steam-ship or its owner, and the owner had sought indemnity against him because the collision was caused by his personal misconduct, he would have been estopped from asserting that the steam-ship was not the instrument of collision. The master of a vessel is liable, not only to third persons, but to the owner, for loss resulting from a collision because of his own misconduct and negligence. *Maude & P. Shipp*. 459; *Kay, Shipm.* 994. Sundberg not only had notice of the suit, but he participated in its defense; and, although it does not appear that he was requested to assume its defense, he would not be permitted to re-examine the fact. *Chicago v. Robbins*, 2 Black, 418; *Robbins v. Chicago*, 4 Wall. 657; *Heiser v. Hatch*, 86 N. Y. 615; *Miller v. Tobacco Co.*, 7 Fed. Rep. 91. He was the agent of the owner of the steam-ship in the alleged trespass which was the cause of action asserted by the owners of the schooner; and the decree necessarily determined that he, as well as his principal, was innocent of the imputed wrong. Upon principle, all those who have litigated that question ought to be precluded, as against one another, from litigating it again. "Justice requires that every cause be once fairly and impartially tried; but the public tranquillity demands that, having been once so tried, all litigation of that question, between those parties, should be closed forever." 1 Greenl. Ev. § 522. The owners of the schooner, having chosen to test their right against the principal, and having had their day in court,

ought to be precluded from testing it again on the same issue against the agent. *Emma Silver Mining Co. v. Emma Silver Mining Co.*, 7 Fed. Rep. 401. It was held in *Emery v. Fowler*, 39 Me. 326, in a carefully-considered opinion by the supreme court, that a party is not permitted to bring an action against a principal for an alleged trespass, and, after failing upon the merits, to subsequently bring one against the servant who acted by the order of the principal, and rely upon the same acts as a trespass. The court said:

"In such cases the technical rule that a judgment can only be admitted between the parties to the record, or to their privies, expands so as to admit it when the same question has been decided and judgment rendered between parties responsible for the acts of others."

See, also, *Kinnersley v. Orpe*, Doug. 517; *Warfield v. Davis*, 14 B. Mon. 40; *Castle v. Noyes*, 14 N. Y. 329; *Kitchen v. Campbell*, 3 Wils. 304; *Phillips v. Ward*, 33 Law J. Exch. 7.

It is unnecessary to the present decision to hold that the former judgment would not estop the owners of the schooner if Sundberg had not participated in defending the suit; but, as the facts are, we think it is a good estoppel. The decree of the court below is reversed, with instructions to dismiss the libel as to all the libelants except the Virginia Home Insurance Company, and as to that libelant to overrule the exceptions to the amended libel, and to take such further proceedings as may be proper, in conformity with this opinion.

THE W. B. COLE.

BAUMGARTNER v. THE W. B. COLE.

(Circuit Court, S. D. Ohio, W. D. February 23, 1892.)

1. MORTGAGE OF VESSEL—ACTUAL NOTICE.

A mortgage of a vessel is valid as against persons having actual notice thereof, though not recorded in the collector's office, as required by Rev. St. U. S. §§ 4192-4194.

2. SAME—FAILURE TO INDEX.

Under those sections, a mortgage which is actually recorded is constructive notice, though it has not yet been indexed.

3. SAME—ACTUAL NOTICE—PRIOR BONA FIDE PURCHASER.

Where one purchases a vessel with either actual or constructive notice of a mortgage, it will not be presumed in his favor that his vendor, who purchased before the mortgage was recorded, was a *bona fide* purchaser without notice, and the burden is on him to show that fact.

4. SAME—ASSIGNEE OF MORTGAGE—PRIOR EQUITIES.

One who takes a mortgage of a vessel by assignment after the recording of a mortgage of earlier date cannot protect himself from the priority of its lien, except by clearly showing that some one of the owners of the vessel through whom he acquired his lien was a *bona fide* purchaser without notice.

In Admiralty. On appeal from district court. Libel by Leo Baumgartner against the steam-boat W. B. Cole. Decree below affirmed.

Miner & Carroll, for appellant.

John F. O'Connell and *Philip Roettinger*, for appellee.

JACKSON, Circuit Judge. The question presented by the appeal in this case is simply one of priority between two intervening claimants to a surplus in the registry of the court arising from the sale of the steam-boat *W. B. Cole*, which has been seized and sold to satisfy and discharge certain maritime liens which are not in controversy. The surplus fund arising from the sale of said steam-boat is claimed by the intervening libellant and appellant, *F. J. O'Connell*, under a mortgage executed by one *William H. Wright*, as owner of the boat, to *B. B. Bradley*, to secure the payment of \$1,300 evidenced by said *Wright* note to said *Bradley*, bearing date March 7 or 8, 1890, and due 30 days after date, which *Bradley*, before maturity, transferred and assigned with the mortgage to said *O'Connell*. The other claimant to the fund, or a portion thereof, is the appellee *C. M. Pate*, who held a mortgage upon an undivided half interest in the said *W. B. Cole*, to secure the payment of notes for about \$1,000. The district court adjudged *Pate's* lien upon one-half the surplus to be superior to that of *O'Connell*, and the present appeal is prosecuted to reverse that decree.

The material facts of the case are these: *C. M. Pate* and *B. B. Bradley* were, in 1889, the joint and equal owners of the steam-boat *W. B. Cole*. In May, 1889, *Pate* sold his one-half interest in the boat to *John Erhman, Jr.*, for part cash, and for the balance of \$1,000, taking the notes of said *Erhman*, with mortgage on the one-half interest in the boat to secure the payment of the same. This mortgage was left for record at the collector's office on the day of its execution. The collector failed to indorse upon it the date when received, and neglected to record it until March 6, 1890, when it was duly recorded, but was not indexed until some time after March 28, 1890. *B. B. Bradley* knew of *Pate's* sale to *Erhman*, and of the latter's mortgage upon a half interest in the boat to secure the payment of the notes given *Pate* for the deferred payments of purchase money. *Bradley* was also present when *Pate* left or filed said mortgage with the collector for record. Early in January, 1890, said *Erhman* sold and transferred his undivided half interest in the steam-boat to said *Bradley*, who thereby became the sole owner of the *W. B. Cole*. On the 17th January, 1890, *Bradley* sold the boat to the *Moscow & Cincinnati Tow-Boat Company*. On the 7th of March, 1890, said *Moscow & Cincinnati Tow-Boat Company* sold the boat to *William H. Wright*, who on the same day mortgaged it to said *B. B. Bradley*, to secure the payment of a 30-day note for \$1,300, which note *Bradley*, before maturity, indorsed and transferred to appellant *O'Connell*. The *Wright* mortgage to *Bradley*, under which *O'Connell* claims priority, was executed and filed and noted for record a day or two days after the *Erhman* mortgage to *Pate* was actually recorded.

The contention of the appellant is that, under sections 4192-4194 of the Revised Statutes of the United States, the *Pate* mortgage could not and did not become a lien upon the half interest in the boat until

it was actually recorded and indexed. Section 4192, Rev. St., provides that "no bill of sale, mortgage, hypothecation, or conveyance of any vessel of the United States shall be valid, against any persons other than the grantor or mortgagor, his heirs or devisees, and persons having actual notice thereof, unless such bill of sale, mortgage, hypothecation, or conveyance is recorded in the office of the collector," etc. Section 4193, Rev. St., directs the collector to record all such bills of sale, mortgages, etc., in the order of their reception, noting in the record book, and also upon the instruments, the times when received or filed. Section 4194, Rev. St., requires the collector to make and keep an index of such records, etc. We have not been cited to, nor have we been able to find, any direct ruling by the supreme court upon the question whether, under these provisions of law for the recording of mortgages upon vessels of the United States, such mortgages are considered or deemed recorded when or at the time of being filed with the proper officers. Decisions of the state courts under their recording acts, which vary greatly in their provisions, are so conflicting on the question as to afford no safe guide in determining whether the filing for record is equivalent to actual recording. There is no rule or theory by which the decisions can be harmonized, as they rest so largely upon the particular language of the respective recording acts on which they are based. Much may be said on both sides of this question, under the foregoing provisions of the United States Revised Statutes. But we do not deem it necessary, in the present case, to go into that question, although the court below rested its judgment upon the ground that the Pate mortgage became a lien from May 8, 1889, the day it was filed with the collector.

It is settled by the decision in *Moore v. Simonds*, 100 U. S. 145-147, that Pate's mortgage was not rendered invalid, as against parties having notice thereof, by the failure of the collector to record it. In that case it is said by the court "that congress only intended to require that a mortgage on a vessel should be acknowledged for the purpose of authenticating it for record, and that as between the parties, and as against persons having actual notice thereof, it was valid without acknowledgment or record." Now, it was found by the special master to whom the claims were referred for investigation and report thereon, and there is nothing to contradict his findings, that Pate's mortgage was duly executed, acknowledged, and filed for record May 8, 1889, and that Bradley, the joint owner of the boat, knew of the mortgage, and was present when it was filed with the collector. It is perfectly clear, therefore, that when said Bradley, in January, 1890, purchased said Erhman's half interest in the boat, he took that interest subject to the prior lien of the mortgage to Pate. It does not appear from the report of the special master whether the Moscow & Cincinnati Tow-Boat Company, to whom the boat was sold by said Bradley on January 17, 1890, was a *bona fide* purchaser thereof for value, and without notice or knowledge of said mortgage. Nor does it appear from said report or otherwise, in the record submitted to this court, that William H. Wright, to whom the Moscow

& Cincinnati Tow-Boat Company sold the boat on March 7, 1890, was such a purchaser for value and without notice of said Pate mortgage. It is, however, clearly established, and so reported by the special master, that the Pate mortgage was duly recorded on March 6, 1890, and, whether then indexed or not, that record was constructive notice to said Wright, when he purchased, on the 7th March, 1890, of Pate's prior lien under the Erhman mortgage of May 8, 1889. But it is said that this constructive notice should not affect the title in Wright's hands, because he purchased from the Moscow & Cincinnati Tow-Boat Company, who was an innocent purchaser for value, without notice, previous to March 6, 1890. As already stated, there is nothing in the findings of the report to support the position that the Moscow & Cincinnati Tow-Boat Company was an innocent purchaser for value without notice of the mortgage to Pate. It is not to be assumed in favor of Wright, who purchased with constructive, if not actual, notice of Pate's mortgage, that his vendor was a purchaser for value and without notice. When he, or those claiming under him, invoke the benefit of the principle that a purchaser with notice, actual or constructive, is protected by his vendor's want of notice, it must be distinctly and clearly shown that such vendor was an innocent purchaser for value without notice. That fact will not be presumed, but must be established affirmatively. It has not been established in this case, and it consequently follows that the title which Wright acquired to the steam-boat by his purchase on March 7, 1890, was subject to the Pate mortgage.

But aside from this view of the subject, which would prevent Wright from avoiding the force and operation of the constructive notice of Pate's mortgage created by its registration on March 6, 1890, and render the title acquired by him subordinate thereto, how stands the case when Bradley took or reacquired the title from Wright on the 8th March, 1890? Bradley, in taking title to the boat by way of mortgage to secure payment of the \$1,300 note executed by Wright, had both actual and constructive notice of Pate's mortgage. He, after buying Erhman's half interest early in January, 1890, owned the entire vessel, and held it subject to the lien of the mortgage to Pate. When the title was re-vested in him under the mortgage from Wright, why should not Pate's equity and lien reattach to the vessel as against him? Bradley could not possibly have defeated or acquired priority over Pate's mortgage, of which he had both actual and constructive notice when he took the mortgage from Wright, without showing that said Wright or the Moscow & Cincinnati Tow-Boat Company was such an innocent purchaser for value, without notice, as purged away the equity or lien of the Pate mortgage from the vessel. What Bradley would have been required to establish, in order to have his mortgage outrank that of Pate, his assignee, O'Connell, should be required to show; for O'Connell having taken the assignment and transfer of the note and mortgage after the record of the Pate mortgage, and therefore with constructive notice of its existence, can only be allowed to protect himself against its priority by clearly establishing the superior equity of some prior vendor, under whom he, or

those to whose rights he has succeeded, held the vessel. Pate's lien is prior in date to the Bradley mortgage, under which O'Connell claims. It was also first recorded, and the priority of lien thereby conferred and acquired is only to be defeated by an affirmative showing on the part of the appellant that some one or more of the owners or purchasers of the vessel through or under whom he acquired his title or lien were such *bona fide* purchasers for value, without notice, as to cut off and defeat Pate's lien. Neither the intervening petition of appellant nor the findings of the special master's report make out such a showing.

There is no error in the judgment of the lower court, and the same is affirmed, with costs of this court to be taxed against appellant and sureties on bond for appeal. The appellee, Pate, will be allowed interest on the amount awarded him, and the cause will be remanded to the district court to proceed with the distribution of the funds in the registry of that court arising from the sale of the W. B. Cole, in conformity with its decree in the premises, and with an allowance to Pate of interest on the same, to be decreed to be paid to him since date of said decree.

THE YAMOIDEN.¹

SPICER *et al.* v. THE YAMOIDEN.

(District Court, E. D. Pennsylvania. February 2, 1892.)

1. SEAMEN—"DISRATING" BY MASTER—EVIDENCE.

The "disrating" of certain seamen by the master was sustained by his testimony and the mate's, but was contradicted by the testimony of each seaman disrated, as regards himself, but not as regards the other seamen. The appearance of the seamen did not impress the court favorably. *Held*, the disrating would be accepted by the court in computing the wages due.

2. CHARGES AGAINST STEWARD—BREAKAGE.

A charge for "breakage" against a vessel's steward is unusual, and will not be allowed.

In Admiralty. Libel by Henry Spicer, Peter Peterson, Paul Hanson, George Peterson, and George Henry against the bark Yamoiden, to recover wages. Decree for libelants.

Alfred Driver, for libelants.

John A. Toomey, for respondents.

BUTLER, District Judge. It is difficult to reach a satisfactory conclusion from the evidence presented. If the libelants' offer to submit the controversy for settlement to the shipping commissioner had been accepted, the chances of reaching a just result would have been increased. With

¹Reported by Mark Wilks Collet, Esq., of the Philadelphia bar.

the parties before him, in person, that officer would have had a better opportunity of getting at the truth than the court (with depositions alone to look to) can have.

While I feel reluctant to accept the master's "disrating" of some of the men, the evidence does not seem to justify a disregard of it. His testimony and the mate's sustain it, and while each of the libelants contradicts this testimony so far as respects himself, they do not testify for each other to a material extent; and what I saw of these men at the trial of their prosecutions against the master, did not impress me favorably. The settlement must be based therefore on the rates which the master has fixed—as shown by the log and his testimony.

The charge against Henry, the steward, of \$10 for breakage, should not be allowed. Such charges are unusual; and if he assented to it as the master testifies, it was in view of the prospect of an immediate settlement—which he could only obtain by assenting to the master's terms.

The other items of charge against him, as well as those against his co-libelants, must be allowed. The account kept by the master is more reliable than their memories.

A decree will be entered in favor of the libelants as follows: For Spicer \$121.92; for Peter Peterson \$96.55; for Hanson \$39.95; for George Peterson \$48.59; for Henry \$264.06; whereof \$24 for the use of Thompson—to whom he gave an order which the master accepted for that amount—this sum of \$24 to be paid to Thompson or to Henry on presentation of the order. Respondent to pay the costs. The \$25 charged for advancement to each libelant, on shipment, I understand to be abandoned; if it is not, it is disallowed. It was not paid, and should not have been charged.

STATE OF TEXAS v. DAY LAND & CATTLE Co.

(Circuit Court, W. D. Texas, Austin Division. March 5, 1892.)

1. REMOVAL OF CAUSES—CRIMINAL PROCEEDING—REMAND—AMENDMENTS.

An action brought by the state of Texas to recover the penalty prescribed by Act Tex. Feb. 7, 1884, for unlawfully appropriating public lands, having been removed to the federal court, was remanded on the ground that the proceeding was of a criminal nature, and not removable. Afterwards the complaint was amended so as to ask additional damages under that law, and a second count was added, setting up, in the alternative, a civil cause of action for the reasonable value of use and occupation, the removal of inclosures, etc., under Act Tex. April 1, 1887. *Held*, that the original cause of action remained distinct from the case made by the second count, and was not so combined with it as to permit the removal of the whole case. *Huskins v. Railway Co.*, 37 Fed. Rep. 504; and *Evans v. Dillingham*, 43 Fed. Rep. 177, distinguished.

2. SAME—SEPARABLE CONTROVERSIES—CITIZENSHIP.

The clause of the removal act relating to separable controversies is applicable only to controversies between citizens of different states, and is not available to the defendant when the opposite party is a state.

3. SAME—FEDERAL QUESTION.

The clause of the removal act authorizing the removal of civil suits, arising under the constitution or laws of the United States, relates only to the entire action, and does not permit the removal of a part thereof when the rest is not removable.

At Law. Action by the state of Texas against the Day Land & Cattle Company. Heard on motion to remand to the state court. Granted. For former report, see 41 Fed. Rep. 228.

C. A. Culberson, Atty. Gen., for the State.

Fisher & Townes and West & McGown, for defendant.

Before MAXEY, District Judge.

MAXEY, District Judge. This suit was originally instituted by the state against the defendant in the district court of Travis county, Tex., on the 22d day of September, 1888. On the 4th day of October, 1888, a petition and bond for removal of the cause were filed in the state court, and the record seasonably entered in this court. A motion to remand was made by plaintiff, and, the same being granted, the suit was remanded to the state court for trial. In that court, and subsequent to the remanding order, the plaintiff filed two amended petitions, the first June 24, 1891, and the second October 12, 1891. On the same day, October 12, 1891, the defendant filed a second petition and bond for removal, and the record was duly entered here January 30, 1892; and the plaintiff now moves to remand the cause again to the state court. The cause of action relied upon by the plaintiff in its original petition is fully stated by Judge PARDEE in an opinion rendered by him when the case was formerly before the court. *State v. Cattle Co.*, 41 Fed. Rep. 228. In the original petition it is alleged, in effect, that plaintiff was the owner of 203,000 acres of land in Greer county, which defendant appropriated to its own use without lawful authority, for the purpose of herding and grazing 20,000 head of cattle and 1,000 horses. It is further averred that—

"By reason of the aforesaid unlawful inclosure of the said land by the defendant, and by reason of the aforesaid unlawful loose herding and detaining said cattle and horses upon said land for grazing purposes, by said fence and by line riding, as aforesaid, the defendant is liable and bound to pay to the plaintiff the sum of one hundred dollars for each of said three years past on each six hundred and forty acres of land embraced in said two hundred and three thousand acres so inclosed and grazed upon as aforesaid, which makes in the aggregate 318 tracts of land, upon which one hundred dollars per year is due, or the full sum of thirty-one thousand eight hundred dollars per year; and for the said three years, from September 1, 1885, down to September 1, 1888, there is due from defendant to plaintiff the full sum of ninety-five thousand four hundred dollars, with interest thereon according to law."

The allegations of the original petition and first amendment are substantially the same. They embody one and the same cause of action, and their only material difference consists in the fact that the amendment prays for the recovery of an increased amount of damages arising out of the lapse of time intervening between September 8, 1888, and the filing of the amendment. As a matter of convenience, the second amended petition may be regarded as containing two separate counts. The first count is simply a repetition of the allegations contained in the first amendment, and in no particular varies the cause of action as embodied in the original petition. Upon the second count, the petition for removal is predicated. The first paragraph of this count is as follows:

"If the court should hold that the state of Texas, plaintiff, is not entitled to recover on the above allegations, and that plaintiff is not entitled to recover the one hundred dollars penalty provided for by the act of the legislature, approved February 7, 1884, then the plaintiff, the state of Texas, acting by and through her attorney general, C. A. Culberson, by the direction of James S. Hogg, governor of Texas, as provided for by the act of the legislature of the state of Texas, approved April 1, 1887, pleads and prays as follows in the alternative."

The count proceeds to set out the unlawful acts of defendant in appropriating the land in the original and first amended petitions described, and substantially as in the latter alleged. Then follows the prayer, in these words:

"Wherefore, by reason of the premises, the plaintiff prays for the possession of said lands and for the removal of said fences and inclosures, and for judgment for damages for the use and occupation of said land at the rate of twenty thousand and three hundred (\$20,800) dollars per annum, and in the aggregate amounting to one hundred and twenty-one thousand and eight hundred (\$121,800) dollars to the present time, from September 1, 1885, and for all costs, and for damages and legal interest to the time of this trial; and that the said fences and inclosures and the said cattle and horses on said land owned by defendant be subjected to the payment of damages, and judgment recovered herein, and to the payment of all costs, and for any relief, both special and general, to which the plaintiff may be entitled."

The distinguishing features between the two counts are: (1) The first count is based upon the act of 1884, and seeks to recover in the aggregate one hundred and ninety thousand and eight hundred (\$190,800) dol-

lars as damages, or a penalty of one hundred dollars per annum for each section of land appropriated by the defendant. (2) The second count is predicated upon the act of 1887, and prays in the alternative for the recovery of a less sum, as the reasonable value of the use and occupation of the land, for the removal of the inclosures, with the additional prayer that the inclosures, cattle, and horses on the land, owned by the defendant, be subjected to the payment of the judgment and costs.

Defendant sought to remove the suit as originally instituted, on the ground, employing the language of Judge PARDEE—

"That the cause was one arising under the laws and treaties of the United States, because the lands upon which the alleged trespass was committed were lands that did not belong to the state of Texas, but did belong to the United States, and were not within the limits and under the control of the state of Texas, but were in Greer county, a part of the Indian Territory, and that on said lands the defendant was a tenant at will of the United States."

It was held by the court, on the former motion, that "the action is clearly one to enforce a criminal law of the state," and therefore not removable. If the grounds relied upon to remove the suit, as it now stands, are the same as those urged in the first petition, it is evident that the cause must go back to the state court. In *Railroad Co. v. McLean* it is said by the supreme court that—

"When the circuit court first remanded the cause, the order to that effect not being superseded, the state court was reinvested with jurisdiction, which could not be defeated by another removal upon the same grounds and by the same party. A different construction of the statute, as may be readily seen, might work injurious delays in the preparation and trial of causes." 108 U. S. 217, 2 Sup. Ct. Rep. 498.

But the defendant insists that the grounds of the present petition are essentially different, in that the plaintiff, in its second amendment, sets up a new cause of action, based upon the act of the legislature of 1887, which converts the suit into one of a civil nature, and thus relieves it of the objection successfully urged against the right of removal on the former motion. As already stated, the first count of the second amended petition embraces the same cause of action as declared on in the original petition. That issue is as distinctly before the court now as it was then, not withdrawn nor abandoned by the plaintiff, but strenuously urged.

In the present petition for removal, the allegation is made that the suit arises under the laws and treaties of the United States, following in that respect the allegations of the defendant's first petition. Then follows the claim that the suit should be removed, because the second count of the second amendment filed by the plaintiff sets up a new cause of action, under the act of 1887, which is in its nature a civil suit. In support of its contention, the defendant refers to *Huskins v. Railway Co.*, 37 Fed Rep. 504, and *Evans v. Dillingham*, 43 Fed. Rep. 177. Is the rule announced in those cases applicable to this suit?

Huskins v. Railway Co. was a suit in which the plaintiff originally claimed \$2,000 damages, and afterwards increased the amount to \$10,000. Speaking of the cause of action, Judge KEY says:

"But what was the suit in this case? The damages—the money plaintiff seeks to recover—is the *gravamen*, the heart, the soul of his suit. The suit he began was a suit for \$2,000, and such a suit it remained until the closing hour of the first term at which it could have been tried, when the plaintiff went into court, and converted his suit for \$2,000 into a suit for \$10,000. The \$2,000 suit disappeared. It was merged into and swallowed up by a suit for \$10,000. The life of the new suit began at the moment the first suit expired. Plaintiff's complaint was no longer for \$2,000, but it became a complaint for five times that sum."

In *Evans v. Dillingham* it is said by Judge McCORMICK:

"There is no question, in my mind, that, when an amended petition makes a substantially different suit from the original petition, the limitation as to the time within which the petition for removal can be presented should relate to the new pleading of the plaintiff."

These two cases, it is thought, only go to the extent of holding that if the original petition fails to state a cause of action removable under the statute, and the plaintiff subsequently files an amendment embracing a cause of action properly removable, in which the original suit is merged and "swallowed up," the time for removal will be computed from the date of filing the new pleading.

But in this suit the original cause of action is not merged in the case stated in the second count of the second amended petition. To state the proposition most favorably for the defendant, the second count simply sets out an additional cause of action, leaving the original suit to abide a decision on its own merits. The former may be removable. The latter is not, for the reason that it is a suit of a penal or criminal nature. The question then presents itself, is it permissible, upon the motion and at the election of the defendant, to separate the suit into parts, and compel the plaintiff to litigate in both courts, federal and state, at one and the same time? If not, can the controversy or cause of action contained in the second count of the second amendment have the effect of removing the entire suit, and thus drawing with it to this court a cause of action embraced in the first count, which is clearly not removable?

The rule, entitling a defendant to remove a suit on account of the separability of a controversy from the rest of the cause, is thus stated by the supreme court:

"The rule is now well established that this clause in the section refers only to suits when there exists a separate and distinct cause of action, on which a separate and distinct suit might have been brought, and complete relief afforded as to such cause of action, with all the parties on one side of that controversy citizens of different states from those on the other. To say the least, the case must be one capable of separation into parts, so that, in one of the parts, a controversy will be presented with citizens of one or more states on one side, and citizens of other states on the other, which can be fully determined without the presence of the other parties to the suit as it has been begun." *Ayres v. Wiswall*, 112 U. S. 192, 193, 5 Sup. Ct. Rep. 90; *Fraser v. Jennison*, 106 U. S. 191, 1 Sup. Ct. Rep. 171.

In *Ayres v. Wiswall* the court was construing that clause of the act of 1875 which finds its counterpart in the act of August 13, 1888, and the

rule announced applies equally to both laws. To authorize a removal in such cases, the suit must be between citizens of different states, not a state and a citizen. In the nature of things, a state cannot be a citizen of any state. *Sone v. State*, 117 U. S. 433, 6 Sup. Ct. Rep. 799. Under the clause of the statute referred to, it is evident that neither the whole of plaintiff's suit, nor a separate controversy embraced therein, can be removed. The same may be said of the local prejudice clause, which empowers the court, under circumstances named, to remand the suit as to certain defendants, and retain it as to others. But that clause only embraces suits between citizens, and, for other apparent reasons, it has no application to this suit.

No other clause of the act can remotely apply to this proceeding, except the first clause of the second section, which provides:

"That any suit of a civil nature, at law or in equity, arising under the constitution or laws of the United States, or treaties made, * * * may be removed by the defendant or defendants therein to the circuit court of the United States for the proper district." 25 St. at Large, p. 434.

This clause authorizes any suit of a civil nature, arising under the laws of the United States or treaties made, to be removed. A part of a suit, a count in a petition, is not embraced by its terms, although it may be of a civil nature. Nor can the entire suit be removed because the first count, the original suit, embraces a cause of action of a criminal nature. The statute is not sufficiently comprehensive to entitle a party to remove a suit like the present one, and courts are without power to enlarge it by construction. The state had the right, under rules prescribed by the supreme court of this state, to "state the cause or causes of action in several different counts, each within itself presenting a combination of facts, specifically amounting to a single cause of action," (Rules District Court, No. 4;) and, having elected to rely upon two counts instead of one, it has the further right to prosecute its suit to final determination in its own way. See *Pirie v. Tvedt*, 115 U. S. 43, 5 Sup. Ct. Rep. 1034; *Railroad Co. v. Ide*, 114 U. S. 52, 5 Sup. Ct. Rep. 735; *Little v. Giles*, 118 U. S. 596, 7 Sup. Ct. Rep. 32. For the reasons assigned, the court is of opinion that the cause is not removable under the act of congress, and it becomes unnecessary to discuss other interesting questions raised by the motion of plaintiff. The suit should be remanded to the state court, and it is accordingly so ordered.

NEW YORK, L. E. & W. R. Co. v. BENNETT *et al.*

(Circuit Court of Appeals, Sixth Circuit. October 6, 1891.)

CIRCUIT COURT OF APPEALS—JURISDICTION.

Under Act Cong. March 3, 1891, § 2, "hereby creating" circuit courts of appeals, and joint resolution March 3, 1891, providing that the first meeting of the new court be held the third Tuesday of June, 1891, but allowing appeal to existing circuit courts until July 1st, an appeal taken to the new court June 24th will not be dismissed, the right having existed from the passage of the act.

Error from Circuit Court.

Thomas H. Cooke, for motion.

Frank Spurlock, opposing.

Before BROWN, Circuit Justice, JACKSON, Circuit Judge, and SAGE, District Judge.

BROWN, Circuit Justice, (*orally.*) In this case a motion was made to dismiss a writ of error, upon the ground that the writ of error was made returnable more than 30 days from the day of signing the citation, contrary to the provisions of the fourteenth rule; and upon the further ground that the judgment of the court below was rendered in April, and, under the law as it stood before the passage of the court of appeals act, was an unappealable judgment; and, as there was no court of appeals in existence at that time, it is claimed that this court has no jurisdiction of the case. In the course of the argument, however, it was intimated that counsel desired only a ruling upon the question of jurisdiction; and that if the court should hold that it had, or could have, jurisdiction of the case, they would waive the irregularity in the return of the writ.

There has been a general impression among the bar that this act did not take effect until July, excepting so far as holding the formal meeting of the court in June, and that no appeals could be taken before the 1st of July. Upon an examination of the act, however, we are of the opinion that it was designed to take effect immediately as to most of its provisions.

The second section of the act provides "that there is hereby created in each circuit a circuit court of appeals, which shall consist of three judges, of whom two shall constitute a quorum, and which shall be a court of record, with appellate jurisdiction." It says, "is hereby created." That certainly contemplates an immediate creation of the court.

Section 3 of the act provides "that the chief justice and the associate justices of the supreme court assigned to each circuit, and the circuit judges within each circuit, and the several district judges within each circuit, shall be competent to sit as judges of the circuit court of appeals within their respective circuits, in the manner hereinafter provided;" and then there are further provisions with regard to the manner of making up the court when the associate justice is not present, etc.

The third section contains, as a final clause, the following: "The first terms of said court shall be held on the second Monday in January,

eighteen hundred and ninety-one, and thereafter at such time as may be fixed by said courts." That became inoperative from the fact that the act was not passed until after that date, so that congress was obliged to change the date.

Section 4 provides "that no appeal, whether by writ of error or otherwise, shall hereafter be taken or allowed from any district court to the existing circuit courts, and no appellate jurisdiction shall hereafter be exercised or allowed by said existing circuit courts; but all appeals, by writ of error or otherwise, from said district courts shall only be subject to review in the supreme court of the United States, or in the circuit court of appeals hereby established."

Now, were it not for the joint resolution that was subsequently passed, it would be quite evident from this that no appeal could be taken in any case, after the passage of the act, to the supreme court of the United States, or to the existing circuit court. Indeed, the only modification really of the act, so far as its immediate effect is concerned, is contained in the joint resolution which was approved on the same day the act was passed, and which provides "that the first meeting of the several circuit courts of appeals mentioned in the act of congress passed at this present session, entitled 'An act to establish circuit courts of appeals, and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes,' shall be held on the third Tuesday in June, A. D. eighteen hundred and ninety-one." Now, there is nothing in that language that would prevent the president appointing the circuit judges the day after the act was passed, and nothing that would prevent the circuit court of appeals from taking cognizance of any case appealed after the passage of the act.

Then there is a further resolution, —a saving resolution, but not a prohibitory resolution,— "that nothing in the said act shall be held or construed in any wise to impair the jurisdiction of the supreme court, or any circuit court of the United States, in any case now pending before it, or in respect to any case wherein the writ of error or appeal shall have been sued out or taken to any of said courts before the first day of July, A. D. eighteen hundred and ninety-one."

We are of the opinion that, while the existing jurisdiction of the circuit courts and of the supreme court was preserved up to the 1st of July as to all appeals pending or taken before that time,—before that date,—there was also a right of appeal to this court from the time the act was passed; and, consequently, that the writ of error in this case, which was taken on the 24th day of June, was properly taken, and that the court has jurisdiction of the case.

The motion to dismiss is therefore denied.

FARMERS' & MERCHANTS' STATE BANK *et al.* v. ARMSTRONG.*(Circuit Court of Appeals, Sixth Circuit. October 6, 1891.)***1. CIRCUIT COURT OF APPEALS—CERTIFYING CAUSE TO SUPREME COURT.**

Where a pending appeal in the supreme court and a cause before the circuit court of appeals can, by reason of their connection, be heard together, and the district and perhaps the circuit judges are, under Act Cong. March 3, 1891, disqualified to pass on the case from having heard the same or similar questions in the court below, it is a proper exercise of discretion to certify the questions involved to the supreme court, under section 6 of that act.

2. NAME—RECORD.

Under Act Cong. March 3, 1891, § 6, providing for the certification of questions by the circuit court of appeals to the supreme court for instructions, the matter of sending up the whole record is left with the supreme court.

Motion to Certify the Case to the Supreme Court of the United States. Granted.

William Worthington, for motion.

John W. Herron, opposing.

Before **BROWN**, Circuit Justice, **JACKSON**, Circuit Judge, and **SAGE**, District Judge.

BROWN, Circuit Justice, (*orally.*) In this case a motion was made to certify the case to the supreme court of the United States. The sixth section of the act establishing the circuit court of appeals provided:

"The circuit court of appeals may, at any time, certify to the supreme court of the United States any questions or propositions of law concerning which it desires the instruction of that court for its proper decision."

We think that, in view of the fact that the district judge who is assigned to hold this term of the court of appeals is disqualified to pass upon the questions involved in this case by reason of having heard them in the court below, and that the circuit judge also is perhaps disqualified under the terms of the act, by reason of having decided a similar question in another case, and in view of the further fact that there is a case already pending on appeal, in the supreme court of the United States, which is incidentally connected with this case, and that these may probably be argued together, we think the questions arising in this case should be certified to the supreme court.

The law provides that, in case there are questions or propositions of law concerning which this court desires instructions, the court may certify the case; and that, upon such certifying being made, the court "may either give its instructions on the questions and propositions certified to it, which shall be binding upon the circuit court of appeals in such case, or it may require that the whole record and cause may be sent up to it for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there for review by writ of error or appeal." That would seem to leave the matter of sending up the whole record to the supreme court.

WEBB et ux. v. HAYNER et al.

(District Court, W. D. Texas. March 12, 1892.)

1. HOMESTEAD—WHAT CONSTITUTES—BUSINESS PREMISES.

Under Const. Tex. art. 16, § 51, an urban homestead may include not only a house and lot used as a family residence, but also other lots contiguous thereto, which are used by the head of the family for business purposes, provided that both together do not exceed \$5,000 in value, exclusive of improvements. *Miller v. Menke*, 56 Tex. 550, followed.

2. SAME—EXEMPTION.

Under sections 50, 51, such homestead is exempt from judicial sale to pay debts incurred in the purchase of merchandise.

3. SAME—DESIGNATION—PLEADING.

Under the Texas constitution, a designation of business premises as a homestead is sufficiently shown by a bill which alleges that plaintiff "purchased said property for the purpose of using the same as a place to carry on his said business, and with the fixed intention of designating and using the same as his business homestead," and that on the day he acquired title he took possession, and has since continuously used the premises as his place of business. *Miller v. Menke*, 56 Tex. 550, followed.

4. SAME—SALE OF HOMESTEAD—INJUNCTION.

Equity will enjoin the forced sale of a homestead to pay debts, since such sale, though invalid, would create a cloud upon the title.

In Equity. Suit by Joseph W. Webb and wife against Hayner & Co. and Paul Fricke to enjoin the sale of a homestead. Heard on demurrer to the bill. Overruled.

George F. Pendexter, for complainants.

James B. Goff, for defendants.

Before MAXEY, District Judge.

MAXEY, District Judge. This bill of injunction is brought to restrain Hayner & Co. and Paul Fricke, marshal of this district, from selling a house and lot claimed by complainants as a business homestead. Defendants demur on several grounds, but at the argument only the following were relied upon: (1) "That said bill discloses no equity, and sets forth no facts which, if true, would entitle the plaintiffs to the relief sought." (2) "That it appears from the averments in said bill contained that, if the same are true, plaintiffs have a full and adequate remedy at law." (3) "That said bill sets forth no facts constituting a designation of the land therein described as a homestead." It is alleged in the bill that the husband, Joseph W. Webb, has during the past 10 years been a married man, and the head of a family, a citizen of Travis county, and continuously during the period aforesaid has been engaged in the mercantile business as a member of the firm of John A. Webb & Bro. The bill then proceeds as follows:

"Your orator would further show that heretofore, to-wit, on November 9, 1881, he acquired by purchase a legal and equitable title to certain real estate in the city of Austin, Travis county, Texas, fully described as follows, to-wit: Ten feet off of the east side of lot No. three, and twenty-nine and a half feet off of the west side of lot No. four. Said lots adjoin each other, and are situated in block No. 68, in said city of Austin; together with the improvements thereon situated, consisting of a two-story brick store-house. *Third.* Your orator would further show that he purchased said property for

the purpose of using the same as a place to carry on his said business, and with the fixed intention of designating and using the same as his business homestead; and that on the day he acquired title to said property as aforesaid your orator took possession of the same and commenced at once to use said premises as a place to carry on his said business, and that he has since continuously used, occupied, claimed, and enjoyed said property as his place of business, and so now, at this time, uses, occupies, and enjoys the same. And he further shows that he has never sold or conveyed said property or any interest therein, but is now the legal and equitable owner thereof by fee-simple title, and has at all times since he acquired title thereto as aforesaid claimed, used, occupied, and enjoyed said property as his business homestead, and as a place in which to carry on his said business, and now so claims, uses, occupies, and enjoys the same. And your orator further shows that at the time he so designated said property as his business homestead, and commenced to use the same as a place in which to exercise and carry on his said business, the same, exclusive of the improvements thereon, was of less value than five thousand dollars, and that said premises now exceed in value the sum of two thousand dollars. And, further, your orator shows that he has not now, and did not have any residence homestead at the date of the levy of said execution the value of which, added to that of his said business homestead, would equal five thousand dollars. *Fourth.* Your orator would further show that he, being a married man, and the head of a family, as aforesaid, is, and was at the date he acquired said property, under the constitution and laws of the state of Texas, entitled to hold said property as his homestead, exempt from all claim thereon by his creditors, of the nature hereinafter mentioned; and that said property, so being his homestead as aforesaid, was at all times since he acquired the same, and is now, not subject to be levied on or sold to satisfy any judgment or execution against him of the nature hereinafter mentioned, of which fact the above-named defendants were each and all advised at and before the dates hereinafter mentioned."

The allegations of the bill also show that on July 20, 1882, the defendants Hayner & Co., merchants of St. Louis, Mo., recovered judgment against the firm of John A. Webb & Bro. in the circuit court of the United States for this district in the sum of \$14,573.89, the same being for the value of goods, wares, and merchandise theretofore sold and delivered by Hayner & Co. to John A. Webb & Bro.; that Fricke, the marshal, acting under the direction and authority of his co-defendants, did, on the 13th day of November, 1891, levy a writ of execution on complainants' said business homestead, and on the same day duly advertised said property for sale. It is further alleged by complainant that the levy of said execution on his homestead, and the advertisement thereof under the same, have cast a cloud upon his title to the property; "and he further shows and represents that said defendants now threaten and intend to sell his said homestead pursuant to said levy and advertisement, and will proceed so to do unless restrained by your honors from so doing. And your orator further shows and represents to your honors that the threatened sale of his said homestead by defendants will cause him great and irreparable injury, for which he has no adequate remedy at law; that said sale will cast a further cloud upon your orator's title to his said homestead, and thereby greatly decrease the value thereof, and will of necessity require your orator to institute and prosecute, at great expense to himself, a suit or suits against the pur-

chasers of his said property at such sale for the purpose of removing the cloud thereby cast on his title to his said homestead."

The first question arising on the facts, admitted by the demurrer to be true, is whether the house and lot claimed by complainants as a business homestead are exempt from forced sale under the constitution and laws of the state. It is provided by the constitution that "the homestead of a family shall be, and is hereby, protected from forced sale for the payment of all debts except for the purchase money thereof, or a part of such purchase money, the taxes due thereon, or for work and material used in constructing improvements thereon; and in this last case only when the work and material are contracted for in writing, with the consent of the wife given in the same manner as is required in making a sale and conveyance of the homestead; nor shall the owner, if a married man, sell the homestead without the consent of the wife given in such manner as may be prescribed by law. No mortgage, trust-deed, or other lien on the homestead shall ever be valid except for the purchase money therefor, or improvements made thereon, as hereinbefore provided, whether such mortgage or trust-deed or other lien shall have been created by the husband alone or together with his wife; and all pretended sales of the homestead, involving any condition of defeasance, shall be void." Const. art. 16, § 50. "The homestead, in a city, town, or village, shall consist of lot or lots, not to exceed in value five thousand dollars at the time of their designation as the homestead, without reference to the value of any improvements thereon: provided, they shall be used for the purposes of a home, or as a place to exercise the calling or business of the head of a family." Id. § 51. Construing the foregoing constitutional provisions, the supreme court of this state holds that not only a house and lots used as a home for the family are exempt from forced sale, but that the exemption also includes other lots, not contiguous to the home place, used by the head of a family for business purposes, provided both do not exceed in value the sum of \$5,000, without reference to improvements. The question was presented to the supreme court in 1882, and, speaking for the court, Mr. Chief Justice MOORE says:

"In seeking to ascertain the extent or limit of the urban homestead which is exempted from forced sale, it is well to note that while the first clause of the section of the constitution under consideration declares that the homestead in a city, town, or village shall consist of a lot or lots, not exceeding in value, etc., the particular lot or lots which shall constitute the homestead are only indicated or designated in the proviso. By it the homestead lot or lots are designated by the use made of them; that is, if the lots, not exceeding in value \$5,000, are used as a home or place of business, such lots are recognized as the constitutional homestead, and are exempted from forced sales. The lots exempt include all used in the one way or the other, unless they together exceed the limit of value." *Müller v. Menke*, 56 Tex. 550, 551.

A motion for rehearing was filed in that case, and in deciding the motion Mr. Justice STAYTON, at pages 562, 563, observes:

"We are of the opinion that the framers of the present constitution intended, by the language used in that instrument, to so far extend the meaning of the words, 'the homestead of a family,' as to make them embrace not

only the home or residence of the family, but, in addition thereto, the place where the head of the family may exercise his calling or business, even though the same be upon land in a town or city, not contiguous to that upon which the home or residence of the family stands. * * * The intention by the constitution, in the language used, must have been to extend the protection which it was intended to give to something under the designation of 'the homestead of a family,' however incongruous that something may be to the ordinary meaning of the words 'homestead' or 'home of the family,' which had not been considered protected by the terms of former constitutions, under the decisions of this court, and that that something was 'a place to exercise the calling or business of the head of the family.' "

Shryock v. Latimer, 57 Tex. 674; *Inge v. Cain*, 65 Tex. 75; *Willis v. Mike*, 76 Tex. 82, 13 S. W. Rep. 58.

That the constitution places the business homestead of a debtor beyond the reach of creditors who attempt to sell it to satisfy an indebtedness incurred in the purchase of goods, wares, and merchandise, is clearly settled by all the cases cited. The objection urged by defendants, that the "bill sets forth no facts constituting a designation of the land therein described as a homestead," is answered by the chief justice in *Miller v. Menke*, where he says: "By it [meaning the constitution] the homestead lot or lots are designated by the use made of them." The allegations of the bill plainly indicate the intention of complainants, and the use made of the property by them, and that use, coupled with the intention, was a designation of the lots as a homestead, within the meaning of the constitution. See *Gardner v. Douglass*, 64 Tex. 76.

The remaining ground of objection is that a court of equity will not restrain the sale of a homestead, but remit the party complaining to his remedy at law. This objection presupposes that a sale of the homestead, owing to its invalidity, would convey no title to the purchaser, and, therefore, equity should not interpose its restraining hand. Upon this point the remarks of Mr. Chief Justice STAYTON in *Cattle Co. v. State*, 68 Tex. 537, 538, 4 S. W. Rep. 865, although having reference to another question, are strikingly apposite:

"A defendant who asserts claim, even under an instrument void on its face, cannot be heard to say that it has not such semblance of validity as to create a cloud upon the title to property which it professes to convey that will prejudice the right of the real owner if it be not removed. He cannot be heard to say that others will not attach to it the same degree of faith and credit as a title-bearing instrument which he in good faith gives to it, and that, to the extent of the doubt or cloud thus cast upon the real title, its holder is injured, or is likely to be injured."

That courts of equity will enjoin the sale of a homestead under execution appears well established by the authorities. The rule is thus stated by Mr. High:

"Regarding the sale of the homestead interest as operating as a cloud upon the title, and the legal remedies being generally inadequate for the prevention of such a grievance, relief in equity has been freely extended for the purpose of preventing an enforced sale under execution of premises in the actual occupancy of the debtor as a homestead, and which are protected from levy and sale under the homestead exemption laws of the state." 1 High, Inj. § 488.

Mr. Freeman says:

"The sale of homestead property under execution has frequently been enjoined. The injunction, in such cases, has uniformly been justified upon the ground that the sale, if permitted to be made, would create a cloud on the defendant's title." *Freem. Ex'ns*, § 439.

In *Thompson on Homesteads and Exemptions*, (section 681,) it is said by the author that—

"One of the grounds on which courts of equity frequently interfere for the protection of the debtor's homestead is cloud upon title. Thus, where a house constituting a part of a debtor's homestead has been sold under an execution against him, although the sale confers no title, yet it constitutes such a cloud upon the debtor's title that equity will interfere to enjoin possession. So, in order to prevent a cloud being cast upon his title, a court of equity will enjoin a threatened sale of a debtor's homestead."

See, also, 10 *Amer. & Eng. Enc. Law*, p. 809, tit. "Injunctions." Reference also to the following cases will conclusively show that injunction is the proper remedy to prevent the threatened sale of a homestead under circumstances disclosed by the bill in this suit. *Gardner v. Douglass*, *supra*; *Van Ratchiff v. Call*, 72 *Tex.* 491, 10 *S. W. Rep.* 578; *Fink v. O'Neil*, 106 *U. S.* 272, 1 *Sup. Ct. Rep.* 325.

Defendants rely, in support of their position, upon *Whitman v. Willis*, 51 *Tex.* 421; *Carlin v. Hudson*, 12 *Tex.* 202; and *Cameron v. White*, 3 *Tex.* 152. It is apparent from an examination of those authorities that they are without application to the facts as set forth in the bill of complaint. There no homestead question was involved. Here the only purpose of the bill is to restrain the sale of homestead property, which is securely protected from forced sale by the constitution and laws of the state. The demurrer to the bill should be overruled; and it is so ordered.

WEBB *et ux.* v. HAYNER *et al.*

(District Court, W. D. Texas. March 12, 1892.)

In Equity. Suit by John A. Webb and wife against Hayner & Co. and Paul Fricke to enjoin the sale of a homestead. Heard on demurrer to bill. Overruled.

George F. Pendexter, for complainants.

James B. Goff, for defendants.

MAXEY, District Judge. The bill in this suit is in all respects similar to that in case No. 182, (49 *Fed. Rep.* 601,) except that in the present bill it appears that the execution was levied by the marshal upon different, but adjoining, property; and the complainants in this suit have no homestead other than that described in the bill, which is used solely for business purposes. The demurrer of defendants raises the same grounds of objection as those already considered, and a like ruling must follow. It is therefore ordered that the demurrer be overruled.

FRANKLIN COUNTY NAT. BANK v. BEAL, Receiver.

(Circuit Court, D. Massachusetts. March 11, 1892.)

BANKS AND BANKING—COLLECTIONS—COURSE OF DEALING—INSOLVENCY.

Plaintiff and defendant banks for several years had acted as agents for each other in the collection of checks, notes, and drafts, the practice being for each to credit the other for checks when received, and for drafts and notes when advised of their payment. When a check was returned unpaid after being credited, the amount thereof was charged back again. The amounts thus collected were mingled with the general funds of the bank. Plaintiff sent defendant a note for "collection and credit," which, on maturity, was paid by a check, and credit was immediately given on the books. But defendant failed, and the check passed into the hands of the receiver. *Held* that, in view of the course of dealing, the two banks stood in the relation of debtor and creditor with respect to the amount of the check, and it became a part of the assets of the bank.

In Equity. Suit by the Franklin County National Bank against Thomas P. Beal, receiver of the Maverick National Bank, to recover possession of a certain check or its proceeds. Heard on demurrer to the bill. Sustained.

Causten Browne, for complainant.

Hutchins & Wheeler and Frank D. Allen, U. S. Atty., for defendant.

COLT, Circuit Judge. This case was heard upon demurrer to the bill of complaint. The defendant is the receiver of the Maverick National Bank, which closed its doors for business, October 31, 1891. For several years prior to this date the Maverick Bank had been the agent of the complainant to collect checks on other banks, and drafts and individual notes of other parties. Under this course of dealing, the Maverick Bank received such checks, drafts, and notes, crediting the checks to the complainant when received, and crediting the drafts and notes when it was advised of their payment; and upon such credits it allowed the complainant a certain rate of interest, but whenever a check received by the Maverick Bank, and credited to the complainant, was returned unpaid, the amount so credited was charged back to the complainant. The complainant was also agent of the Maverick Bank to collect checks, drafts, and notes payable in Greenfield, Mass., where the complainant was located, and the amounts of such checks were credited to the Maverick Bank on receipt, and the amounts of such drafts and notes upon the advice of payment. The amounts collected were not kept separate by either bank, but the money was mingled with the general funds. On the 28th of September, 1891, the complainant mailed to the Maverick Bank a letter inclosing various checks and notes. The letter stated that they were inclosed for "collection and credit." Among these inclosures was a note for \$10,000, drawn by Brown, Durrell & Co., of Boston, payable to their own order, indorsed by them and also by J. A. Brown. The note fell due October 31, 1891, and Brown, Durrell & Co. delivered to the said Maverick Bank, before it suspended, their check, drawn on the North National Bank, for \$10,000, in payment of the note. This check was also indorsed by Brown, Durrell & Co. and J. A. Brown. Upon the re-

ceipt of the check, the Maverick Bank entered the amount of said check on its books to the credit of the complainant. The check passed into the hands of the examiner upon the failure of the bank, and its proceeds are now in the hands of the receiver.

Upon this state of facts the complainant contends that the Maverick Bank held this check as its agent at the time of the failure, and that it is entitled to the same, or the proceeds thereof. The defendant, on the other hand, holds that, the Maverick Bank having given the complainant credit for the note as paid, the relationship between the two became that of simple debtor and creditor, the title to the check which was received in payment of the note passing to the Maverick Bank at the time the credit was given the complainant. The note in question was received by the Maverick Bank for "collection and credit." According to the course of dealing between the parties, credit was not to be given by the Maverick Bank until the note was paid. But it appears that the note was paid on the 31st day of October, and credit for the amount given to the complainant by the Maverick Bank. When payment was made and credit given, it seems to me the Maverick Bank ceased to be agent of the complainant, and the relationship between the two became that of debtor and creditor. This proposition is based upon the general course of dealing between the parties, and it might not be applicable to the case of a single note sent by one bank to another for collection and remittance.

The real contention on the part of the complainant relates to the form of payment. It is not seriously questioned that, if the bank had received payment in money which had been mingled with the general funds of the bank, the complainant could not follow the specific fund, but could only come in as a general creditor. I do not think any sound reason has been advanced for drawing a distinction between a payment in money and a payment by check under the facts presented in this case. When the Maverick Bank received payment of the note, and credited the complainant with the amount in its general account with the complainant, it assumed all responsibility with respect to the payment of the note. If the check received in payment proved to be bad, it would not relieve the Maverick Bank. It might have received payment in cash, or by check or draft, or even by the substitution of a new note, but with this the complainant had no concern. Looking at the general nature of the transactions between these parties, it seems to me that, when the note was paid and credit given to the complainant, the agency of the Maverick Bank to collect and credit this note ceased, because, as between the complainant and the bank, the bank had done that which it was required to do, and therefore the relation of the parties from that time must be held to be that of debtor and creditor. The form of payment is immaterial, because it could not affect the claim of the complainant against the bank, such payment being at the risk of the bank. *Marine Bank v. Fulton Bank*, 2 Wall. 252, 256. In the case of *Manufacturers' Nat. Bank v. Continental Bank*, 148 Mass. 555, 20 N. E. Rep. 193, the draft had not been collected at the time of the insolvency of the bank, and the court held that the agency to collect was terminated by such in-

solvency. In the present case, so far as the complainant and the Maverick Bank are concerned, the note had been collected and credit given. The reasoning of the court in the last above cited case would seem to support the contention of the defendant in this case. So far as the conclusions reached by the court in *Levi v. Bank*, 5 Dill. 104, are inconsistent with this opinion, I do not agree with them. Demurrer sustained.

EAST TENNESSEE, V. & G. R. Co. *et al.* v. ATLANTA & F. R. Co.

(Circuit Court, S. D. Georgia, W. D. February 24, 1892.)

1. RECEIVERS—JURISDICTION OF STATE AND FEDERAL COURTS—COMITY.

Comity does not require that a federal court shall refuse to appoint a receiver for a railroad because of the pendency of a prior foreclosure suit in the state court, when such suit is admittedly an amicable proceeding, intended as a means of nursing the property into success, and it appears that there is no immediate purpose of procuring the appointment of a receiver therein.

2. SAME—PRIORITY OF SUIT AND OF POSSESSION.

Where a receiver appointed by a federal court actually takes possession of the property, the jurisdiction of that court is complete, and possession will not be yielded to a receiver subsequently appointed by a state court, although the suit in the state court was commenced before that in the federal court.

3. SAME—POSSESSION—WHAT CONSTITUTES.

The fact that the state court, prior to the appointment of the federal receiver, had granted an order restraining the officers of the company from using its funds for other than corporate purposes, does not show prior possession by it.

4. FEDERAL COURTS—JURISDICTION—RESIDENCE OF RAILROAD CORPORATION.

Under the laws of Georgia, (Code, § 3406,) a railroad corporation is a resident of the entire state, and an inhabitant of all the counties through which the road runs, and may be sued in any of them. *Davis v. Banking Co.*, 17 Ga. 326, followed.

5. SAME—"INHABITANCY."

Under Rev. St. U. S. § 739, declaring that civil suits shall only be brought in the district of which the defendant is an inhabitant, etc., a railroad company is an inhabitant of any district in which it operates its road through authorized agents. *U. S. v. Railroad Co.*, 49 Fed. Rep. 297, followed.

6. SAME—EFFECT OF STATE LAWS.

When a federal court has general jurisdiction of the controversy, and the federal statutes give the plaintiff a choice as to the district in which he will sue, the jurisdiction thus obtained cannot be restricted by the laws of the state respecting the venue of causes.

7. SAME—REPEAL OF STATUTE—SUITS OF "LOCAL NATURE."

Rev. St. U. S. §§ 740-742, relating to the districts in which suits of a "local nature" may be brought, were not repealed by the jurisdictional acts of 1876, 1887, or 1888.

8. SAME—RECEIVERSHIPS.

A suit by creditors for the appointment of a receiver for a railroad is a suit of a "local nature," within the meaning of Rev. St. U. S. §§ 740-742, relating to the districts in which suits may be brought.

In Equity. Bill by the East Tennessee, Virginia & Georgia Railroad Company and the Western Railroad Company of Alabama against the Atlanta & Florida Railroad Company for injunction and the appointment of a receiver. Plaintiffs move for an attachment against T. W. Garrett for resisting the decree of the court and interfering with the possession of R. H. Plant, as receiver. Motion granted.

Calhoun, King & Spalding, for plaintiffs.

Marion Erwin, for R. H. Plant, receiver.

Henry R. Jackson and *John L. Tye*, for attachment defendant.

SPEER, District Judge. It appears from the record and other evidence before the court that at 40 minutes after 9 o'clock on the 9th day of February we signed an order directing R. H. Plant, as receiver of the circuit court, to take possession of the property of the Atlanta & Florida Railroad Company. The order was granted upon consideration of the bill before the court, and in view of its sworn allegations. Mr. Plant, through his agent, immediately proceeded to take possession of the property as directed, and, according to his report, verified by oath, his agent and representative was in actual custody in the office of the company, the officers present having been notified of the order appointing him, when T. W. Garrett, superintendent of the defendant corporation, entered the office, and, having been informed by the agent of Mr. Plant of his possession as receiver, declined to recognize the same. Mr. Garrett informed the agent of the receiver that he himself had been appointed receiver by the state court at 10 minutes after 11 o'clock. The order put in evidence here by the respondent indicates that the appointment by the state court was made at 15 minutes after 11. Then, in the presence of the agent of Mr. Plant, Mr. Garrett went to the telephone, and notified a Mr. Humphreys that he (Garrett) had been appointed receiver, and directed him to recognize his authority. At this time the receiver of this court had been in actual possession for some time; how long, it does not distinctly appear. It is therefore evident that the receiver of this court was appointed nearly two hours before the order appointing the receiver of the state court was granted by Judge CLARKE; and, further, that he was actually in possession when the receiver of the state court came in, announced his appointment, and attempted to take possession. It is insisted, however, that the bill in the state court was pending for quite a while before the bill in this court was filed. But it is perfectly evident that it was an amicable proceeding, to which certain creditors and the road were parties, with no immediate purpose to ask for the appointment of a receiver. One of the learned counsel, Mr. Jackson, who has opposed this motion, who appears now for the respondent, and who states that he represents large interests in the bill in the state court, has stated in his argument here that the bill before that court was an attempt to "nurse the struggling little road into success," and he stated further that at various times counsel for and against the bill had consulted, and had endeavored, with success, to prevent Judge CLARKE from appointing a receiver. No rule *nisi*, calling upon the defendants to show cause why a receiver should not be appointed, had been issued; and yet, notwithstanding these admitted facts, in two hours after the United States court had acted, we find that an order, granted by the consent of the parties, was taken, appointing a receiver of the state court. On the other hand, the bill brought in the United States court is presented at the instance of creditors for a large amount, who appear to be earnestly insisting upon the payment of their debts. If it be true, as

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the bill alleges, that the East Tennessee, Virginia & Georgia Railroad Company and the Western Railroad Company of Alabama, the plaintiffs, are creditors of the Atlanta & Florida Railroad Company, must they be debarred the privilege of applying to a forum which they have a right to seek because there has been in the state court an amicable bill, intended to "nurse" their debtor into prosperity? Is it competent by a proceeding of that character for a portion of the creditors to take charge of litigation involving the entire assets of the company to "stand off" other creditors, urge the court to delay the relief which the bill apparently seeks, and then invoke the doctrine of comity to defeat an earnest attempt by the creditors to seek relief elsewhere? We think not. To apply the doctrine of comity to such facts would seem unwarrantable.

Nor does the mere pendency of the bill in the state court in itself deny to this court the power of appointing a receiver where it has jurisdiction of the parties, and where its action is otherwise proper. Nor will such pendency affect the title of the receiver of this court. The title of a receiver, on his appointment, dates back to the time of granting the order. Beach, Rec. par. 200. In cases of conflicting appointments, the courts will inquire into the priority of appointment, and, if necessary, will take into consideration fractions of the day. Id. 232. While courts of equity have insisted upon the doctrine of *lis pendens*, they have found it difficult, and often inequitable, to force it. Id. 200. The rule upon that subject in this state is deducible from the decision of the supreme court in *Bank v. Trustees*, 63 Ga. 552, where the court (JACKSON, Justice, delivering the opinion) uses this language:

"But it would seem here that the stockholders' bill has been pending here for a long time in the circuit court of the United States, and no receiver is yet appointed. Perhaps none ever will be. Is the judgment creditor to wait until one is to be appointed? He is not even in this case made a party to the bill in the United States court. If he were, and if the bill there filed was similar to this in review here, and could accomplish the same end, to-wit, the collection of this debt by the judgment creditor, having the final process of the state court in his hands, even then we should rule that neither law nor equity nor comity would require the equity court to wait upon the United States court in a case like this."

The application of that decision is that neither law, equity, nor comity will require the United States court to wait upon the state court in a case like this.

In a very carefully considered case, Mr. Justice BRADLEY, while presiding in this circuit, gave a controlling definition of the law. In *Wilmer v. Railroad Co.*, 2 Woods, 426, the learned justice used this language:

"This test, I think, is this: not which action was first commenced, nor which cause of action has priority or superiority, but which court first acquired jurisdiction over the property. If the Fulton county court had the power to take possession when it did so, and did not invade the possession or jurisdiction of this court, its possession will not be interfered with by this court. The parties must either go to that court, and pray for the removal of its hand, or, having procured an adjudication of their rights in this court, must wait till the action of that court has been brought to a close, and judicial possession has ceased. Service of process gives jurisdiction over the person,—seizure

gives jurisdiction over the property; and, until it is seized, no matter when the suit was commenced, the court does not have jurisdiction."

In this holding the Honorable JOHN ERSKINE, the judge of this district, now retired, concurred, and in its support Justice BRADLEY cites many authorities, which he states have been "somewhat carefully consulted." In addition to these it will be instructive to refer to *Barton v. Keyes*, 1 Flip. 61; *Levi v. Insurance Co.*, 1 Fed. Rep. 206; *Walker v. Flint*, 7 Fed. Rep. 487; *Erwin v. Lowry*, 7 How. 172; *Griswold v. Railroad Co.*, 9 Fed. Rep. 797; *Covell v. Heyman*, 111 U. S. 176, 4 Sup. Ct. Rep. 355; *Heidritter v. Oil-Cloth Co.*, 112 U. S. 294, 5 Sup. Ct. Rep. 135.

It is insisted, however, that the superior court of the state had taken control of the property, because, upon an amendment to the bill therein pending, alleging that the officers were permitting a use of the corporation funds for private purposes, it had granted a restraining order enjoining the officers of the road from permitting the use of its funds for other than the purposes of the corporation. This, however, was nothing more than an order to restrain actual or threatened malfeasance of an officer or officers of the corporation, and was in no sense a seizure of the property itself. It indeed was a distinct recognition of the fact that the officers were yet in control. Otherwise, no injunction would have been issued against them.

The sole remaining objection to the order apparently necessary to enforce obedience to the decree of this court is that the circuit court of the United States for the northern district of Georgia has exclusive jurisdiction of the controversy presented by the bill, for the reason that the principal office of the company is in that district. In support of this proposition it is urged that in the case of *Banking Co. v. Seymour*, 53 Ga. 499, the supreme court of the state held that section 3406 of the Code of Georgia imperatively requires that the suit must be brought in the county where the principal office of the company is located, unless it is upon a contract made or to be performed in some other county. It is, however, true that the residence of a railroad corporation in Georgia is not restricted to the county in which its principal office is situated. In the case of *Davis v. Banking Co.*, 17 Ga. 323, it was held that such a corporation is a resident of the entire state, and an inhabitant of all the counties through which the road runs. This decision had under consideration the act of the general assembly now embodied in section 3406 of the Code. This allowed suits to be brought against railroad companies in any county in which a tort sued for was committed, or in which a contract declared on was to have been performed. This statute they held not to be in conflict with the provision of the state constitution, then of force, which declared that no person shall be sued elsewhere than in the county in which he resides. The doctrine of the case in 17 Ga. was reaffirmed in *Railway Co. v. Oaks*, 52 Ga. 410. In that case Judge McCAY, for the court, observed:

"We do not care to go over the elaborate argument of Judge BENNING in the case of *Davis v. Banking Co.*, 17 Ga. 336. There was a unanimous decision of this court upon the conformity of these laws to the constitution

requiring suits to be brought in the county of the residence of the defendants. The argument is full, exhaustive, and, in our judgment, conclusive. The position it takes has ever since been taken as the law of this state, and we approve of and adopt it."

The supreme court of the United States has declared in several cases that corporations are conclusively presumed to be residents of the states in which they are created. *Railroad Co. v. Koontz*, 104 U. S. 5; *Ex parte Schollenberger*, 96 U. S. 369; *Railroad Co. v. Letson*, 2 How. 558. In the case of *Locomotive Engine, etc., Co. v. Erie R. Co.*, 10 Blatchf. 307, it was held that railroad corporations are to be regarded as residents of every district of the state of their domicile in which they own property and exercise their functions. In the very recent case of *U. S. v. Railroad Co.*, 49 Fed. Rep. 297, Justice HARLAN, in the northern district of California, held that a railroad corporation doing business in a district becomes an inhabitant of the district. The learned justice points out the obvious fact that, if the construction of the statute insisted upon by the counsel for defendant is maintainable, it would effectually destroy the jurisdiction of these courts in all suits against joint defendants where a necessary party lives out of the district in which the suit is pending. It was, moreover, held, in the western district of Texas, by Judge MAXEY, in *Zambrino v. Railway Co.*, the suit is maintainable in a district where the road runs, although the principal office was located in another district. This is reported in 38 Fed. Rep. 449, and was followed in the case of *Riddle v. Railroad Co.*, 39 Fed. Rep. 290. It moreover appears to be true that where there is the proper diversity of citizenship which will give the circuit court of the United States general jurisdiction of the controversy, and where the federal statute confers upon the plaintiff a right to select the district within which the suit can be brought, the laws of the state regulating the venue as to suits in the state courts will not have the effect to restrict the territorial jurisdiction of the federal courts within limits more narrow than those prescribed by the acts of congress. *Cowles v. Mercer Co.*, 7 Wall. 118, 122; *Railway Co. v. Whitton's Adm'r*, 13 Wall. 271; *Insurance Co. v. Morse*, 20 Wall. 453; *Davis v. James*, 2 Fed. Rep. 618.

The bill before the court alleges that the Atlanta & Florida Railroad Company is a corporation under the laws of Georgia, and a citizen thereof, and that the plaintiffs are citizens of the other states named; that the railroad for which a receiver is asked is located in both districts of the state. One terminus of the completed portion is Atlanta, in the northern district, and the other Ft. Valley, in the southern district. The larger part of the completed portion, as well as of that projected and surveyed, but not completed, is in the southern district. The proper diversity of citizenship to give the court jurisdiction is apparent.

The act of congress, prescribing the place where a person may be sued, is not one affecting the general jurisdiction of the courts. It is rather in the nature of a personal exemption in favor of the defendant, and it is one which he may waive. *Ex parte Schollenberger*, 96 U. S. 369. Assuming, for the present, that the defendant corporation will waive noth-

ing, it becomes important to determine, by an analysis of the line of statutes upon this subject, whether jurisdiction has been affirmatively conferred upon this court. The eleventh section of the judiciary act of 1789, following clauses which conferred jurisdiction on the circuit courts in all suits of a civil nature at common law and in equity, on account of diversity of citizenship, federal questions, alienage, etc., provided as follows:

"But no person shall be arrested in one district for trial in another in any civil action before a circuit or district court. And no civil suit shall be brought before either of said courts against the inhabitants of the United States, by any original process, in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ." See section 730, Rev. St.

The next provision upon this subject will be found in the act of May 4, 1858, (11 St. at Large, p. 272.) That act contained but two sections, both of which relate to the *locus* of suits where there are more than one district in the same state. The first of these sections provided that, where there is more than one district in a state, the suit, if not of a local nature, and if against a single defendant, must be brought in the district where the defendant resides; but, if there are two or more defendants residing in different districts of the same state, the plaintiff may sue in either district. *Vide* section 740, Rev. St. And, in suits of a local nature, where the defendant resides in a district in the same state different from that in which the suit is brought, the plaintiff may have original process against such defendant directed to the marshal of the district in which he resides. *Vide* section 741, Rev. St. The second section provided:

"That, in all cases of a local nature, at law or in equity, where the land or other subject-matter of a fixed character lies partly in one district and partly in another within the same state, the plaintiff may bring his action or suit in the circuit or district court of either district, and the court in which it is brought shall have jurisdiction to hear and decide it, and to cause mesne or final process to be issued and executed as fully as if the said subject-matter were wholly within the district for which said court is constituted." *Vide* section 742, Rev. St.

This, as we shall presently see, is still the law, and expressly controls the question now under consideration. The several provisions above enumerated have been embodied in sections 739, 740, 741, and 742 of the Revised Statutes, all manifestly relating to cognate topics, and designed to confer jurisdiction in the special cases to which they refer.

By the act of congress of June 1, 1872, (17 St. at Large, p. 198,) it was further provided that, in any equity suit to enforce any legal or equitable lien or claim against property in a district in which the defendant is not an inhabitant, or is not found, or does not voluntarily appear, it shall be lawful to serve the defendant by personal service on him, wherever he may be, or to make service by publication. In case he does not appear, the effect of the judgment is restricted to the property in the district. These provisions are embodied in section 733 of the Revised Statutes. This statute had the effect to extend the pro-

visions of that portion of the act of May 4, 1858, which is embodied in section 741 of the Revised Statutes, to the case of a defendant residing out of the state, but who was interested in property of a local nature, within the jurisdiction, which the plaintiff was seeking to subject to a legal or equitable lien. It did not enlarge or otherwise affect the general jurisdiction of the court in the "suit of a local nature," for which section 741 of the Revised Statutes provided, but it merely furnished the procedure by means of which the non-resident could be legally served and made a party to the judgment, so far as it affected the property actually within the operation of a legal or equitable lien or claim which the court had otherwise jurisdiction to enforce against it. Before the enactment of this statute we can well understand how, in many instances, the court was unable to afford relief to which suitors were obviously entitled, where the non-resident defendant owning property in the district could not be served and would not voluntarily appear. *Vide Brightford v. Luddington*, 12 Blatchf. 237. The provisions of section 738 of the Revised Statutes were afterwards enlarged by section 8 of the act of March 3, 1875, which is still of force.

To summarize the result of our examination, it appears that, when the revision of the statutes had been made, the following provisions relative to the *locus* of suits in the circuit court were in full force:

First. The provision in the eleventh section of the judiciary act, that suits of a civil nature should be brought in the district of which the defendant was an inhabitant, or in which he might be found. This has been embodied in section 739, Rev. St.

Second. That suits not of a local nature, where there are joint defendants residing in different districts of the same state, might be brought in either district. This part of the act of 1858 is expressed in section 740, Rev. St.

Third. That in suits of a local nature, where the defendant resides in a district in the same state different from that district in which the suit is brought, the plaintiff may have original process sent into the other district, and served upon the defendant there. This clause of the act of 1858 was embodied in section 741, Rev. St.

Fourth. That suits of a local nature, where the land or other subject-matter of a fixed character lies partly in one district and partly in another within the same state, may be brought in either district, and the court in which they are brought shall have plenary jurisdiction to hear and decide them, to issue and control the process, as if the subject-matter were wholly within the district for which such court is constituted. The compilers embrace this clause in section 742, Rev. St.

Fifth. The provision for procedure to effect service upon defendants in suits of a local nature, where the defendants are out of the territorial jurisdiction of the court, so that the judgment can be operative upon the property within such jurisdiction. This provision was made by act of 1872, and is embodied in section 738, Rev. St.

It is contended, however, by counsel who resist this motion, that all these special provisions relating to suits brought in states where there

are more than one federal judicial district were superseded by the provisions of section 1 of the act of March 3, 1875. This, they claim, was intended to cover the entire subject, and to indicate the locality in which civil suits in the circuit and district courts might be brought. They rely on the language—

"No civil suit shall be brought before either of said courts against any person, by any original process or procedure, in any other district than that whereof he is an inhabitant, or in which he is found at the time of serving such process."

They insist, moreover, that the amendatory acts of March 3, 1887, and August 13, 1888, had the effect to repeal these provisions above enumerated by implication. Let us consider these propositions in the order of their statement. An analysis of the first section of the act of March 3, 1875, makes it apparent that it is a substitute for the eleventh section of the judiciary act of 1789, the provisions of which, so far as they confer general jurisdiction on the circuit court, were embodied in subdivisions 1, 2, and 3 of section 629 of the Revised Statutes, and, so far as they prescribed the appropriate district in which the suit might be brought, were embodied in section 739 of the Revised Statutes. *Ames v. Hager*, 36 Fed. Rep. 129; *U. S. v. Moony*, 116 U. S. 104, 6 Sup. Ct. Rep. 304. That act contained no provision covering the special cases provided for in the act of May 4, 1858, which, we have seen, is embodied in sections 741, 742, Rev. St., which relate to joint defendants in different districts of the same state, and to suits of a local nature affecting property within the jurisdiction. It was not the intention of congress, by the act of March 3, 1875, to do away with all the salutary statutes conferring special jurisdiction upon the circuit and district courts. "The intention of the law-maker constitutes the law. A thing may be within the letter of a statute and not within its meaning, or within its meaning and not within its letter. In cases admitting of doubt, the intention of the law-maker is to be sought in all the context of the section, statutes, or series of statutes, *in pari materia*." This language is used by Mr. Justice SWAYNE, for the court, in the case of *Atkins v. Disintegrating Co.*, 18 Wall. 272; and the learned justice applied the doctrine by the announcement that, although an admiralty case is a "civil suit," the prohibition in the eleventh section of the judiciary act had no reference to it. A decision more directly in point is the case of *U. S. v. Mooney*, 116 U. S. 104, 6 Sup. Ct. Rep. 304, where Mr. Justice WOODS, in delivering the opinion of the court, used the language following:

"How, then, can the substantial re-enactment of section 11 [of the judiciary act] by the act of March 3, 1875, with modifications immaterial, as far as the question in hand is concerned, have an effect which the original section did not? * * * To sustain the contention of the plaintiffs, we must hold that the purpose of section 1 of act of March 3, 1875, was to repeal by implication, and to supersede, all laws conferring jurisdiction on the circuit courts, and, of itself, to cover and regulate the whole subject. But this construction would lead to consequences which it is clear congress did not contemplate. The act of 1875, it is clear, was not intended to interfere with the

prior statutes conferring jurisdiction upon the circuit or district courts in special cases and over particular subjects. Its purpose was to give to the circuit courts a jurisdiction which the federal courts did not then possess, by enlarging their jurisdiction in suits of a civil nature, in common law or in equity, and not to take away from the circuit or district courts jurisdiction conferred by prior statutes."

That the scope of the first section of the act of 1875 was to be limited to the general jurisdiction of the courts, conferred by the eleventh section of the judiciary act, was distinctly held by Circuit Judge SAWYER in *Ames v. Hager*, 36 Fed. Rep. 129; by this court in *U. S. v. Shaw*, 39 Fed. Rep. 433; and by Judge BARR, in *Kentucky*, in *U. S. v. River Mills*, 45 Fed. Rep. 273. It follows, therefore, that the special cases for which provision was made by the act of May 4, 1858, embodied in sections 740, 741, and 742 of the Revised Statutes, relating to the locality of suits in the states containing more than one district, were not within the contemplation of congress when that act was enacted, and are not repealed by it. The language of that act, so far as it requires suits to be brought in the district of which the defendant is an inhabitant, or in which he is found, is not at all different from the eleventh section of the judiciary act. This was co-existent with the act of 1858, and, as we have seen, was embodied in section 739 of the Revised Statutes by the compilers, as an independent provision, not at all in conflict with the legislation conferring jurisdiction, and making it effective in the special cases indicated in sections 740, 741, and 742 of the Revised Statutes; all of which were re-enacted by the adoption of the Revision simultaneously with it. The provisions of the act of March 3, 1887, and of August 13, 1888, amendatory of the act of 1875, in respect to the questions under discussion, are in no particulars different from the latter act. These recent statutes, therefore, are likewise within the range of the authority of *U. S. v. Mooney*, *supra*, and, in the opinion of the court, clearly did not repeal sections 740, 741, and 742 of the Revised Statutes. It is moreover true that, if we trace the same provision through the numerous acts of congress passed since the act of 1875, and since the act of 1888, whereby other divisions of judicial districts are created in the several states, it will be observed that suits of a local nature are always excepted from the provisions changing the locality of suits, or requiring subsequent suits against its residents to be brought within the new divisions.

It is insisted, however, by the learned counsel for the plaintiff that this is not a suit of a local nature, within the meaning of the act of congress. To this proposition the court cannot assent. We are controlled by the averments of the bill. It alleges that the defendant corporation is insolvent; that the plaintiffs are creditors; that the only means by which they can obtain payment of their debts is by the seizure of the railroad itself,—the *res*,—which is the subject-matter of this litigation. This railroad is mainly real estate, and is an entirety. A large part of it is actually located within this district. In so far as the assets are personal, they are likewise largely located here. It is therefore a suit

of a local nature, and the fact that a portion of this entirety is in the northern district of Georgia does not affect the local character of the suit. The statute of the state Code (section 3149a) gives to the plaintiffs an equitable right to subject this property to the payment of their debts, which right, it has been repeatedly held, a court of equity of the United States can enforce. To do this, it is necessary for a receiver of the court to take actual possession of the *res*, to control and administer it, and to do this in the locality in which it is situated. The character of the suit is not doubtful.

An attentive examination of all the enactments hereinbefore referred to will, we think, lead to the inevitable conclusion that it was not the purpose of congress, by the acts of 1875, 1887, or 1888, to repeal the salutary provisions which enabled the circuit court to afford relief in any district where the suit is of a local nature, or where the property sought to be reached is an entirety, and is partly within the district and partly within another district of the same state, or relief as against the property itself, where it is within the district, and is subject to a legal or equitable lien or claim, even though the defendant be a resident of another state. It follows, therefore, that the jurisdiction of the circuit court in this, the southern district of Georgia, over the parties and the subject-matter of this litigation, is strongly founded upon the fact that the property to be dealt with is of a fixed character, and is located in both districts of the state, and as well upon the general doctrine that a railroad corporation is a resident of the state of its creation, and of each district of the state through which it runs. The case is very unlike one where a railroad is operated in two districts situated in different states, in which ancillary bills should be filed, and orders extending the appointment of a receiver are necessary; but in this case, under section 742 of the Revised Statutes, the jurisdiction of this court is plenary over the entire property in both districts of this state.

In several cases, notably in the case of *Tefft v. Sternberg*, reported in 40 Fed. Rep. 2, we have attempted very carefully to indicate that in no case would we encroach upon the proper jurisdiction of the state court relative to the substance of litigation. There the substance of the litigation was the goods which the sheriff had seized. Here the substance of the litigation is the railroad itself. There was a balance, which a receiver of this court might have administered; but, with a desire to avoid anything like conflict with the state court, we declined to permit the receiver here to receive even that balance to which the creditors, whose claims were in the hand of the sheriff, apparently had no right whatever. In a recent case (*Candler v. Balkcom*) a receiver had been appointed by Judge CLARKE a short time prior to a similar appointment of this court, and that receiver, by telegraphic instructions of his appointment, had taken possession of the property a few minutes before the receiver of this court attempted to take possession. Therein, in a case parallel to this, we declined to interfere with the state court, and the bill was dismissed. There are, however, cases occurring where the court feels obliged, and will hereafter feel obliged, to support its author-

ity and the action of its officers in carrying out its judgments, and this is one of those cases.

The court has attentively considered the arguments of counsel for respondent, but is unable to reach a conclusion differing from that announced upon the hearing on the application for the rule *nisi*; nor is the answer for defendant in any respect sufficient to exonerate him from the legal consequences of the defiant attitude which he has taken towards the proper order of this court in a matter of which it had both prior and plenary jurisdiction: While the announcement is made with very great reluctance, the duty devolves upon the court to make the rule absolute, and cause the attachment to issue against the defendant, directing the marshal to arrest and commit him for his contemptuous disregard of the decree of the court. If there is further disobedience on the part of any person whatsoever, the court will grant a writ of assistance sought, directing the marshal to take actual possession of the property of the defendant corporation. It will be so ordered.

PARK BROS. & Co., Limited, v. KELLY AXE MANUF'G Co.

(Circuit Court of Appeals, Sixth Circuit. January 20, 1892.)

1. PLEADING—DEMURRER.

A demurrer to an answer denying plaintiff's power to make the contract sued upon does not admit the facts therein alleged, so as to make them part of the petition; and it is error for the court, on overruling the demurrer, to regard them as part of the petition, and dismiss the suit.

2. LIMITED PARTNERSHIPS—CONTRACTS.

Although Act Pa. June 2, 1874, § 5, limits the liability of partnerships formed thereunder to \$500 on a single undertaking, unless the same is in writing signed by two managers, yet a failure to so sign a contract for a larger amount will not prevent the partnership from suing thereon when it has made or tendered full performance.

3. SAME—CONTRACT BY AGENT—RATIFICATION.

The allegation that the contract in suit was made by an agent for the benefit of plaintiff, a limited partnership, organized under Act Pa. June 2, 1874, and that it has since been adopted by the partnership, is sufficient to sustain the action; there being nothing in the statute to prevent such ratification.

4. SAME.

The bringing of a suit by a limited partnership on a contract made by an agent is a ratification of its terms.

5. CONFLICT OF LAWS—CONTRACTS—LIMITED PARTNERSHIPS.

The legality of the execution of a contract made in Kentucky by an agent for a limited partnership organized under the laws of Pennsylvania, in a suit brought in the former state, is to be determined by the laws of Kentucky, and not by the act under which the partnership was created.

In Error to the Circuit Court of the United States for the District of Kentucky.

Action by Park Bros. & Co., Limited, against Kelly Axe Manufacturing Company. Demurrer by defendant sustained. Plaintiff brings error. Reversed.

Humphrey & Davis, for plaintiff in error.

A. Barnett and Walter Evans, for defendant in error.

Before JACKSON, Circuit Judge, and SAGE and SWAN, District Judges.

JACKSON, Circuit Judge. It appears from the record in this case that on December 9, 1887, the plaintiff in error submitted to the defendant in error, a Kentucky corporation, located and doing business at Louisville, in said state, the following written proposition:

"We propose to supply you with all the axe and hatchet steel, of good and suitable quality, you will use in your works prior to December 31, 1888, not to exceed 125 net tons, nor be less than 100 net tons, at 8½ cents per pound. The above price is guaranteed against our own and association decline on the undelivered portion of this contract at the date of said decline. Terms: Four-months note, or 3 per cent. discount for cash in 30 days from date of shipment. Deliveries to be made f. o. b. Pittsburgh, less freight to Louisville, Ky. To be specified for as follows, at the rate of 10 tons per month. In the event of serious fire, strikes, or delays, unavoidable or beyond our control, the provisions of this contract shall cease until such cause shall have been removed. In case any shipment of steel proves unsuitable, it is understood that you will immediately discontinue its use, and advise you (us) of the facts, that we may have the opportunity of deciding what shall be done under the circumstances, so that possible loss and damage to either you or ourselves shall be prevented."

This proposition was signed, "PARK BROTHERS & Co., (Limited.) JOHN A. SUTTON," and was dated at Louisville, Ky., where it was submitted to and accepted in writing by the Kelly Axe Manufacturing Company. Thereafter, plaintiff proceeded with the delivery of the steel, and when 80,097 pounds thereof had been received, the defendant declined and refused to accept the balance, amounting to 119,903 pounds, which plaintiff alleges was duly tendered. Partial payments were made by defendant on 80,097 pounds received, leaving a balance due thereon of \$1,756.54 according to the contract price, which defendant refused to pay. The plaintiff thereupon instituted this suit in July, 1889, against the defendant, to recover the sum of \$5,120.32, with interest thereon from January 1, 1889, as the damages sustained by its alleged breaches of said contract. The first count of the original petition or declaration claims the sum of \$3,363.78 as the net profit the plaintiff would have made upon the 119,903 pounds of steel which was tendered to and refused by defendant; said net profit being the alleged differences between the cost of producing that quality of steel, with the freight thereon to Louisville, Ky., from Pittsburgh, and the contract price of 8½ cents per pound to be paid therefor. The second count of the petition seeks to recover the unpaid balance of \$1,756.54 on the 80,097 pounds received and accepted. In the petition or declaration the plaintiff avers that it is and was at all times a corporation established and existing by and under authority of the law of the state of Pennsylvania, with power and rights, under the laws of said state, to contract and be contracted with, to sell and be sold; that since its creation it has had and still has its office and place of business at Pittsburgh, in said state of Pennsylvania, of which it is a citizen. The defendant is alleged to be a corporation and citizen of Kentucky.

The defendant demurred to this petition, setting up as grounds of demurrer—*First*, that the sum claimed in either or both paragraphs (or counts) of the petition was not sufficient in amount to bring the subject-matter within the jurisdiction of the court; *second*, that said petition, and neither paragraph thereof, states facts sufficient to constitute any cause of action as against defendant. This demurrer was properly overruled and disallowed by the court, for the reason that the petition claimed more than \$2,000 for the alleged breach of the contract, and because, if the two counts could be regarded as presenting two distinct causes of action, they could properly be joined in one suit under the Kentucky Code, so as to make the "matter in dispute" sufficient to give the court jurisdiction. The theory of the demurrant was that the measure of damage set up in the first paragraph of the petition for non-acceptance of the 119,903 pounds of steel tendered, was stated in a way that would only entitle plaintiff to nominal damages, which, added to the \$1,756.54 claimed by the second paragraph, would be less than the \$2,000 requisite to confer jurisdiction. This was clearly an erroneous view to take of the petition, which claimed against defendant the sum of \$5,120.32 for the breaches complained of, and the court below was right in overruling the demurrer.

Thereafter the plaintiff, by leave of the court, amended the first paragraph of its petition, and alleged, in substance, that defendant's refusal to accept the 119,903 pounds tendered it under the contract was not because of any alleged unsuitableness of said steel; that, by reason of said refusal, plaintiff had been compelled to and had disposed of said 119,903 pounds of steel at the best market price procurable for the same, which was 5½ cents per pound; and that after allowing defendant credit for the sum thus realized, and the further credit of \$233.31 as the freight on said quantity of steel to Louisville, Ky., and charging it with the contract price of 8½ cents per pound on the same, the difference amounted to \$3,064.02, which, with interest since December 31, 1888, constituted plaintiff's damage for the non-acceptance by defendant of the 119,903 pounds of steel. To the petition as thus amended the defendant interposed several defenses. By the first paragraph of its answer, it denied plaintiff's corporate existence. By the second, after admitting the written agreement sued on, and its acceptance thereof, it denied that plaintiff had prepared or offered to it axe and hatchet steel in quantities of 10 tons per month, or any quantity, during the period covered by said agreement, of good and suitable quality, needed in its work; that plaintiff had tendered the 119,903 pounds of steel free on board the cars at Pittsburgh, or any part of it, good or suitable for use in its factory; that it had refused any tender of such steel; that the cost of manufacturing such steel was 5 cents per pound; that there was any profit to plaintiff in making such steel, as claimed; that its refusal to accept the steel was not caused by its unsuitableness; that plaintiff had the right, under said contract, to deliver within the year ending December 31, 1888, the 119,903 pounds of steel, or any part thereof, or to receive 8½ cents per pound therefor; that plaintiff was, by its refusal or failure to accept said steel,

compelled to dispose of the same; that the market price thereof, after its alleged refusal to accept, was 5½ cents per pound; that the steel was disposed of at that price; and that the sum claimed by plaintiff was due from it. By the third paragraph the defendant set up as a special defense that the plaintiff and the other makers of steel throughout the United States had about and before December, 1887, entered into a trust combination to raise the price of said steel from 6 cents per pound, which was a reasonable price, and afforded a reasonable profit to the steel-makers, to 8½ cents per pound; that defendant having a large axe and hatchet factory, in which much money was invested and numerous operatives were employed, was forced to sign said contract with plaintiff in order to procure the supply of steel needed to carry on its works; that 8½ cents per pound was more than the steel was worth, and was an unreasonable price therefor, extorted from defendant under said trust combination; and that it was not, therefore, bound by said contract to pay said price, but was only liable for the actual value of the steel delivered to it, which was of no value. By the fourth paragraph, it was alleged that the use of the 80,097 pounds of steel delivered to and received by defendant had resulted in or caused a loss and damage to its business, occasioned by the trade rejecting and refusing to handle its axes and hatchets because of the inferior quality of said steel employed in making the same, etc.; and for this damage a counter-claim of \$10,000 was set up. By the fifth paragraph of its answer the defendant averred that plaintiff was a joint-stock association, known as a partnership, (limited,) organized under an act of Pennsylvania passed June 2, 1874, with power to sue and be sued in the firm name of Park Bros., Limited; that plaintiff and defendant attempted to make the contract sued on, but that the same was and is from the first null and void; that plaintiff, under said act of June 2, 1874, had no power to make any contract, for the non-performance of which it could be subjected to a liability in excess of \$500, unless such contract was reduced to writing, and signed by at least two managers of said association; that the written contract declared on was not signed by any manager or managers of said association, and that said John A. Sutton, who claimed to be the agent of said association, in fact had no authority to bind it; and that, as said contract subjected plaintiff to a liability in excess of \$500, it was null and void, and defendant was not bound thereby. To these special defenses, constituting the 3d, 4th, and 5th paragraphs of the answer, the plaintiff demurred on the grounds that they, nor either of them, presented any defense or cause of action. The court did not act upon the demurrer so far as it related to the defense setting up the trust combination between plaintiff and other steel-makers, but sustained it as to the counter-claim and overruled it as to the defense setting up the invalidity of the contract under the Pennsylvania act of June 2, 1874; and thereupon the court adjudged and decreed "that said demurrer be now carried back to the petition, and the court adjudges that said petition is insufficient in law, and the demurrer is sustained thereto;" to which plaintiff excepted; and, under leave given, plaintiff thereafter filed an amended

petition, setting forth that although said John A. Sutton executed the written contract sued on in his own individual name, and was bound thereon individually, he made the same as agent for and for the benefit of plaintiff, and that "plaintiff has adopted and does adopt said contract as its own," etc. The defendant demurred to the plaintiff's petition as thus amended because insufficient in law to sustain its action. The court sustained this demurrer, and thereupon ordered the dismissal of the plaintiff's suit, from which judgment the plaintiff prosecutes the present writ of error, and assigns for error in the action of the court below—*First*, that the court erred in overruling its demurrer to the fifth paragraph of the defendant's answer, which set up the invalidity of the contract under the Pennsylvania act of June 2, 1874, for want of signature by two managers of the association; *second*, that the court erred in its order carrying back the demurrer of the plaintiff to the petition, and adjudging the said petition to be insufficient in law, and sustaining the demurrer thereto; *third*, that the court erred in sustaining the defendant's demurrer to the petition as amended, and holding the same as insufficient in law; and, *fourth*, that the court erred in its final judgment, entered July 9, 1891, dismissing the petition.

It does not appear from the record that the plaintiff was given or allowed the right of replying to said fifth paragraph of the answer upon the demurrer thereto being overruled by the court, nor that its right to make reply thereto was waived or abandoned. On the contrary, it is shown by the record that upon overruling that demurrer of plaintiff the court proceeded to carry the same back to the petition, and adjudge that it was insufficient in law, notwithstanding a direct demurrer thereto by defendant had been previously overruled. It is undoubtedly a well-settled rule that a demurrer reaches back to the first error in the pleadings, and judgment may properly be given against the party who committed it. In *Cooke v. Graham*, 3 Cranch, 229-235, Chief Justice MARSHALL thus states the rule:

"When the whole pleadings are thus spread upon the record by a demurrer, it is the duty of the court to examine the whole, and go to the first error. When the special demurrer is by the plaintiff, his own pleadings are to be scrutinized, and the court will notice what would have been bad upon a general demurrer."

The principle has no application, however, where the defect is one of form and not of substance. *Aurora City v. West*, 7 Wall. 82, and *Railroad Co. v. Harris*, 12 Wall. 84. In the present case the original petition, as first amended on the measure of damages, was not bad upon general demurrer. It states a good and valid cause of action against the defendant, whose demurrer thereto had been properly overruled. Upon what principle, then, could plaintiff's demurrer to the fifth paragraph of the answer operate to read into the petition the facts and averments set up in the fifth paragraph of the answer, on overruling plaintiff's demurrer to that paragraph, and thus make the petition bad? There is no rule of pleading warranting such a procedure as that. Plaintiff's demurrer to said fifth paragraph, while admitting the facts therein alleged

for the purpose of testing their legal sufficiency as a defense to the suit, did not so admit them as to make them a part of the averments of the petition, or authorize the court to incorporate them into said petition, and thereby create defects therein which did not otherwise exist on the face of the pleading itself. We are accordingly clearly of the opinion that the second assignment of error is well taken, and should be sustained. The other assignments of error are so connected as to be properly considered together.

The action of the court in overruling plaintiff's demurrer to the fifth paragraph of the answer, and in sustaining defendant's demurrer to the petition as thereafter amended, proceeded upon the theory that the written contract between plaintiff and defendant, which formed the cause of action sued upon, was invalid or wanting in binding force as to the plaintiff because not signed by two of its managers, and that being invalid, and not obligatory upon the plaintiff, there was no mutual and reciprocal obligation such as the law required to make the contract binding upon the defendant. This conclusion was rested upon the provision of section 5 of the Pennsylvania act of June 2, 1874, relating to and providing for the organization of limited partnerships, which provided:

"That there shall be at least one meeting of the members of the association in each year, at which there shall be elected not less than three nor more than five managers of said association, one of whom shall be the chairman, one the treasurer, and one secretary, or one may be both treasurer and secretary, who shall hold their respective offices for one year, and until their successors are duly installed; and no debt shall be contracted or liability incurred for said association except by one or more of said managers, and no liability for an amount exceeding five hundred dollars, except against the person incurring it, shall bind the said association, unless reduced to writing, and signed by at least two managers."

In *Melting Co. v. Reese*, 118 Pa. St. 355, 12 Atl. Rep. 362, and *Walker v. Brewing Co.*, 131 Pa. St. 546, 20 Atl. Rep. 309, the supreme court of Pennsylvania had this section before it for construction in suits against limited partnerships organized under the act upon verbal contracts made by one manager, which the partnership company had repudiated. Thus, in *Melting Co. v. Reese*, 118 Pa. St. 355, 12 Atl. Rep. 362, the chairman of the limited partnership verbally contracted to sell 600 tierces of oleo-margarine oil at 6½ cents, when the market price was 8½ cents. The company refused to confirm the sale and deliver the oil. The purchaser tendered the price, and brought suit to enforce the contract. The supreme court held that the manifest purpose of the section was "to protect the association and its members from all obligations not sanctioned in the manner especially provided;" that under the enactment the individual members did not have the authority of general partners to bind the association or limited partnership; that strangers dealing with such limited partnership, being supposed to know the law, are bound by the limitation imposed upon the members, and could not have the benefit of those inferences which flow from a relation of general partnership merely, and that "a contract of sale made by the chairman of the board of managers of such association without express authority from the board, or author-

ity to be implied from a course of like sales made without objection, is not binding." *Walker v. Brewing Co.*, 131 Pa. St. 546, 20 Atl. Rep. 309, is to the same effect. In *Andrews Bros. Co. v. Youngstown Coke Co.*, 39 Fed. Rep. 353, a bill was filed to reform an improvident contract made by one manager, and which the company had disavowed and repudiated, by compelling its execution by two managers of the association, to the end that it might be legally enforceable against the defendant. The relief sought was denied by the circuit court; *ACHESON, J.*, holding that said section was in the nature of a statute of frauds, of which the association could avail itself, and could not be deprived of the right so to do by a court of equity. These decisions fall far short of holding that all verbal or written contracts of limited partnerships, involving a liability exceeding the sum of \$500, are null and void unless made and signed by two managers of the association. They do not so construe said section 5 of the act, which, being intended for the protection of such association and their members, admits of no such construction. The intimation, if not the direct ruling, in *Melting Co. v. Reese*, 118 Pa. St. 355, 12 Atl. Rep. 362, is that a single member of a limited partnership, under express authority from the board of managers, or authority to be implied from a course of like sales made without objection, might bind the association. It will be noticed that the contracts sought to be enforced against the associations in the above cases were Pennsylvania contracts; that they were never approved, ratified, or acted upon by the association, but were promptly disaffirmed and repudiated. The court below, while conceding that said section of the act of 1874 did not make the contract in question null and void, yet held that the fifth paragraph of the answer, which set it up as a defense to the whole petition, was a good defense to the plaintiff's recovery of damages for breach of the executory contract of sale and purchase, for the reason that said contract could not have been enforced against the plaintiff if it had chosen to insist upon the informality in the written contract. From the construction given the act by the supreme court of Pennsylvania, the court considered it followed necessarily "that executory contracts of any kind cannot be enforced against either party, where, as in this case, there is no other consideration than the mutual agreement of the parties thereto." We do not concur in this view and ruling as a correct application of the law to the present case. The legal principle that contracts must be mutual does not mean that each party must be entitled to the same remedy for a breach by the other. There must be mutuality of obligation, but not necessarily mutuality of remedy. *Brown v. Munger*, (Minn.) 44 N. W. Rep. 519. This question arose in *Fishmongers' Co. v. Robertson*, 5 Man. & G. 131, where it was contended that as the plaintiffs were a body corporate, and the agreement which they sought to enforce was not under seal, as required by law, it did not bind them, and could not be obligatory on the defendant. *TINDAL, C. J.*, said, in delivering the judgment of the court, that the argument for the defense was that the company could not sue as plaintiffs on an agreement which could not have been enforced against them as defendants. The court held the de-

fenses bad, inasmuch as the declaration contained an averment of the performance of every matter which was a condition precedent to the right of action. As the result of this and other like decisions cited, it is said in *Hare on Contracts* (page 380) that "what is essential to a recovery is not that the contract shall be mutually obligatory, but that the plaintiff shall have complied with the terms on which the defendant declared his willingness to be bound." Contracts covered by the statute of frauds furnish analogous illustrations of their principle. Thus a contract for the sale of merchandise is obligatory on the vendor, under the seventeenth section of that statute, although the vendee does not sign the same, and could not be compelled to pay the price; and so, conversely, the vendee cannot defend an action for the purchase money on the ground that the vendor did not sign the memorandum, and might have withheld the goods. A defendant who has received or been tendered the full benefit of a contract cannot be allowed, in reason or justice, to set up as a defense to an action upon such contract that the plaintiff was not originally, or at the time of its execution, bound to perform the same. This principle is clearly recognized in *Storm v. U. S.*, 94 U. S. 76, where it was held that a defendant who had received the consideration of a written agreement could not, in an action brought against him for a breach of his covenant or contract, set up that the agreement did not bind the plaintiff to perform his covenants, provided it appears that he has performed them in good faith, and without prejudice to the defendant. In that case the defendants attempted to show that the agreement between themselves and the United States was inoperative because it contained a provision that it might be terminated at such time as the quarter-master general might direct, and in consequence of the further provision that it was made subject to the approval of the department and division commander. There was no direct evidence that said commander had approved the contract. The court say:

"Beyond doubt the written agreement went into operation, and it is not even suggested that department and division commanders ever expressed any disapproval of its terms and condition. * * * Suppose it be true that the quartermaster general might terminate it, if he should see fit. It is a sufficient answer to the suggestion to say that he never did interfere in the matter, and that the contract continued in full force and operation throughout the whole period for which the necessary supplies were purchased by the United States in open market—"

And then proceed to lay down the rule that, where defendant has received the consideration of a written agreement, it is no answer to an action for a breach on his part to say that it did not bind the plaintiff when executed; citing *Add. Cont.* (6th Ed.) 15, and *Morton v. Burn*, 7 Adol. & E. 25.

Now, in the present case, it is distinctly shown by the petition, and not controverted by the answer, that the written agreement between the parties was not only made, but went into actual operation; that plaintiff delivered 80,097 of the 200,000 pounds of steel agreed to be furnished and received; that defendant paid the contract price therefor, less
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the sum of \$1,756.54; that the balance of the steel was duly tendered by plaintiff and refused by defendant. What is the legal effect of those averments, if true? They establish full performance of the contract on the part of plaintiff, under the rule laid down in *Hepburn v. Auld*, 1 Cranch, 321-330, where it is said by the chief justice, speaking for the court, that—

“To entitle themselves to the money for which the suit was instituted, it is incumbent on the plaintiffs to show that they have performed the very act on the performance of which the money became payable, or that they are excused by the conduct of the defendant for its non-performance. The act itself has not been performed, but a tender and refusal is equal to a performance.”

This is fully supported by the modern authorities; and, after such actual and legal performance as plaintiff has alleged in this case, it is no answer to the action for defendant's alleged breach of the contract to say that plaintiff was not bound to have performed or tendered such performance.

Again, if it be conceded that plaintiff was not originally bound by the written agreement sued on, it is alleged in the last amendment of the petition that plaintiff had adopted and did adopt said contract. There was nothing in the agreement, either as to subject-matter or terms and conditions, to render the contract illegal or contrary to public policy, or to show that it was beyond the scope and authority of the plaintiff to make, or, if made by an unauthorized agent, to prevent the plaintiff from ratifying and adopting it; nor would such ratification and adoption have to be made in the form or with the formality of a writing signed by two managers of the partnership company, (limited.) In section 635, 2 Mor. Priv. Corp., the rule is accurately stated as follows:

“It is to be observed that a provision in a charter requiring a certain formality in the formation of a contract does not necessarily make such formality essential to the ratification of a contract already formed, and the superior agents of a corporation may have authority to dispense with formalities which are made obligatory upon inferior or subordinate agents.” Citing *Beecher v. Rolling-Mill Co.*, 45 Mich. 103, 109, 7 N. W. Rep. 695, and *Reuter v. Telegraph Co.*, 6 El. & Bl. 341.

In the latter case the charter of the defendant corporation prohibited the company from being bound by any contracts above a certain value, unless they were signed by at least three directors. The company was sued on a contract above the prescribed value, which had been made by the chairman alone, verbally; and it was held that the contract, executed by the chairman alone, without authority, had been rendered binding upon the company by the subsequent acquiescence on its part. *Wilson v. Railroad Co.*, 2 De Gex, J. & S. 475, is to the same effect. The decisions of the supreme court establish beyond question the same general principle. *Supervisors v. Schenck*, 5 Wall. 782; *Bank v. Matthews*, 98 U. S. 629; *Creswell v. Lanahan*, 101 U. S. 349-351; *Pittsburgh, C. & St. L. Ry. Co. v. Keokuk & H. Bridge Co.*, 131 U. S. 381, 9 Sup. Ct. Rep. 770. So in *Kelsey v. Bank*, 69 Pa. St. 426-429, the court said:

“The law is well settled that a principal who neglects promptly to disavow an act of his agent, by which the latter has transcended his authority,

makes the act his own; and the maxim which makes ratification equivalent to precedent authority is as much predicable of ratification by a corporation as it is of ratification by any other principal, and it is equally to be presumed from the absence of dissent."

It admits of no question that plaintiff, in its corporate or limited partnership capacity, had the power, as a company or association, to make the contract in question. There is nothing in the act of June 2, 1874, set up in the fifth paragraph of the answer, to limit and confine the plaintiff, whether regarded as a corporation or association, to the single mode of entering into contracts by two of its managers; and, whatever contract it could make as a body, it can ratify when made by an agent who has acted without previous authority. There is, indeed, nothing in the pleadings in the present case to negative the presumption that Sutton, who acted on behalf of plaintiff, did not have full and ample authority to make the contract sued on for plaintiff. The statement in the fifth paragraph of the answer that he did so without proper authority is a legal conclusion not admitted by the demurrer to said paragraph. But, however this may be, plaintiff's ratification and adoption of the contract is sufficiently alleged to enable it to sue upon the same.

Besides, the bringing of suit upon the contract is a ratification thereof, and of the act of the agent in entering into it for plaintiff. *Bank v. Sharp*, 4 Smedes & M. 75. In *Fishmongers' Co. v. Robertson*, 5 Man. & G. 131, the court seems to have considered that the ratification implied in bringing suit thereon rendered the contract obligatory on the company. See, also, to the same point, *Richards v. Green*, 23 N. J. Eq. 537, and Fry, Spec. Perf. (2d Amer. Ed.) § 297. It is not, however, deemed necessary to discuss what acts or contracts on the part of the principal will constitute a ratification of an unauthorized act done by another in his name or on his behalf. It being distinctly alleged that plaintiff had adopted, and had, in legal effect, performed, the contract, the right to maintain the action thereon was clear.

But, aside from the views already expressed, there is presented by the record another ground for holding the action of the lower court to be erroneous. It seems to have been assumed by the court, and the same assumption is made by counsel for defendant in this court, that the written contract between plaintiff and defendant, which constituted the foundation of the suit, was a Pennsylvania contract, governed and controlled by the said act of June 2, 1874. The contract was dated and executed at Louisville, Ky.: by or on behalf of both parties. The alleged defect in the agreement is that it was not signed or executed by or for plaintiff in proper form, or according to the formalities required by the fifth section of the Pennsylvania act of June 2, 1874, in order to make it binding on plaintiff. It is settled by the authorities that the place of making the contract governs as to the formalities necessary to the validity of the contract. Wheat. Conf. Laws, § 401; Pars. Bills & Notes, 317. In *Scudder v. Bank*, 91 U. S. 412, the court says:

"Whether a contract shall be in writing, or may be made by parol, is a formality to be determined by the law of the place where it is made. If valid

there, the contract is binding, although the law of the place of performance may require the contract to be in writing." Citing *Dacosta v. Davis*, 24 N. J. Law, 319.

It is further said by the court that—

"Matters bearing upon the execution, the interpretation, and the validity of a contract are determined by the law of the place where the contract is made. Matters connected with its performance are regulated by the law prevailing at the place of performance. Matters respecting the remedy, such as the bringing of suits, admissibility of evidence, statutes of limitation, depend upon the law of the place where the suit is brought."

In *Pritchard v. Norton*, 106 U. S. 130, 1 Sup. Ct. Rep. 102, the foregoing propositions are again approved. See, also, *Matthews v. Murchison*, 17 Fed. Rep. 768. It follows from the foregoing principles and authorities that, the contract in question having been executed at Louisville, Ky., its validity and binding operation is not to be determined by the Pennsylvania act of June 2, 1874, set up as a defense by the fifth paragraph of the answer, and plaintiff's demurrer thereto should have been sustained.

Other questions presented need not be specially referred to, as the foregoing conclusions dispose of the case. We think the plaintiff's assignments of error are well taken, and that the action of the lower court in overruling plaintiff's demurrer, and in sustaining defendant's demurrer to the petition as amended, and in dismissing the suit, was erroneous, and should be reversed. It is accordingly so ordered and adjudged, and the cause will be remanded to the circuit court for the district of Kentucky for further proceedings therein in conformity with this opinion, and with leave to plaintiff to further amend its petition so as to show the citizenship of its members, if it is an association or limited partnership and not a corporation, as may be necessary under the authority of *Chapman v. Barney*, 129 U. S. 682, 9 Sup. Ct. Rep. 426.

POST v. PULASKI COUNTY.

(Circuit Court of Appeals, Seventh Circuit. March 8, 1892.)

1. COUNTY BONDS—RECITAL—NOTICE.

A recital in county bonds that they are issued "pursuant to an order of the county court" puts all persons dealing in the bonds upon inquiry as to the terms of the order.

2. SAME—RAILROAD AID BONDS—VALIDITY.

Act March 6, 1867, incorporating the C. & V. R. Co., empowered municipal corporations, when authorized by popular vote, to subscribe for stock in the company, and issue bonds in payment therefor. A county agreed, by popular vote, to subscribe for \$100,000 of stock, and issue bonds therefor, but before issuance of the bonds the county authorities agreed to sell the stock back to the company in exchange for \$5,000 in bonds. In fact, only \$95,000 of bonds were issued and delivered to the company, and no stock received by the county. Held, that the bonds were void, since the transaction, being a gift and not a subscription, was not authorized by the statute, nor assented to by the popular vote. *Choisser v. People*, (Ill. Sup.) 29 N. E. Rep. 546, followed.

8. SAME—CONSTITUTIONAL LAW.

Act Feb. 9, 1869, (8 Priv. Laws 1869, p. 259,) amending the charter of said railroad company, which attempts to validate all contracts between said company and municipalities, whereby the latter agreed to sell to the company at a nominal price the stock for which they had subscribed, has no effect, where the contract was made by the municipal authorities without being submitted to popular vote, as required by law, since the legislature cannot impose an obligation upon a municipality without its consent, legally expressed. *Choisser v. People*, (Ill. Sup.) 29 N. E. Rep. 546, followed.

Error to the Circuit Court of the United States for the Southern District of Illinois.

Assumpsit by Mary E. Post, as administratrix of the estate of A. T. Post, deceased, against the county of Pulaski. Judgment for defendant. Plaintiff brings error. Affirmed.

Connolly & Mather and John F. Dillon, for plaintiff in error.

Saml. P. Wheeler, (L. M. Bradley and Brown, *Wheeler & Brown*, of counsel,) for defendant in error.

Before GRESHAM, Circuit Judge, and BLODGETT and JENKINS, District Judges.

BLODGETT, District Judge. This is an action of *assumpsit* upon 196 interest coupons, of \$20 each, cut from 30 bonds of the defendant county; said bonds being for the sum of \$500 each, of like tenor, all dated October 17, 1872, payable 20 years after date, with interest at the rate of 8 per cent. per annum, payable on the 1st days of January and July in each year, as evidenced by coupons attached; said bonds being part of an issue of 200 bonds, of like tenor and amount, issued by the defendant county in aid of the construction of the Cairo & Vincennes Railroad. Defendant pleaded the general issue, and filed with its plea an affidavit denying the execution by the county of the instruments sued upon. By stipulation in writing between the parties, a jury was waived, and the case tried by the court, who found the issues for the defendant, and entered judgment upon the finding.

The evidence in the bill of exceptions, and the opinion of the court below, which is found in the record, show that the case was heard and considered solely upon the question of the power of the county to issue the bonds from which the coupons in question were cut. The bonds in question each contain the following recital:

"This bond is one of two hundred, of like tenor and amount, of the same issue, and is issued pursuant to an order of the county court of said county, authorized by a majority of the legal votes cast at an election held in said county, pursuant to law, on the 5th day of November, A. D. 1867. This bond is also issued under the provisions of an 'Act to incorporate the Cairo & Vincennes Railroad Company,' approved March 6th, 1867, and under the provisions of an act to amend said act, approved February 9th, 1869; also, under the provisions of an act entitled 'An act to fund and provide for the payment of the railroad debts of counties, townships, cities, and towns,' approved April 16th, 1869, and is in part payment of a subscription to the capital stock of the Cairo & Vincennes Railroad Company, in the total sum of one hundred thousand dollars."

The special statutory authority for the issue of bonds by the county in aid of the railroad named is found in the tenth section of the act of

the general assembly of Illinois, approved March 6, 1867, entitled "An act to incorporate the Cairo & Vincennes Railroad Company," (2 Priv. Laws 1867, p. 561,) as follows:

"The several towns, cities, or counties through or near which said railroad shall pass may subscribe for and take stock in this company, and may issue bonds in payment for such stock of five hundred dollars each, bearing interest at the rate of eight per cent. per annum, or less, payable half-yearly in the city of New York on the 1st days of January and July of each year, said bonds to run not longer than twenty-five years. And a tax of not more than one dollar on each one hundred dollars' worth of taxable property may be levied and collected in such town, city, or county, per annum, to pay the installments on such stock, or to pay the interest and principal of bonds issued in payment for such stock: provided, that no such subscription shall be made, no such bonds shall be issued, and no such tax shall be levied unless a majority of the legal voters of said town, city, or county shall vote for the same at an election to be held under order of the corporate authorities in cases of towns or cities, and of the county court in cases of counties: provided, further, that a majority of legal voters at any such election shall be held as a majority of the legal voters of any such town, city, or county, and the questions of making a subscription, issuing bonds, and levying taxes may be submitted as one question or as separate questions at such election, and either or all of said questions may be submitted to an election at any time, in the discretion of the authorities authorized to call such election."

Power is also given a municipal corporation to issue bonds in payment of subscription to the stock in railroad corporations by an act approved November 6, 1849, entitled "An act supplemental to an act entitled 'An act to provide for a general system of railroad incorporations.'"

Without discussing all the questions made on the argument of the case, we think the record shows one so obvious ground for sustaining the judgment of the court below that no other need be considered. The bonds recite that they are issued "pursuant to an order of the county court of said county, * * * in part payment of a subscription to the capital stock of the Cairo & Vincennes Railroad Company." This recital, that the bonds were issued pursuant to an order of the county court, undoubtedly put all persons dealing in the bonds on inquiry as to the terms of that order. An examination of the records of the county court of the county would have shown, as clearly appears from the proof in this case, that on the 17th day of September, 1867, the court ordered that an election be held in the county, at the various voting precincts, on the 5th day of November, 1867, to vote upon the question of subscribing the sum of \$100,000 to the capital stock of the Cairo & Vincennes Railroad Company, and the issue of the bonds of the county in the denominations of \$500 each, payable in 20 years, bearing interest at 8 per cent. per annum, payable half-yearly, on the 1st days of January and July in each year, in payment for such stock, and that on the 2d day of December, 1867, the county court entered into a contract with the railroad company, which recites that, at an election held in the county on the 5th day of November, 1867, the county court was authorized to make a subscription of \$100,000 to the capital stock of said railroad company, and to pay for said stock in bonds of the county. It

was therefore agreed that the county should sell to the railroad company the \$100,000 of stock so to be issued to the county in payment for said bonds for the sum of \$5,000 in bonds,—in other words, that the county should give \$95,000 of its bonds for \$5,000 of stock in the railroad company; and by orders of the county court entered upon their records at the July term, 1870, June term, 1871, and March term, 1872, which in terms purported to extend from time to time the period within which the railroad should be completed, and yet be entitled to receive the bonds, this provision in regard to the sale of the stock to the railroad company was retained in full force. No actual subscription by the county for the stock of the railroad company was made until March 4, 1872, when the county court, for the first time, made a subscription for the \$100,000 of the stock of the railroad company; and, in the order making this subscription, it was expressly provided that the subscription should in no way invalidate the contract then in force between the county and the railroad company, by which the capital stock received by the county is sold to the railroad company; and in a subsequent order, entered the same day, in regard to the same subject-matter, is the following paragraph:

“And it is further agreed that upon the completion of said road and the delivery of said bonds, upon the terms and conditions hereinbefore expressed, this county will accept and receive the balance of said sum of \$100,000, to-wit, \$5,000, due to said company, in full payment for the sum of \$100,000 stock in said road, and will waive the actual issue thereof to said county.”

There can be no doubt that the legal effect of this contract and the orders of the county court was to donate or give the railroad company \$95,000 in the bonds of the county. The county was to receive no stock, but was to give the railroad company \$95,000 of its bonds. The election held on the 5th of November, 1867, was to vote upon the question of subscribing for \$100,000 of the stock of the company, and issuing the bonds of the county in payment therefor. No special or general statute of the state, then in force, authorized the county to make a donation of its money or bonds in aid of this railroad company. That there is an essential difference between a proposition to subscribe for stock in a railroad company, and thereby become a stockholder, with a right to share in the profits of its business and have a voice in the management and policy of the company, and a proposition to make a donation of bonds or money to the railroad company, is too plain to require argument or the citation of authority. The order of the county court, making the subscription to the stock and directing the issue of the bonds, and which must be read into each bond and coupon, shows in unmistakable language, so plain that it requires no technical skill to construe or apply it, that the bonds were issued as a donation to the railroad company, and not in payment of a subscription to its stock.

The case of *Choisser v. People*, 29 N. E. Rep. 546, lately decided by the supreme court of Illinois,—the manuscript opinion of which has been handed us since the argument of this case,—is almost identical in its facts, as far as the questions now under consideration are concerned,

with this case. It involved an issue of bonds by another county (Saline) in aid of the construction of the same railroad, and in pursuance of the same section of the charter of the railroad company. An agreement between that county and the railroad company was made after the vote authorizing the subscription, in substantially the same terms as was made in the case now under consideration. And in that case the court, speaking by Mr. Justice BAILEY, says in regard to this contract:

"That in its consummation, if not in its inception, the transaction was a donation, pure and simple, is too plain to admit of serious controversy. In the beginning, and until the election was had, the guise of a subscription was resorted to, so as to bring the municipal aid sought to be obtained apparently, at least, within the power conferred upon the county by the tenth section of the railroad company's charter. But, when viewed in the light of the interpretation put upon the transaction by the subsequent acts of the parties, it appears too transparent to mislead. The bonds being essentially a donation, it was not within the power of the county court to issue them, and they must therefore be held to be *ultra vires* and void."

It is further urged in behalf of the appellant that the action of the county court in making the contract in question with the railroad company was validated by the third section of "An act to amend an act entitled 'An act to incorporate the Cairo & Vincennes Railroad Company,'" approved February 9, 1869, (3 Priv. Laws Ill. 1869, p. 259.) This section provides:—

"That all contracts made by towns, cities, and counties, into, through, or near which the Cairo & Vincennes Railroad shall run, whereby, as an inducement for the construction of said railroad, such towns, cities, and counties agreed, upon the completion of certain portions of said railroad, to sell to the said company, at a nominal price, the stock of said company, for which such towns, cities, or counties, by a vote of their electors, had theretofore subscribed and agreed to issue bonds in payment therefor, thereby, in effect, agreeing to make a donation to said company of certain amounts of the bonds of such towns, cities, or counties, as an inducement for the construction of said railroad, are hereby declared to be valid and binding upon such towns, cities, and counties, and shall be carried into effect, in good faith, by the same; and all orders for and notices of elections, and elections and returns of such elections, in respect to such subscriptions of stock to said company, in any such towns, cities, and counties, are hereby declared to be valid and binding upon such towns, cities, or counties."

In reference to the validity of this statute, we cannot express our own views more clearly or forcibly than by quoting from the opinion of the learned judge in the case just referred to, in which he says:

"The only proposition which had been submitted to the vote of the people of the county, and the only proposition which, under existing laws, the county court had power to submit to them, was that of making a subscription to the capital stock of the railroad company, the stock to be received as the consideration, and, presumably, the equivalent, for the county bonds to be issued in pursuance of the subscription. The proposition to donate \$95,000 in county bonds to said railroad company was never submitted to the people of said county, was never voted upon by them, and could not, under then existing laws, have been submitted to such vote. The subsequent contract entered into by the county court, to sell back the stock subscribed for for a nominal consideration, so as to effectually transmute the proposition to subscribe \$100-

000 to the capital stock of said company, to which the people of the county had given their assent, into a proposition to donate to the railroad company \$95,000 of county bonds, to which the people of the county had not, and could not have, given their assent, was clearly void, so as to confer no rights and impose no obligations. * * * In the present case the amendatory act of 1869, if effectual at all, can be held to operate only by way of validating a contract for a donation which, by reason of want of power, as well as the absence of either an intention or opportunity on the part of the legal voters of the county to give their assent to it, was *ultra vires* and void. Declaring such void contract to be valid and binding, and providing that it should be carried into effect in good faith, as said amendatory act undertook to do, was an attempt to impose upon the county an obligation in aid of the railroad without its own consent, expressed in any legal form."

For these reasons, we are of opinion that whoever dealt in those bonds is chargeable with notice from the records of the county court of Pulaski county that the bonds were donated to the railroad company, and were not issued by the county in payment of a subscription to the stock of the company. The recitals in the bonds that they were issued pursuant to an order of the county court put whoever should come into the possession of those bonds, even if purchased for value upon the open market, upon inquiry as to the terms of that order; and it needs no judicial interpretation of the contract referred to in the orders of the county court, to see that the county did not, in legal effect, subscribe for the stock of this railroad, but agreed to donate, and did donate, its bonds in aid of this railroad. The decree of the court below is therefore affirmed.

In re KURSHEEDT MANUF'G CO.

(Circuit Court, S. D. New York. March 9, 1892.)

1. CUSTOMS DUTIES—ADMINISTRATIVE CUSTOMS ACT JUNE 10, 1890—FINDING OF BOARD OF UNITED STATES GENERAL APPRAISERS.

In a case arising under section 14, and brought for review before the United States circuit court under section 15 of the administrative customs act of June 10, 1890, (chapter 407, 26 St. U. S. p. 131,) a finding upon a question of fact by the board of United States general appraisers, in the absence of any further or different testimony than that returned to that court by that board, will not be disturbed, but will be affirmed, by that court.

2. SAME—TARIFF ACT OCT. 1, 1890—VELVETEEN DRESS FACINGS.

Articles composed of cotton, which are made from colored cotton velvet or velveteen by cutting the same bias into narrow strips or short lengths, and lapping over the ends of such strips, and then sewing together such ends so lapped, and which are principally used for facing skirts of dresses, and not for trimming dresses, and are known commercially, not as trimmings, but as velveteen dress facings, are not dutiable at the rate of 14 cents per square yard, and 20 per centum *ad valorem*, under the provision for "velvets, * * * velveteens, * * * and all pile fabrics composed of cotton, * * * colored," contained in paragraph 350 of the tariff act of October 1, 1890, (chapter 1244, 26 St. U. S. p. 567,) or at the rate of 60 per centum *ad valorem* as trimmings composed of cotton, under the provision for such trimmings contained in paragraph 373 of the same tariff act, but are dutiable at the rate of 40 per centum *ad valorem*, as "manufactures of cotton," under the provision for such manufactures contained in paragraph 355 of the same tariff act.

At Law.

During the year 1891 the Kursheedt Manufacturing Company imported from a foreign country into the United States at this port certain merchandise, consisting of so-called bias velveteen dress facings. This merchandise, having been returned by the local appraiser as colored cotton velvet, cut bias into strips one and one-eighth inches wide, and sewed together, and intended for binding, facing, or trimming dresses, was classified as colored velveteen or velvet, composed of cotton, under the provision for such velveteens and velvets contained in paragraph 350 of the tariff act of October 1, 1890, (chapter 1244, 26 St. U. S. p. 567,) and duty at the rate of 14 cents per square yard, and 20 per cent. *ad valorem*, as prescribed by that paragraph, was exacted thereon by the collector of customs at this port. Against this classification and this exaction the importers protested, claiming that this merchandise was dutiable at the rate of 40 per cent. *ad valorem*, as a manufacture of cotton, under the provision for such manufactures contained in paragraph 355 of the same tariff act. The board of general appraisers to which the invoice of this merchandise, and all the papers and exhibits connected therewith, were transmitted by the said collector pursuant to section 14 of the administrative customs act of June 10, 1890, (chapter 407, 26 St. U. S. p. 131,) after taking testimony, found, among other things: (1) That this merchandise was principally used for facing the skirts of dresses, (and not for trimming dresses;) (2) that it was composed of cotton; (3) that it was commercially known as "velveteen dress facings;" (4) that it was made from cotton velvet or velveteen; (5) that it differed from cotton velvet ribbons and cotton velvet piece goods, it having been cut bias into narrow strips of short lengths, and the ends thereof lapped over and sewed together, thus rendering square-yard measurement difficult, if not almost impossible; (6) that it was not commercially known as trimmings, nor was it chiefly used as trimmings; (7) that it was not dutiable as velvets, velveteens, or other pile fabrics composed of cotton, under the provisions for such velvets, velveteens, and pile fabrics, contained in said paragraph 350, or, as claimed by the said collector, if not so dutiable, at the rate of 60 per centum *ad valorem*, as trimmings composed of cotton, under the provision for such trimmings contained in paragraph 373, but was dutiable as a manufacture of cotton at the rate of 40 per centum *ad valorem*, under the provision for such manufactures contained in said paragraph 355, as claimed by the appellant. From this decision of the board of general appraisers the collector, pursuant to section 15 of the said administrative customs act, appealed to the United States circuit court for a review of the questions of law and fact involved therein. The case was tried upon the return made by the board of general appraisers.

Edward Mitchell, U. S. Atty., and *Thomas Greenwood*, Asst. U. S. Atty., for appellant.

Alexander E. Kursheedt, for appellees.

LACOMBE, Circuit Judge. I do not think that I should interfere with the finding of the board of general appraisers. This is a case where, un-

der the old practice, I should send it to the jury to determine whether, by the ordinary processes of manufacture, the article had been advanced, in the meaning as understood in trade and commerce, outside of and beyond the group of articles included in paragraph 350; and their verdict, on such evidence as there is here, I should not disturb, whatever it might be. Under these circumstances, I shall not disturb the finding of the board of general appraisers. Decision affirmed.

COMBS *et al.* v. ERHARDT.

(Circuit Court, S. D. New York. November 24, 1891.)

CUSTOMS DUTIES.—ACT OF MARCH 3, 1883.—METALLIC BEDSTEADS.

Certain bedstead mounts, brass and iron castings, bedstead tubes, bedstead knobs, vases, castors, etc., for use in the manufacture of metallic bedsteads, held not dutiable as "house and cabinet furniture in piece or rough, and not finished," at 30 per cent. *ad val.*, under Schedule D, par. 229, Act March 3, 1883, but at 45 per cent. *ad val.*, as "manufactures of metal," under Schedule C, par. 216, of said act.

At Law.

The plaintiffs, Henry W. Combs & Co., in July, 1890, imported into the port of New York certain brass and iron castings, iron tubes, brass knobs, castors, etc., for use in the manufacture of metal bedsteads. The defendant, collector of customs at the port of New York, levied and assessed a duty of 45 per cent. *ad valorem* upon the importation as "manufactures of metal," under paragraph 216, Schedule C, of the tariff act of March 3, 1883. The plaintiffs protested, claiming that the merchandise was dutiable as "house and cabinet furniture in piece or rough, and not finished," at the rate of 30 per cent. *ad valorem*, under paragraph 229 of Schedule D of the same act. The articles in suit were manufactured at Birmingham, England. They were not made in the same factories in Birmingham where metal bedsteads or metal furniture of any kind were manufactured. The manufacture of such articles as those in suit is in England a separate trade from the furniture. They did not constitute, on their arrival, all the completed parts of metallic bedsteads, and were not then in a condition to be put together, without further manipulation, to form completed metal bedsteads. At the close of the testimony the United States attorney, in behalf of the defendant, moved for a direction of a verdict in his favor, on the grounds (1) that the articles in suit, in the condition in which they were imported, were not "furniture" in any proper or correct sense of the term, and were not, therefore, covered by paragraph 229 of Schedule D; and (2) that the articles in suit, being manufactured entirely of brass, iron, or other metal, were not covered by the furniture paragraph, (229,) which relates only and exclusively to furniture made of wood, or of which wood is the component material of chief value.

Hoffman Miller, for plaintiffs.

Edward Mitchell, U. S. Atty., and Henry C. Platt, Asst. U. S. Atty., for defendant.

LACOMBE, Circuit Judge. I shall grant the motion of the defendant upon the ground that the articles imported are not within the meaning of the tariff phrase, "house furniture in the piece or rough."

UNITED STATES v. LOEB.

(Circuit Court, S. D. New York. February 23, 1892.)

INTERNAL REVENUE—CONSTITUTIONAL LAW—TRADE-MARKS.

Rev. St. U. S. § 3449, making it an offense to ship spirituous or fermented liquors or wines under any other brand or name than that known to the trade as designating the kind or quality thereof, is not unconstitutional, within the principle of the *Trade-Mark Cases*, 100 U. S. 82, because it incidentally acts in some cases as a protection to trade-marks.

Petition for a Writ of *Habeas Corpus* to release Morris Loeb, held under commitment for violating the internal revenue laws.

A. J. Dittenhoefer, for petitioner.

Maxwell Evarts, for the United States.

LACOMBE, Circuit Judge. Under the authority conferred by the first clause of section 8 of article 1 of the constitution, to-wit, to "levy and collect taxes," and to "make all laws which shall be necessary and proper for carrying into execution that power," congress has levied a tariff upon foreign goods, and also taxes certain domestic products, under a comprehensive plan of internal revenue. The government of the United States collects duties upon spirituous and fermented liquors and wines, brought from abroad, and lays taxes upon such as are manufactured here, and also upon the business of manufacturing and dealing in them. It has elaborated in great detail a system by which it practically takes control of the manufacture of alcoholic spirits for the purpose of managing the collection of the revenue assessed therefrom, and exercises a surveillance over their manufacture and sale. The constitutionality, generally, of such legislation is not assailed. Without rehearsing the details of this system, it is apparent that it may be very desirable, perhaps necessary, to its success that all casks or packages containing distilled spirits shall be truthfully marked, such marking affording to the officers of the government a convenient means both of checking the returns of the manufacturing distiller and preventing the smuggling of untaxed products into the general market of the country. In the last paragraph of section 29 of the act of congress approved July 13, 1866, and entitled "An act to reduce internal taxation and to amend an act entitled 'An act to provide internal revenue to support the government, to pay interest on the public debt, and for other purposes,' approved June 30, 1864," (now section 3449, Rev. St. U. S.,) it is provided as follows:

"Whenever any person ships, transports, or removes any spirituous or fermented liquors or wines, under any other than the proper name or brand known to the trade as designating the kind and quality of the contents of the casks or packages containing the same, or causes such act to be done, he shall forfeit said liquors or wines, and casks or packages, and be subject to pay a fine of five hundred dollars."

That the relator did ship, transport, and remove a package of spirituous liquor, to-wit, gin, under a name or brand "other than the proper name or brand known to the trade as designating the kind and quality of" the contents of the package, is conceded. He insists that he should be discharged, because, as he contends, this provision of statute is an attempt to legislate for the protection of trade-marks, and, as such, beyond the constitutional power of congress, citing the *Trade-Mark Cases*, 100 U. S. 82. I am unable to assent to this proposition. There is nothing in the section which restricts its operation as counsel for the relator suggests, or indicates that it was passed for any purpose other than to provide facilities for the enforcement of the internal revenue laws. The trade may be able to recognize the kind and quality of spirituous liquors by some "proper name or brand," and that name or brand still be no "trade-mark," in the sense in which the word was used in the statute which was criticised by the supreme court in the case cited. The section seems to be well adapted to facilitate the administration of the internal revenue system. As a part of that system, it was within the power of congress to enact it, and it should not be held unconstitutional because, in some cases, the "name or brand," which must be placed upon the cask or package in order to truthfully describe the contents, happens to be a trade-mark, which might thus incidentally be protected. *State v. Bridge Co.*, 18 How. 421.

STARLING v. WEIR PLOW CO. *et al.*¹

(Circuit Court, N. D. Illinois, S. D. August 20, 1891.)

1. PATENTS FOR INVENTIONS—PATENTABILITY—NOVELTY—SULKY PLOWS.

The first claim of letters patent No. 154,298, issued August 18, 1874, to William Starling, for an improvement in sulky plows, consisting of the combination of a crank-bar with the plow-beam, lever, and axle, so that the horses are made to raise the plow out of the ground, is void for want of novelty.

2. SAME—RES ADJUDICATA.

A decision that a patent which has three claims covering different features of the device is not void for want of novelty does not render the question of novelty *res adjudicata*, when a single one of the claims is attacked in a subsequent suit for want of novelty, and proof is introduced in such subsequent suit that was not offered in the former suit.

In Equity. Bill by William Starling against the Weir Plow Company and William Weir to restrain an alleged infringement of a patent.

¹Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

W. H. Walla, for complainant.
Bond, Adams & Pickard, for defendants.

BLODGETT, District Judge. This is a suit charging the defendant with infringement of patent No. 154,293, granted August 18, 1874, to complainant, for an "improvement in sulky plows," and praying an injunction and accounting. The plow described in the specifications and drawings of this patent consists of a two-wheel sulky plow, with an arched axle, or an axle bent downward towards each end; the spindle for the right-hand wheel being a horizontal projection from the portion so bent downward. Pivoted upon the vertical part of the axle, just above the angle from which the right-hand wheel spindle projects, is what the patentee calls a "crank-bar," which extends backward and transversely across, nearly from hub to hub, and is also pivoted to the lower end of the vertical part of the axle, near the spindle of the left-hand wheel; and the plow-beam is attached to the transverse part of this crank-bar, near the middle of the bar, by a jointed coupling, so that the plow-beam can rock upon its attachment to the crank-bar, and the forward end of the beam be raised and lowered by rocking this crank-bar. A lever rigidly connected with this crank or bail extends upward to the driver's seat, so that by the movement of this lever by the driver the crank-bar may be rocked and the plow raised or lowered. There are other features of the plow, not now in controversy, which it is not necessary, for the purposes of this case, to describe.

Infringement is charged only as to the first claim, which is:

"(1) The crank-bar, K, combined with the plow-beam, N, lever, L, and axle, A, as and for the purpose set forth, so that the horses are made to raise the plow out of the ground."

The defenses relied upon are: (1) That the patent is void for want of novelty; (2) that defendants do not infringe.

The material question in the case, in my judgment, is as to the patentable novelty of the device, in the light of the state of the art as disclosed in the proof. This patent was before the United States circuit court for the district of Minnesota in *Starling v. St. Paul Plow-Works*, 29 Fed. Rep. 790, and 32 Fed. Rep. 290, and there sustained. That case was a suit at law brought by complainant, as owner of this patent, upon a contract or license given by him to the St. Paul Plow-Works, by which the licensee was permitted to manufacture and sell plows made under this patent, within certain territory, for a royalty of \$2.50 per plow. After the defendant in that case had made and sold 35 or 40 plows under the license, notice was given to the patentee that the plows were unsatisfactory; that many of them had been returned as unserviceable; and that the licensee renounced the license, and would thereafter manufacture plows of its own design. After this notice and renunciation of the license, the licensee made about 1,300 plows after what it called its own design, on which it refused to pay the royalty called for by the license, whereupon the patentee brought suit to recover his royalty or license fee,

claiming that the plow designed and made by the licensee after the renunciation of the license contained the features covered by the patent. The question properly in issue in that case was whether the plows made by the defendant, on which it refused to pay royalty, embodied the features, or any of them, covered by the claims of the patent. The court held, properly, as I think, that as defendant had, by its answer in the case, denied the novelty of the device covered by the patent, and plaintiff had not replied an estoppel under the license, proof upon the question of novelty was admissible; and, under this ruling, proof of the issue of several prior patents was heard and considered. The plaintiff's patent has three claims, covering different features of the device; and it is obvious that, if the plows made by the defendant in the Minnesota case contained features covered by any of these claims, then it was liable for a license fee. This case differs, then, from the Minnesota case, in two essential particulars: *First*, only one claim is in controversy here, while the whole patent was in controversy there; and, *second*, defendants have introduced in this case a large amount of proof which was not offered in that case; and I think it but right to say that I think the Minnesota case was properly decided upon the issues and proofs before that court. The Minnesota case is invoked here under a rule of comity which prevails between federal courts of co-ordinate jurisdiction when a question which has been decided in one is raised in another, upon substantially the same facts. If the facts in the later case essentially differ from those of the adjudged case, then the rule of comity has no application, or its application is limited. While, therefore, this court would be very glad to consider the question of novelty as *res adjudicata*, and follow the Minnesota case, it is plain that, as the proofs in this case differ from the proofs in that case, we must examine the question of novelty here upon the proof now presented, instead of resting upon the former decision.

I do not deem it necessary to analyze all the prior patents which have been put in proof in this case. It is enough, I think, to say that it clearly appears from the proof that crank or arched axles are old in the art, and that crank-bars, bails, or yokes,—for the same thing is known by these different names in the art,—as a means of raising or lowering the plow-beam, were well known in the art prior to the plaintiff's patent. A patent to William Mason, of January, 1869, for an "improvement in gang plows," shows an arched axle with a frame to which the plow-beams were attached, and a crank-bar so arranged in connection with the frame that when the crank-bar was rocked by means of a lever at the driver's seat the plow-beams were raised or lowered. It is true this Mason patent shows two crank-bars,—one under the rear and the other under the forward end of the frame to which the plow-beams were attached,—both of which crank-bars were rocked by the lever; but the principle or idea of a crank-bar operating with an arched axle and lever as a means for raising or lowering the plow-beam is, I think, clearly developed in this patent. In the Worrell & Ryneerson patent of March, 1871, a plow is shown with a bent or arched axle, and underneath the axle are pivoted two bars projecting to the rear of the axle, where their rear end

is connected by a cross or transverse bar to which the plow-beam is attached, or, as the specification says, "this transverse or cross bar may be made a continuation of the rearward projecting arms." One of these arms, so pivoted to the axle, also extends forward of the axle, and forms a lever, by means of which the crank-bar may be rocked and the plow-beams raised or lowered; the driver, from the location of the lever, rocking the lever with his foot instead of his hand, as in the complainant's patent. It is obvious, I think, that by merely bending this arm of the Worrell & Rynearson crank-bar, which extends horizontally forward of the axle, upward, so that the driver could operate it with his hand, it would be, in function and mode of operation, the crank-bar and lever of the complainant's patent, and thus to bend the lever of the crank-bar upward to the driver's seat, or where it can be reached and operated by the driver's hand, instead of his foot, is a mere mechanical change, which would not involve invention. The Owens patents of February, 1872, and November, 1872, also show a crank-bar or yoke, as it is called in these patents, to which the plow-beam is attached or hung, which yoke, when tilted or rocked by means of a lever extending up to the driver's seat, raises or lowers the plow-beams. We have in these four patents, as it seems to me, a complete anticipation of the complainant's crank-bar, and in all those patents the crank-bar co-operated with the arched or bent axle, and a lever which rocked the crank-bar, to raise and lower the plow-beams, thus containing all the elements of the first claim of complainant's patent, combined, operating, and producing the same result produced by the complainant's combination. It is true that in several of these older patents the crank-bar is incumbered with other auxiliary devices; but, for the office performed by the crank-bar in complainant's patent, they are essentially the same as complainant's crank-bar. It is true that complainant states in his specifications, and assumes to cover by his first claim, the feature that by the operation of his crank-bar and lever the forward end of the plow-beam is first raised, so that the plow is run out of the ground by the forward movement of the team. It is apparent to any one at all familiar with the operation of plowing that it depends solely upon the location of the attachment of the plow-beam to the crank which determines whether the forward end of the plow-beam will rise first when the crank is rocked so as to lift the plow-beam, and it does not seem to me a patentable device to so locate the point of attachment of the beam to the crank-bar as to secure this result. It is also noticeable that Mr. Starling nowhere in his specifications or description of his device gives any instruction as to location of the attachment of the beam to the crank which will secure the lifting of the forward end of the beam first. Undoubtedly any mechanic who wished to so construct his plow as that the crank, when rocked in the right direction, would lift the forward end of the beam first, would simply attach the beam to the crank forward of the center of gravity of the plow when running in the ground; in other words, so locate it that the plow, when working, would offer more resistance behind than forward of the point of attachment.

The proof in the case also shows several patents on plows prior to the Starling patent where the plows were organized so as to raise the forward end of the plow-beam first, among which are the Baker patent of December, 1860; the Frasier patent of April, 1861; the Sattley patent of February, 1864; the Davenport patent of February, 1864; and the Davenport patent of February, 1866. So that the advantage of first raising the point of the plow, instead of the heel, in order that the forward movement of the team would aid in running the plow out of the ground, was well known in the art long before the complainant's patent. And although the lifting devices of these old patents may not have been the same as used by complainant, the forward end of the beam was lifted, and the advantages of doing so well understood, before this patentee adopted his method; and it certainly did not require inventive genius to apply to any plow, at the date of complainant's patent, the idea of lifting the forward end of the plow-beam first in order to secure the aid of the team in running the plow out of the ground, and in any of these old bail plows that end could be secured by locating the bail forward of the center of resistance.

For these reasons, I conclude that the first claim of the complainant's patent is void for want of novelty. Bill dismissed for want of equity.

FOOS MANUF'G CO. v. SPRINGFIELD ENGINE & THRESHER CO.

(Circuit Court of Appeals, Sixth Circuit. October 6, 1891.)

1. PATENTS FOR INVENTIONS—INVENTION—PRIOR ART—CRUSHING-MILLS.

Letters patent No. 359,588, issued March 15, 1887, to James F. Winchell, for a crushing and grinding mill, consisting of the "combination with a main shaft and grinders and a moving conveyor of a plurality of intergeared crushers, mounted to crush the material for the conveyor, and having protuberances which extend approximately in line with each other, one of said crushers being geared with the main-shaft," being a combination of old elements, are void for want of invention, in view of the prior state of the art, as shown by the Roberts mill, which the patentee had seen, and by the Baldwin patent, (No. 1,199,) of June 26, 1889, the Beal & Hale patent, (No. 4,895,) of December 17, 1846, the Newlous patent, (No. 8,425,) of October 14, 1851, the Nichols patent, (No. 9,330,) of October 12, 1852, the Wilson patent, (No. 12,977,) of May 29, 1855, the Vascomb & Guirand patent, (No. 20,810,) of May 10, 1883, the Hope patent, (No. 22,807,) of February, 1859, and the McCulla patent, (No. 29, 612,) of August 14, 1860.

2. SAME—INFRINGEMENT.

Even if considered valid, the patent must be limited to the particular structure described, and is not infringed by a mill in which the projections on the crushers are not in line with each other, and the crushers, instead of being geared to the main shaft, are geared to a counter-shaft, which derives its motion from the main shaft by means of a belt.

44 Fed. Rep. 595, affirmed.

Appeal from the Circuit Court of the United States for the Western Division of the Southern District of Ohio.

Suit by the Foos Manufacturing Company against the Springfield Engine & Thresher Company for infringement of a patent. Judgment dismissing the bill. Affirmed.

H. A. Toulmin, for appellant.

Bowman & Bowman, for appellee.

Before BROWN, Circuit Justice, and JACKSON, Circuit Judge.

JACKSON, Circuit Judge. This is a suit in equity, brought in the circuit court of the United States for the western division of the southern district of Ohio, for the alleged infringement of the first claim of letters patent No. 359,588, granted March 17, 1887, on an application filed November 16, 1885, to the complainant, as assignee of James F. Winchell, for improvements in crushing and grinding mills. The circuit court (Judge SAGE, presiding) entered a decree dismissing the bill, with costs. The opinion of the court is reported in 44 Fed. Rep. 595, and it appears therefrom that the dismissal of the bill was placed upon three grounds: *First*. That in view of the state of the art, as shown in prior patents, and machines in use before the date of said Winchell's application for letters patent on his improvements in crushing and grinding mills, there was no patentable novelty in his alleged invention. *Second*. That the combination attempted to be made and covered by the first claim of said letters patent was merely the aggregation of old and well-known devices, each operating in the old way and producing no new result, and was therefore void, under the well-settled rule announced by the supreme court in *Hailes v. Van Wormer*, 20 Wall. 353; *Pickering v. McCullough*, 104 U. S. 318; *Royer v. Roth*, 132 U. S. 201, 10 Sup. Ct. Rep. 58; and *Heating Co. v. Burtis*, 121 U. S. 286, 7 Sup. Ct. Rep. 1034. And, *thirdly*, that defendant's machine did not infringe, even assuming the validity of complainant's patent. The complainant, in support of its appeal from the decree dismissing its bill, has assigned for error the foregoing findings and rulings of the court below, in connection with others, not deemed necessary to notice specially, in the view we take of the case.

The invention sought to be covered by said letters patent, as stated in the specification, "relates to certain new and useful improvements in crushing and grinding mills, for reducing corn-cobs, roots, bark, bones, and the like substances—*First*, to a broken state; and, *secondly*, to a granular or finer state." The specification and drawing disclose two crushing and one grinding device. The initial crushing device, consists of two cylinders placed horizontally opposite and rotating towards each other, each being provided with teeth, projections, or protuberances extending "approximately in line with each other." "The crushers are sufficiently near to each other to cause the crushing protuberances of the respective (initial) crushers to stand either in line with each other, as seen in Fig. 2, or to lap each other, or to not quite reach each other," and one of said crushers is geared with the main shaft. The material to be reduced is first broken by this device, and then drops into the second device, consisting of a cylinder and concave provided with a moving conveyor, where it is still further reduced; and from thence, by means of the conveyor, it is carried to the vertically arranged grinding disks, where the final operation is performed in the way of reduction. Each of said de-

vices is a combination in itself, and operates separately and successfully upon the material to be reduced. It is clearly shown that each of said devices or separate features of the mill, and the operation thereof, was old and well known. The claim based thereon, and alleged to be infringed, is as follows:

"In a mill, the combination with a main shaft and grinders and a moving conveyor of a plurality of intergeared crushers, mounted to crush the material for the conveyor, and having protuberances which extend approximately in line with each other; one of the said crushers being geared with the main shaft."

Without passing upon the question whether this claim is for a mere aggregation of old devices or elements, operating in the old way, and producing no new results, and therefore void, as held by the court below, under the decisions referred to above, and reaffirmed in the more recent cases of *Florsheim v. Schilling*, 137 U. S. 64, 11 Sup. Ct. Rep. 20; *Mill Co. v. Walker*, 138 U. S. 124, 11 Sup. Ct. Rep. 292; *Setter Co. v. Keith*, 139 U. S. 530, 11 Sup. Ct. Rep. 621; *Electric Co. v. La Rue*, 139 U. S. 601, 11 Sup. Ct. Rep. 670,—we are clearly of the opinion that complainant's patent is void for lack of invention, within the rule laid down in *Aron v. Railway Co.*, 132 U. S. 84, 10 Sup. Ct. Rep. 24; *Day v. Railway Co.*, 132 U. S. 98, 10 Sup. Ct. Rep. 11; *Gardner v. Herz*, 118 U. S. 180-193, 6 Sup. Ct. Rep. 1027. It is shown by the testimony, and clearly appears from an inspection of the two mills, that what Winchell, the patentee, did, was simply to add to the old Roberts mill the intergeared initial crusher, so as to produce two crushing operations instead of one, and thereby remedy in some degree the defect in said Roberts mill. This initial crusher arrangement was frequently sold separate, and added to the old Roberts mill. It is further shown that, as far back as 1876, Roberts had attached to his mill the double or initial breaker, and operated the same in cutting and crushing weeds; that said Winchell saw the mill thus operated with initial or double breakers as early as the fall of 1876, and that he was not the first to conceive the idea of making such an attachment to existing mills. This Roberts mill shows substantially, if not identically, the second and third devices of complainant's mill, with the same mode of operation; and after Winchell had seen the double crushers, cutters, or breakers attached to that mill, and operated so as to give a double crushing reduction to the material experimented with, it was not open to him to appropriate the idea or suggestion, and make it the subject of a valid patent. Again, when the state of the art, as disclosed in the prior patents produced in evidence, is considered, we think it clear that the improvements made by Winchell involved only the exercise of mechanical skill, and did not rise to the dignity of invention, such as the law requires in order to justify a patent therefor. A brief reference to the prior patents which we think sustain this conclusion will be sufficient. In the Baldwin patent, (No. 1,199,) dated June 26, 1839, "for improvement in the machinery for crushing and grinding corn and cob for stock, and corn and other grains for stock and family use," there are two crushing cylinders, with teeth or protuber-

ances in the form of deep flutes, which perform the initial operation of reduction, followed by further reduction of the material by means of grinders, of which there appear to be two,—a coarser and finer,—the latter being connected with a concave bed. The specification states that—

"This machine is applicable, and we intend to apply it to, the crushing and grinding of various kinds of grain, etc. We do not claim to be the inventors of toothed iron cylinders, or to be the first who have applied them to the crushing and grinding of corn and other grains. But we claim to be the inventors of a machine for that purpose, such as is herein described, in which the article to be crushed and ground is acted successively upon by crushing and grinding cylinders standing in pairs, the one over the other, and combined with a small grinding cylinder and cave, constructed and operated substantially in the manner set forth."

In the Beal & Hale patent, (No. 4,895,) dated December 17, 1846, for a new and improved machine "for cracking and crushing corn and cobs together," and also for grinding other material, there are found two crushing cylinders, of different sizes, having teeth which pass between each other, the cylinders moving in opposite directions. These cylinders perform the initial crushing or breaking operation upon the material to be reduced. Underneath the main cylinder is placed a hinged, adjustable concave, adapted to the same, with projecting teeth similar to those on said cylinder. The teeth in the concave pass between the teeth of the main cylinder, and a set-screw is provided for regulating the distance between the concave and the main cylinder. The operation of the mill is thus described:

"The corn on the cob, or other substances to be crushed, is placed in the hopper over the [initial crushing] cylinder, and is drawn in between them. The rapid motion of the teeth on the main cylinder crushes and breaks the substance against the slower moving teeth on the [other] cylinders. The article then is carried between the concave and main cylinder, and is again crushed and broken up still finer between the stationary teeth on the concave and the teeth on the main cylinder."

Here we have two crushing devices and operations. In the Baldwin patent are found one crushing and two grinding devices and operations. It would hardly involve invention to supplement the two crushing devices of the Beal & Hale patent with the addition of a grinding device, so as to produce what complainant's counsel consider the essential merit of the patent sued on, viz., that of a double or dual crushing and a single grinding arrangement. Nor would it involve any exercise of the inventive faculty to drop one of the grinding devices of the Baldwin patent, and substitute therefor either the first or second crushing device of the Beal & Hale patent. In the Newlous patent, (No. 8,425,) dated October 14, 1851, we find initial crushing cylinders in connection with grinding cones, so constructed as to produce gradual and successive reduction of the material. The specification states that "the corn in the ear, to be crushed, is thrown into the hopper, and as the crushing cylinders revolve inward, and towards one another, the ears of corn are

seized by the teeth plates, [on the cylinders,] and crushed into small fragments, which fall between the cylinders into a receptacle below," where it is kept stirred, to prevent packing, and from thence into the grinding cones, consisting of two sets or sections; the first, at the smaller end, being provided with large, coarse teeth, and the second, towards the larger end, with the finer teeth, turned in the opposite direction, by means of which arrangement there is, after the initial crushing, first a coarse and then a finer grinding of the material. In the Nichols letters patent, (No. 9,330,) dated October 12, 1852, "for a new and useful machine for crushing and grinding cobs, corn, and other substances," we find from the specification and drawings that the initial crushing device was composed of two cylinders, the substances to be crushed and ground being first operated upon by the teeth on one cylinder into annular grooves in the other cylinder; and it is said in the specification that—

"Series of teeth on one cylinder, acting into continuous grooves in the periphery of another cylinder, I find to be much more efficient and rapid for crushing and grinding purposes than when the teeth on said cylinder act between series of teeth on another cylinder."

In the Wilson patent, (No. 12,977,) dated May 29, 1855, for an improvement "in machines for crushing and grinding corn," we find two initial crushing rollers, provided with V-shaped teeth, which serve to prepare for crushing the grain for the final grinding operation. In the Vascomb & Guirand patent, (No. 20,310,) dated May 10, 1883, for an improvement in grinding-mills, there is shown breaking rollers with teeth, and adjustable, so as to suit for breaking the cob as well as the corn, together with a cylindrical grinder and concave, also adjustable, so as to be made to suit the size of the pieces of cob or other material as it comes from the breaking device. In the William H. Hope letters patent, (No. 22,807,) dated February, 1859, for a new and useful portable mill, "for cutting, crushing, and grinding corn on the cob, grinding all kinds of grain into meal and flour, and grinding roots, herbs, bark, etc.," there are found initial crushing cylinders with V-shaped teeth, thick at their base, and running to a sharp edge, with downward inclination on one and upward inclination on the other cylinder. Where the mill is not needed as a corn and cob crusher and cutter, these cylinders are so arranged as to be detached. Below these cylinders, devices are arranged for two other crushing or grinding operations, according to the fineness of the reduction desired. In the P. G. McCulla letters patent, (No. 29,612,) dated August 14, 1860, for an improved grinding-mill, there appear two crushing cylinders, provided with teeth placed in a spiral line or position; the teeth on one cylinder being in line with the centers of the spaces between the other. The grinding apparatus employed in connection with said cylinders is adjusted longitudinally so as to grind finer or coarser, as may be desired, and the mill is so constructed to crush only, without grinding, or to grind only, without crushing, or to perform both operations; and it is stated in the specification that if corn and cob, or other substances, require to be crushed before grinding, they are fed into the proper receptacle and between said cylin-

ders, which draw in the substances, owing to the direction in which they turn; and, further, that—

"The crushing device may be fed without difficulty, and is not liable to choke or clog, as is the case with the usual crushing device, which is formed of a single toothed cylinder and stationary toothed concave. This latter device is quite liable to clog and troublesome to feed,—difficulties which are avoided by my invention."

This suggestion of the advantages of the double toothed crushing cylinders over the single toothed cylinder and stationary concave Winchell adopted and applied to the Roberts mill, which embodied the second and third features of his machines or improved mill. Any skilled mechanic, acquainted with the state of the art relating to crushing and grinding mills, and of the defects connected with and to be remedied in the Roberts mill, could and would readily, without the exercise of any inventive faculty or genius, have added the intergearing initial cylindrical crushers, provided with teeth or protuberances to draw in the substances to be crushed and ground, as shown in the foregoing prior patents. Such carrying forward or application of ideas or devices and their operation, disclosed in earlier patents, does not constitute invention. It is to be noticed that the patentee does not seek to patent the means and method adopted for bringing the old devices together. In view of the devices disclosed in the prior patents referred to, and in the Roberts mill, we are of the opinion that complainant's letters patent, (No. 359,588,) dated March 17, 1887, are lacking in patentable novelty, and are therefore void.

While this conclusion renders it unnecessary to consider other questions or assignments of error, it may be proper to state that, if said patent could be sustained, it would, under well-settled rules, have to be limited and confined to the particular structure or machine described and covered by the first claim, and that, being thus limited, it is not infringed by the appellee's mill, as the court below correctly held. The decree of the court below, dismissing the bill, is accordingly affirmed, with costs.

THE ITATA.

UNITED STATES v. THE ITATA.

SAME v. TWO THOUSAND CASES OF RIFLES, etc.

(District Court, S. D. California. March 3, 1892.)

PENALTIES AND FORFEITURES—NEUTRALITY LAWS—FURNISHING ARMS TO FOREIGN INSURGENTS—REV. ST. § 5283.

The steam-ship *Itata*, a vessel belonging to a foreign insurgent party, but not being a vessel of war, came into the territory of the United States, and there received on board a cargo of munitions of war purchased there by an agent of the insurgents. The cargo was not for the equipment of the *Itata*, but was to be transported

to her country, for the use there of the said insurgents. *Held*, that the vessel was not liable, nor was her cargo liable, to forfeiture under section 5283, Rev. St. U. S., for violation of the neutrality laws. *U. S. v. Trumbull*, 48 Fed. Rep. 99, followed.

In Admiralty. Suits to forfeit the steam-ship *Itata* and her cargo for alleged violation of the neutrality laws.

W. Cole, U. S. Atty., and *Alexander Campbell* and *A. W. Hutton*, Special Asst. U. S. Attys.

Page & Eells, *Stephen M. White*, and *George J. Denis*, for *Tejeda*, commanding steam-ship *Itata*.

William W. Goodrich, for *Compania Sud Americano de Vapores*, owner of the steam-ship *Itata*.

Before *Ross*, District Judge.

Ross, District Judge. These cases were tried and submitted together upon the evidence introduced in the case of *U. S. v. Trumbull*, 48 Fed. Rep. 99, so far as the same is applicable, and upon certain additional depositions. The additional testimony does not alter the facts shown in the *Trumbull Case* further than that it shows that the *Itata*, before leaving Chili for California, discharged the four small cannon, together with the ammunition therefor, she had theretofore carried, and that the soldiers she took on board did not exceed 12 in number, and were taken on board, not to be used as soldiers, but for passing coal and as stokers. It further shows that when the *Itata* came into the waters of the United States she had on board less than her usual complement of men, and but one small brass gun, used as a signal gun, eight or ten old muskets, and one small iron gun, for which there was no ammunition. The additional depositions, which include the testimony of two of the officers of the United States cruiser *Charleston*, still more clearly show, what was before made sufficiently apparent, that in no just sense could the *Itata* be regarded as a ship of war at the time she came within the waters of the United States, or at any time while she remained within those waters. My views in respect to the case are sufficiently stated in the opinion delivered in the *Trumbull Case*, and reported in 48 Fed. Rep. 99, to which I adhere. It is enough now to state the facts I find from the evidence in the present case, together with the legal conclusions, which are as follows:

In January of 1891 the steam-ship *Itata* was an ordinary merchant vessel. Early in that month she was captured in the harbor of Valparaiso, Chili, by the people then known as the "Congressional Party," and who were then engaged in an effort to overthrow the then established and recognized government of Chili, of which *Balmaceda* was the head. The *Itata* was by the Congressional party put in command of one of its officers, and was used in their undertaking as a transport to convey troops, provisions, and munitions of war, and also as an hospital ship, and one in which to confine prisoners. Four small cannon were also put upon her decks, and she carried a jack and pennant. Some time prior to the following April one *Trumbull* came to the United States as an

agent of the Congressional party, and about the month of April went to the city of New York, and there bought, from one of the large mercantile firms of that city dealing in such matters, 5,000 rifles, and 2,000,000 cartridges therefor, with the intention and for the purpose of sending them to the Congressional party in Chili, for use in their effort to overthrow the Balmacedan government. The sale and purchase of the arms and ammunition were made in the usual course of trade. Trumbull caused them to be shipped by rail to San Francisco, and engaged one Burt to accompany them, which he did. Arrangements had been made by Trumbull with his principals in Chili by which they were to send a vessel to the United States to get the arms and ammunition, and convey them to Chili for the use of the Congressional party there. The Itata was dispatched by that party for that purpose, and was accompanied as far as Cape San Lucas by the Esmeralda, a war ship then in the service of the Congressional party. Before leaving Chili, the Itata discharged the four small cannon, with the ammunition therefor, that she had theretofore carried, but she retained one small brass gun, which she had always carried and used as a signal gun, and also eight or ten old muskets, and one small iron cannon, for which there was no ammunition. At one of the Chilian ports the Itata took on board some soldiers, with their arms, not exceeding 12 in number; but they were taken, not to be used as soldiers, but for passing coal and as stokers. At San Lucas the captain of the Esmeralda took command of the Itata, and the captain of the latter was left there in command of the Esmeralda. The Itata then proceeded to San Diego, really in command of the Esmeralda's captain, but ostensibly in command of another, who represented to the customs officers at that port that she was an ordinary merchantman, and was bound to some port on the northern coast. Before coming into the port of San Diego, or into the waters of the United States, the Itata hauled down her jack and pennant; the brass and iron cannon were removed from her deck and stowed in her hold, as were also the arms of the soldiers she carried; and their uniforms, as well as those of the officers, were removed, and all appeared in civilians' dress. At that port she laid in stores of coal and provisions, all of which were bought in the open market, and some of which were marked "Esmeralda." Meanwhile Trumbull had chartered a schooner, called the Robert and Minnie, in San Francisco, to take the arms and ammunition from there to a point in this judicial district, then expected to be near the island of Catalina, where she could meet the Itata, and deliver them on board of her, to be conveyed to Chili for the purposes already stated. The schooner Robert and Minnie accordingly took on board the arms and ammunition at the port of San Francisco, and, in charge of Burt, proceeded to the neighborhood of Catalina island, where she expected to meet the Itata. In the mean time the suspicion of some of the officers of the United States that the neutrality laws were being violated was aroused, and the marshal of this district was directed by the attorney general to detain the Itata, if such was found to be the case; and, acting upon those and certain instructions from the district attorney of this judicial district, he went

on board the ship at San Diego, and put a keeper in charge of her, and then went in search of the Robert and Minnie, which he did not find in the waters of the United States. Communication was, however, had between the Itata and the schooner, and a point near San Clemente island was fixed upon as the place of meeting for the purpose of transferring the arms and ammunition from the schooner to the ship. Accordingly, the Itata, on the 6th day of May, 1891, without obtaining clearance papers, and against the protest of the person left on board and in charge of her by the marshal, weighed anchor, and steamed out of the harbor of San Diego, with him on board, to meet the Robert and Minnie and receive the arms and ammunition. The marshal's keeper was, however, put ashore at Point Ballast, before leaving the harbor. While steaming out of it, one or both of the Itata's cannon were brought on deck, and some of the soldiers on board of her appeared in uniform. On the 9th of May the Itata and Robert and Minnie came together, about a mile and a half southerly of San Clemente island, in this judicial district, and there the arms and ammunition in question were taken from the schooner, and put on board the ship in original packages, and the latter at once left with them for Chili. On September 4, 1891, the Congressional party was recognized by the government of the United States as the established and only government of Chili. Prior to that time there had been no recognition of that party by this government, other than that, on March 4th, the secretary of the navy cabled Admiral McCann "to proceed to Valparaiso, and observe strict neutrality, and take no part in troubles between parties further than to protect American interests." On March 26th the secretary of the navy cabled Admiral Brown, who had superseded Admiral McCann, "to abstain from proceedings in nature of assistance to either—that is, the Balmaceda or Congressional—party; that the ships of the latter were not to be treated as piratical so long as they waged war only against the Balmaceda government." On April 25th, Secretary of State Blaine cabled the American minister: "You can act as mediator with Brazilian minister and French *charge d' affaires*." On May 5th, Minister Egan cabled this government: "Government of Chili and revolutionists have accepted mediation of the United States, Brazil, and France, most cordially; those of England and Germany declined." On May 7th, Acting Secretary of State Wharton acknowledged the dispatch of Minister Egan, and "expressed hope that, through combined efforts of the governments in question, the strife which has been going on in Chili may be speedily and happily terminated." On May 14th, Acting Secretary of State Wharton cabled Minister Egan that "French minister reports threats to shoot the insurgent envoys by Balmaceda," and directed that they should have ordinary treatment under flag of truce.

From the facts found, and for the reasons given in the opinion delivered in the case of *U. S. v. Trumbull*, *supra*, my conclusion is that the libel in each case should be dismissed; and it is so ordered.

THE LUD KEEFER.

WERLING *et al.* v. THE LUD KEEFER.

(District Court, W. D. Pennsylvania. February 8, 1892.)

1. SEAMEN—CONTRACT FOR WAGES—RIVER PILOTS.

Where a steam-boat bound from Pittsburgh, Pa., to Louisville, Ky., engages pilots without the written contract required by Rev. St. U. S. § 4530, she is liable, under section 4521, for the highest wages shown to have been voluntarily paid at Pittsburgh to any pilot for a similar voyage during the three months preceding.

2. SAME—STATUTORY PROVISIONS—EQUITIES.

The purpose of the statute is to prevent disputes as to the agreement for wages, and its positive provisions in favor of the seamen cannot be affected by any equities in the case.

In Admiralty. Libel by Werling and Reno against the steam-boat Lud Keefer for wages as pilots. Decree for complainants.

M. A. Woodward, for libelants.

George C. Wilson and *David S. McCann*, for claimant.

REED, District Judge. The testimony establishes the fact that when the boat started upon her voyage, after making up her tow at Economy, her destination was Louisville. She was to leave her tow at Cincinnati, go to Louisville, and bring back a tow of empty barges to Pittsburgh. The only change that occurred was that in pursuance of a telegram from Jutte & Co., the owners of the tow, she took her tow of loaded barges with her to Louisville, instead of leaving it at Cincinnati. Her destination being a port in another than an adjoining state, the act of congress applies. Section 4520 of the Revised Statutes provides that a written or printed agreement shall be made by the master with every seaman on board, and section 4521 provides that in the absence of such a contract the master shall pay every such seaman "the highest price or wages which shall have been given at the port or place where such seaman was shipped, for a similar voyage, within three months next before the time of such shipping, if such seaman shall perform such voyage." No written or printed agreement was made with either of the libelants. Capt. Reno testifies, without contradiction, that he was to be paid the highest wages that would be paid on each trip, which is substantially what the act provides. No arrangement was made with Capt. Werling as to wages. It follows, therefore, that under the provisions of the statutes referred to the libelants are entitled to receive the highest wages paid at the port of departure for similar voyages. The testimony shows that \$250 was paid to one pilot for a similar voyage at the same time from Pittsburgh to Louisville and return. In another case \$200 was paid to a pilot for a voyage to Louisville, where he left the boat and returned by rail to Pittsburgh, his expenses back being paid by his employers. The libelants, on the contrary, performed the additional service of piloting the boat back to Pittsburgh. These rates seem to have been paid without compulsion, and, while higher than the wages paid to other pilots at the time, were

paid in pursuance of agreement, and apparently because the employers desired the services of those particular pilots for reasons satisfactory to themselves. It is the duty of the court, therefore, to allow the libelants this rate of wages, and the libelants are each entitled to receive the sum of \$250, as claimed in their libel, with costs to be paid by the respondent.

Something was said about the equities of the case by the proctors for respondent, but equities cannot affect the positive provision of the statute, the benefits of which the libelants are entitled to claim. The intention, however, of the statute, seems to be to make it to the interest of the owner of the boat to make a written or printed agreement with the seamen, in order partly to avoid just such disputes as the present one. As is said by Judge TREAT in *Rollins v. The Standard*, 4 Fed. Rep. 750:

"Mariners are wards of the court, and as such are to be protected, not to the injury of the respondents, but to secure them their just wages. It is very easy for officers of vessels to engage mariners at a fixed rate, and if they do not do so the courts must allow them the highest rates existing at the time of departure."

Therefore, there do not seem to be any equities in favor of the respondent. A decree will be made accordingly.

THE KAROO.

JOHNSON *et al.* v. THE KAROO.

(District Court, D. Washington, W. D. February 15, 1922.)

1. SEAMEN'S WAGES—BRITISH VESSEL—JURISDICTION.

A British vessel was libeled for seamen's wages at a port where there was no British consul. The nearest British consul had declined to interfere. Two of the libelants were American citizens. All but three of the crew were not lawfully bound by any contract of shipment. *Held*, that the court was justified in assuming jurisdiction of the case.

2. SAME—SHIPPING ARTICLES—INFORMALITY—RIGHTS OF SAILORS.

Where seamen on a British ship did not sign articles before the British consul, but were taken aboard the vessel by a boarding-house master, who wrote their names in the shipping articles, after which they served aboard the ship, but did not complete the voyage described in the articles, *held*, that the articles were not binding as to voyage or term or rate of wages; that the men could leave the vessel at any port without becoming deserters, and were entitled to recover on a *quantum meruit* for services performed.

3. SAME—KIDNAPPED SAILORS—RATE OF WAGES.

Where it clearly appeared that sailors were inveigled aboard a ship, and compelled to serve against their will, *held*, that the master could not fix the rate of their wages, but the court would fix it anywhere within reasonable limits; and there being some evidence that \$30 per month was the highest rate at their port of shipment at the time of shipment, and also that their fare aboard ship was bad, *held*, that they should recover at the rate of \$30 per month.

4. SAME—RIGHTS OF SEAMEN—INSUFFICIENT FOOD.

The evidence showing that certain sailors, lawfully shipped, were ill treated aboard the vessel, and were deprived of proper food and lime juice or other antiscorbutics, *held*, that it was a breach of the ship's contract, entitling the men to leave the vessel, though the negligence might not have been that of the master of the ship, but of the ship-chandler who supplied her.

In Admiralty. Suit to recover seamen's wages.

Leo & Jordan, for libelants.

W. H. Effinger, for respondent.

Before HANFORD, District Judge.

HANFORD, District Judge. I have very carefully read the testimony and given consideration to the pleadings in this case, and am now ready to announce my conclusions.

I think the court is justified, and in fact required, to take jurisdiction of this case, although it is a suit for seamen's wages against a foreign vessel, for three reasons: (1) There is no British consul at the port of Tacoma, and the consul at Port Townsend, where the nearest consul resides, after being called upon to investigate and adjust the matters of difference between the master and crew, made no response to the request of the seamen except to make a demand for payment of or security for his fees and expenses, with which demand they were not able to comply; but (2) even if the consul had been willing, or had in fact assumed jurisdiction, the case is not one which could be taken out of the jurisdiction of the United States court, properly. Two of the libelants are American citizens, and entitled to sue in the courts of their own country for the determination and adjudication of their rights. (3) All of the libelants but three have been brought to this country without having been lawfully bound by any contract of shipment. They are perfectly free to leave the vessel at this port, and demand payment of their wages. They have left the vessel, have demanded payment of their wages, and their demand has been refused. They have been turned out of the vessel destitute, and wages which they have earned by their services have been withheld from them. They are not bound to return to the home of this vessel to sue her, but are entitled in an admiralty court here to have their rights enforced.

I find a wide divergence in the testimony in behalf of the libelants and in behalf of the ship, and have been obliged to weigh the testimony to determine which side was giving the truth, and in so doing have given importance to the facts and circumstances which are clearly established, and about which there can be no doubt. One important circumstance is that this captain left the port of Barry, on this present voyage, having on board one seaman who had not signed the shipping articles for the voyage in the presence of a shipping commissioner or agent, as required by the laws of the country to which this vessel belongs. He gives as an excuse that it was because of the negligence and fault of the commissioner or shipping agent at the port of Barry in not attending to the matter of having the men all sign the shipping articles. This statement is of itself unreasonable and improbable. It is met by the counter-statement that the man being a foreigner, and unable to understand the English language, the shipping agent refused to sign him without the assistance of an interpreter to explain the contract before he signed the articles,—a statement which is probable, and a full justification of the shipping commissioner's failure. The vessel proceeded to Rio de

Janeiro, and there the larger portion of the crew deserted the ship. The captain brought his vessel away from that port with a crew secured there, none of whom signed the shipping articles in the presence of the British consul. It is shown in testimony, and admitted by the captain, that the British consul refused to sanction the engagement of these men as seamen on this vessel. The captain has entered in his log, and has testified on this trial, and presumably has reported to his owners and the British board of trade, that the reason for the refusal of the British consul to engage these men was that they were not in possession of discharges from the vessels in which they last previously served, and that it was simply an arbitrary and unreasonable piece of stubbornness on the part of the British consul to refuse to sanction the employment of these men. The shipping articles themselves contain an indorsement written by the British consul, signed officially and under his official seal, in which he makes a statement directly at variance with that of the captain. He states that the reason he refused to sanction the employment of these men was that it did not appear to him that the men were not deserters from other vessels then in port, and requiring their services to enable them to proceed on their voyages. I feel bound to accept the certificate of the British consul as being the truth of the matter. It was in accordance with his duty and with law, and altogether more probable than that he unreasonably refused to act in a way that would enable this vessel to secure the services of necessary seamen, and proceed on her voyage.

It appears that the captain employed a shipping or boarding-house master at Rio to secure a crew for him; and a part of these libelants were taken on board with their consent, and have served as mariners on this vessel. The signing of the articles on board the ship, out of the presence of the British consul was a useless formality. The men were not given their option to sign or not. They were not asked to consent to the terms and conditions contained in the articles, but were taken down into the cabin of the vessel, and the shipping master, a resident of Rio, wrote their names and the other facts about them entered in the shipping articles; and they were told the amount of advance that the captain allowed, all of which was paid to the shipping or boarding master, and then they were ordered on deck and set to work. This manner of signing shipping articles is not in any sense the making of or entering into a binding contract. These men, by the writing of their names on the shipping articles by the boarding-house master, were not bound to perform the voyage, or remain in the service of the ship any particular time. They are not bound by the rate of wages. They have the right to leave the vessel in this port, and in leaving her do not become deserters, or forfeit their wages; and they are entitled to recover on a *quantum meruit* the reasonable value of their services from Rio de Janeiro to this port.

It is clearly established, however, that three of these men taken on board the vessel at Rio were not taken on board for the purpose of making the voyage in the ship with their consent, but they were "shanghaied." Two of them were inveigled by the boarding-house master,

whom the captain of the ship employed to get a crew for him on the pretense of working as stevedores, while the vessel was in port at Rio, and under an agreement that they would be paid at the rate of 10 shillings per day for their time. When the vessel was through with their services as stevedores, they requested permission to go on shore, and were refused by the captain. They were unable to go on shore, because the vessel was not at any wharf, but was at a distance from the shore, and there was no boat which they could obtain for the purpose. They were told that they would have to remain in the ship and go in the ship, to which they never consented. These are facts sworn to by them, and not denied or attempted to be denied by the captain in his testimony; and the shipping articles show that somebody else signed for them,—and that was done, as the testimony shows, after they were in fact on board the ship, and detained there against their will. The other man was taken on board the ship by this boarding-house master simply to assist him in getting out to the vessel, to carry the other men on board, and was left on board the vessel when the boarding-house master went ashore. He reported to the captain before the vessel got out of the harbor, and while she was in tow of the steam-tug, and informed the master that he was not in condition to go to sea, that he had no outfit for the voyage, and had even left his coat on shore. The master could easily have sent him ashore on the tug without inconvenience or danger; but he detained him, refused to let him go on shore, and the next day, after the vessel got out of the harbor, made a formality of shipping him, claiming that he was entitled to ship him as a "stowaway," at the wages of one shilling per month. Now, the plain truth about the matter is, this man was kidnapped, brought here against his will, and is entitled to claim as wages from the ship, certainly, reasonable compensation. I do not think it is for the master to fix his wages at one shilling per month, or any other sum. This man has a right to fix his own wages, and the court will allow it anywhere within reasonable limits.

Three of the libelants were lawfully employed, and signed shipping articles at Cardiff, before the vessel started on her voyage. They claim the right to leave the vessel because of a breach of their contract of shipment, in the manner in which they were treated on board, and because of the deprivation of necessities during the voyage,—of proper food, and lime juice or other antiscorbutics. The testimony, I think, shows that the provisions of the ship were scant. I do not think there was starvation, but the provisions were of the coarsest and cheapest quality, were scant in amount, and poorly cooked. The principal article of diet which the crew had was called "skouse," a combination of sea biscuits with a little meat mixed in, and cooked with the skimmings from boiled salt meat. The salted meats were boiled in sea water, and the only seasoning which the skouse had was the skimmings from the boiled meat, boiled in sea water. Some of the crew stated that they liked it, and got along all right; but those who were not able to endure that sort of diet had to put up with it, whether they liked it or not, and they suf-

ferred. There were no dried apples or other fruit furnished them as a relish, and during all the voyage from Rio to Tacoma, they were wholly deprived of lime juice. The excuse is that it requires sugar to mix with the lime juice, and the ship had an insufficient supply of sugar to justify the use of it in furnishing lime juice. It is claimed that there was a mistake on the part of the ship-chandler in giving something else in the place of sugar; that it was because of his negligence in the matter. That does not relieve the vessel from responsibility. It makes no difference to the libelants whether the negligence was that of the master or of some other agent of the owner. The men suffered in either case. It was a breach of the contract; and I hold that it justifies the libelants Newton, Golding, Swenzer, and Orr in leaving the vessel at Tacoma.

In weighing the testimony, I have made due allowance for the exaggerations in the testimony of the libelants, which are apparent, and have not assumed that all of the hardships and cruelties that they have referred to in their testimony are given with strict accuracy; but there is a decided preponderance of evidence that, in addition to deprivations, there was considerable abuse of the crew by harsh and abusive language, and by assaults at different times on different persons. I have felt justified in entirely disregarding the testimony of the captain on all points in which he is contradicted, by reason of the manifest untruthfulness of his testimony in regard to the failure of the shipping agent at Barry and the British consul at Rio to attend to the shipping of these men, and the signing of the articles. He has willfully testified falsely in this material matter, and I do not regard him as a reliable witness.

The libelants Swenzer, Newton, Orr, and Golding will be allowed to recover the balance of wages due them as alleged in the libel. I think they are at least entitled to all that they claim, and will not allow them anything more. The court has to fix the wages to be allowed to the other libelants, because there is no binding contract here fixing their wages. I will allow Johnson the amount he has sued for. Thirty dollars per month is reasonable, and he is entitled to it. There is considerable discrepancy in the evidence as to the rate of wages obtaining at the port of Rio, where these men were secured. On the part of the ship, it is claimed that the highest wages were \$20 per month. On the part of the libelants, it is claimed that it was \$30. These men would be entitled to something in addition to mere wages, as compensation for the deprivation of proper food and antiscorbutics; and, taking that into account, I will allow them \$30 a month, although I would not find as a fact that that was the rate of wages at Rio, or the amount I should have allowed them if they had been well cared for on the ship. The libelants Johnson, Connell, Searl, Wilson, Nordstrum, Paulson, Latchford, and Powle will therefore each be allowed wages at the rate of \$30 per month. The other two, James and Green, will be allowed to amend the libel, and claim wages for the time they served in the ship, doing stevedore work, and served as mariners

on the voyage, at the rate of 10 shillings per day; and the court will allow it.

In the argument the court listened to an appeal in behalf of this ship to consider the interests of the port of Tacoma,—the commercial interests of this port. The court regards as its imperative duty, above any mercenary interest that any parties to this suit or people outside of this litigation may have in the matter, the doing of justice, the upholding of the maritime law of this country and of the world; but, in addition to that, the commerce of the country cannot suffer by protecting the rights of mariners. Reliable and efficient seamen are just as necessary to commerce as ships are; and it is only necessary to sanction or permit the practice of kidnapping seamen to be carried on, to reduce the shipping interests in a very short time to a dependency upon slave labor. I can imagine nothing that would be a more severe blow to the commercial world than to oppress and enslave the class of men who are willing to endure the hardships and encounter the dangers of a seafaring life; and I believe that the interests of the port of Tacoma, as well as justice itself, call upon this court, whenever a ship's master stands convicted before it of the offense of kidnapping seamen, to deal with enough severity to at least check this great evil. In giving what I have to these men, I have given them simple justice, and think I have dealt mildly with the captain of this ship.

THE JAMES T. EASTON.

THE QUAKER CITY.

THE G. C. ADAMS.

EDICOTT v. THE JAMES T. EASTON, THE QUAKER CITY, AND THE G. C. ADAMS.

(District Court, E. D. New York. February 25, 1892.)

1. MARITIME LIENS—SUPPLIES—MORTGAGES—ANTECEDENT INDEBTEDNESS.

A mortgagee of a vessel, who has taken the mortgage for an antecedent indebtedness only, and without inquiry as to existing liens, is not in the situation of a *bona fide* purchaser, and has no equity superior to a material-man who has a lien for necessary supplies furnished on the credit of the vessel.

2. SAME—DISCHARGE BY THIRD PERSON'S NOTE.

The note of a third person, when taken for an antecedent debt of a vessel, is no discharge of the maritime lien of the person receiving it.

In Admiralty. Suit to recover for supplies furnished; mortgagees defending as prior lienors. Decree for libellant.

Shipman, Larocque & Choate, for libellant.

McCarthy & Berier, for claimants.

BROWN, District Judge. The above-named propellers were owned by Samuel Schuyler of Albany, treasurer of the corporation known as "The Schuyler Steam Tow-Boat Company." They were used as helpers in the business of the line, and had been accustomed for some years to obtain supplies, mostly in the engineers' department, from the libellant at Jersey City, as the same might be wanted at this end of their trips. From May, 1890, to the close of the year supplies were furnished to the above-named propellers, as well as to other propellers belonging to the Schuyler Line. The supplies were all ordered by the captains of the different boats at the libellant's place of business in Jersey City, and were necessary for the vessels. The libellant had no acquaintance with the owner. Bills were rendered for the supplies furnished to each boat separately, and the same were charged and rendered as against the boat. I find that the credit was given to the various boats, and that the libellant has a maritime lien therefor, as well also as a lien of indefinite continuance under the statutes of the state of New Jersey, if the state statutes can be held applicable to foreign vessels. See *The Lyndhurst*, 48 Fed. Rep. 839, (Jan. 11, 1892.)

The claimant, the Lehigh Valley Coal Co., a mortgagee of the three vessels, took mortgages thereon respectively for the sum of \$15,000, \$15,000, and \$8,500, recorded in the office of the county clerk at Albany, on the 31st of December, 1890. These mortgages, as appears from the testimony of Mr. Barrett, were not given upon any new consideration, but for an antecedent debt for coal furnished to these and other boats, probably during a considerable period, like that covered by the libellant's supplies. He testifies that when they took the mortgages they had no notice of the libellant's liens. But it does not appear that any inquiry was made; and the evidence indicates that the mortgagee parted with nothing on the strength of its mortgages. It was, therefore, not in the position of a *bona fide* purchaser, as in the *Case of The Lyndhurst*, *supra*, paying the value of the property, and making all reasonable efforts to find any outstanding incumbrances and finding none. The mortgages in the present case conveyed only the interest of the mortgagor, and subject to such liens as existed against the vessel. The mortgagee has, therefore, no equity superior to that of the libellant. The supplies furnished by the mortgagee were, so far as they were furnished to these vessels, of the same legal grade as the supplies furnished by the libellant. The question of laches does not, therefore, properly arise, since there is no later superior equitable right.

The taking of the Schuyler Steam Tow-Boat Company's note was not a discharge of the lien of the libellant. Under the relation of Mr. Schuyler to the company as its treasurer there is even less ground for drawing any inference that the company's note was taken in discharge of the lien, than exists in ordinary cases where the note of a third person is received. And there the rule is well settled that the note of a third person, when given for an antecedent debt, is no discharge. *Noel v. Murray*, 18 N. Y.

167; *Hall v. Stevens*, 116 N. Y. 206, 22 N. E. Rep. 374. In courts of admiralty the law has been the same, since the *Case of Barque Chusan*, 2 Story, 455, 466-470, which in many respects is like the present case. See, also, *The Chelmsford*, 34 Fed. Rep. 399; *The Gen. Meade*, 20 Fed. Rep. 923. Decree for the libelant, with a reference to ascertain the amount due, if not agreed upon.

THE SCANDINAVIA.

COMPAGNIE DU BOLEO v. THE SCANDINAVIA.

MEEK v. CARGO OF THE SCANDINAVIA *et al.*

(District Court, N. D. California. February 23, 1898.)

1. SHIPPING—DISCHARGE OF CARGO—REFUSAL BY CONSIGNEE TO RECEIVE—DUTY OF SHIP.

Where a consignee refuses to receive cargo in accordance with the provisions of the charter-party, the ship-master is authorized to land and store it at the nearest proper and convenient port, having reference to his own convenience and the apparent best interests of its owner, and always acting prudently and in good faith.

2. SAME—LIGHTERS DESTROYED BY STORM—STATEMENT OF CASE.

The ship *S.*, whose charter provided that her cargo should be delivered at the ship's side, lay in the roadstead of Santa Rosalia, and had discharged only about one-half of her cargo when her lay days expired, and the following day the lighters of the consignee were destroyed by a storm. The only method of discharging was into lighters. The place was an open roadstead, dangerous in the event of bad weather. A week later, despite the necessary protests, the consignee had done nothing, and still refused to do anything, towards discharging the balance of the cargo. On that day, after asking the consignee to designate a port where the balance of the cargo could be discharged, which the consignee refused to do, the vessel sailed for San Francisco, and on arrival discharged and libeled the cargo for freight and demurrage. *Held*, that under the circumstances the ship was justified in taking the cargo to some place where it could be stored for the benefit of the consignee, subject to the payment of freight and charges.

3. DEMURRAGE—MUTUAL NEGLIGENCE.

A vessel took a cargo to Santa Rosalia; her charter providing that it was to be discharged along-side "any craft, steamer, or floating depot, or any wharf or pier, where she can always safely lie afloat." There is only an open roadstead at Santa Rosalia. The cargo was not discharged within the lay days, partly because the buckets used by the ship were insufficient and her supply of men short, and partly because the lighters furnished by the consignee, and which were the only means of discharging, were inadequate for the purpose. *Held*, that neither ship nor consignee should be allowed demurrage for such period.

In Admiralty. Libel for damages for non-delivery of cargo. Cross-libel for non-reception of cargo and non-payment of freight and demurrage.

Page & Ellis, for libelant.

E. W. McGraw, for claimant.

Ross, District Judge. These are cross-libels; the *Compagnie du Boleo* claiming demurrage and damages for non-delivery of cargo; and the owner of the ship, damages for non-reception of cargo and non-payment

of freight and demurrage. The Scandinavia was chartered by the company in England to carry a cargo of about 600 tons of coke from Cardiff, Wales, to Santa Rosalia, Lower California, and there deliver the same to the agents of the company "along-side any craft, steamer, or floating depot, or any wharf or pier, where she can always safely lie afloat, as may be directed by the freighter's agents, to whom notice is to be given of the vessel's readiness to discharge." The cargo in fact consisted of 602 tons. The charter-party contained the following, among other, provisions:

"(1) All notices required to be given by the charter-party shall be in writing, and time shall not commence to count until twenty-four hours after delivery. (2) The cargo to be discharged at the rate of not less than 80 tons per working day, weather permitting; time to commence when the vessel has been reported at the custom-house, and has given notice of her readiness to be discharged. (3) The act of God, * * * bad weather, * * * all unavoidable accidents or hindrances in procuring, loading, ^{and} or discharging the cargo, * * * always excepted. (4) Demurrage over and above the said laying days at fifteen shillings per like hour."

The ship arrived at Santa Rosalia on Sunday, January 25, 1891. The next morning, Monday, her master went ashore, entered the ship at the custom-house, and about noon of the same day notified the consignee of his readiness to discharge the cargo. The proof shows that Santa Rosalia is a small, out-of-the-way place, the principal business of which is that of the Compagnie du Boleo,—a company engaged in mining copper. All of the cargoes consigned to the place are consigned to that company. There is no harbor there, but an open roadstead, in which vessels are subject to much danger in case of bad weather. At one time there was a wharf there, at which the cargoes were discharged; but in February, 1890, before the making of the charter-party in question, the wharf was destroyed. After the making of this charter-party, and before the arrival of the Scandinavia at Santa Rosalia, the Compagnie du Boleo provided a number of small lighters, constructed of iron, with water-tight compartments, and containing two rows of four buckets each, into which to put the cargoes to be discharged. These lighters were of the capacity of from three and one-half to four tons of coke each. They were too small to admit of it being sent from the ship into them through chutes, so that the only safe method was to lower it into the lighters by means of the baskets or buckets with which it was taken from the hold of the ship; and that method was pursued in this instance. The ship commenced discharging on the 27th of January. The case shows that the respective parties agreed that the lay days expired with Saturday, February 7th. After that each party commenced claiming demurrage of the other. When the lay days expired, less than half of the cargo had been discharged; there still being in the ship 332 500-2240 tons. Sunday, the 8th of February, the owner of the ship arrived from Guaymas, and on the same day a storm arose, which became so violent by Monday that a number of the lighters were sunk, and the remaining ones beached and damaged. With Tuesday, February 10th, commenced complaints by both parties; each claiming that the other was and had been at fault,

and demanding demurrage, damages, etc. Prior to that time the only complaint made was by the agent of the company to the master, that he was unnecessarily delaying the discharging, to which the latter responded that he was doing the best he could. This was during the lay days. Commencing with February 10th, and thereafter daily, to and including February 14th, the owner of the ship, through the master, demanded demurrage, and that the consignee provide means for discharging the balance of the cargo; the consignee responding that if the master had exercised proper diligence during the lay days the cargo would have been discharged during those days, and that, the storm having afterwards sunk some and disabled others of the lighters, the company could not for the time being furnish the means for further discharging, and could not say when it could do so. Commencing with February 10th, the consignee's agent also made daily demands on the ship for demurrage. This condition of affairs continued until the night of February 14th, at which time the ship left for San Francisco without being cleared; the customs officer at Santa Rosalia refusing to clear the ship until she had fully discharged her cargo. The departure of the ship was by the order of the owner; her master protesting against going, and entering his protest in the ship's log. Before leaving, the master, by direction of the owner, requested the consignee to designate a port at which the balance of the cargo should be discharged; but this the consignee refused to do. It appears that Guaymas was the nearest port at which the cargo could have been discharged; but as the ship was short of coal, and it was doubtful whether she could get any there, the owner concluded to go to San Francisco, which he did, being obliged to stop for coal at San Diego, on the way.

The evidence shows that the failure to discharge the cargo within the lay days was due partly to the fault of the ship, and partly to the fault of the consignee. In the first place, the baskets used by the ship in discharging were insufficient in size for the purpose. Their capacity was only about 150 pounds. In the second place, for three and a half of the lay days, the ship was derelict for lack of men. January 28th, 29th, and 30th, and February 2d, but one hatch was used, for want of men to work another. This was clearly the fault of the ship. On the other hand, the lighters furnished by the consignee were inadequate to the purpose. As that was the only means of discharging, the duty devolved upon the consignee to provide lighters of sufficient capacity to receive the cargo at the ship's side in the way such a cargo is usually discharged,—through chutes. The evidence, I think, shows that the cargo could and would have been discharged within the lay days, had the lighters been of sufficient capacity, notwithstanding the fact that the baskets used by the ship were also insufficient in size, and notwithstanding the further fact that for three and a half of the lay days but one hatch was worked, for want of men. But it is also true, I think, that the cargo could and would have been discharged within the lay days, by means of the lighters that were furnished by the consignee, had the ship used proper baskets and enough men to work two hatches. The failure

to discharge the cargo within the lay days being due in part to the fault of each party, neither, in my opinion, should be allowed demurrage.

The lay days having expired, less than half of the cargo having been discharged, and the storm having abated, what, on February 10th, were the obligations and rights of the respective parties? That the obligation of the consignee to furnish proper and sufficient means for the reception of the cargo at the ship's side continued, seems to me to be clear. The consignee was not relieved of that obligation by the fact that the discharge of the cargo was not completed within the lay days. The duty of delivering the cargo on shore did not, under the charter-party, devolve upon the ship. Her master, therefore, was not required to employ the canoes or dug-outs, referred to in the evidence, in which the coke might, at increased cost and delay, have been landed after having been put in sacks, which the ship did not, and was not required to, have. Those canoes or dug-outs, it seems from the evidence, were used by the *Compagnie du Boleo* for the purpose of discharging cargoes consigned to it in the interval between the destruction of the wharf, in February, 1890, and the procuring of the iron lighters; and, if they could have been used at the time in question for the purpose of discharging the balance of the cargo of the *Scandinavia*, it was the duty of the *Compagnie du Boleo* to have employed them, and not the duty of the ship. No effort on the part of the consignee was made after the storm to provide the ship with the means to discharge the balance of her cargo, upon which she had a lien for the balance of the freight. On the contrary, the claim and demand of the consignee's agent, daily repeated, was that the ship should seek and employ such means. This conduct on the part of the consignee, in view of the fact, apparent from the evidence, that the *Compagnie du Boleo* dominated Santa Rosalia; that it was the owner as well as the consignee of the cargo; that the ship was short of coal; and that the roadstead in which she lay was a dangerous place for her to stay,—was equivalent to a refusal to receive the balance of the cargo and to pay the balance of the freight. Under such circumstances, what was the ship to do? She could not be required to remain there forever. The consignee refused, after being requested to do so, to name a port to which the balance of the cargo should be taken. Under these circumstances, I think the master was justified in taking it to some place where it could be safely stored with a third party for the consignee, subject to the payment of the freight and charges. Ordinarily, such place should be the place nearest to the port of destination, where the cargo could be so discharged and stored; but the circumstances of the case may be such as to make that rule inapplicable. Here it appears that Guaymas was the nearest port to which the cargo could have been discharged and stored; but it also appears that the ship was short of coal, and it was doubtful whether she could get a supply at that port. For aught that appears, the ship may not have been provided with means to pay the necessary cost of lighterage there. Nor was she required to be so provided; for, under the charter-party, her cargo was stipulated to be delivered at the ship's side, not on shore. The true rule, it seems to me, is

given in a note by Judge SHIPMAN to the case of *Fox v. Holt*, 4 Ben. 300,—that in a case like the present the master is authorized to land and store the cargo at the nearest proper and convenient port, having reference to his own convenience and the apparent best interests of the owner; always, of course, acting prudently and in good faith. The selection of San Francisco, where lighterage was not necessary, and where there was every facility for discharging and storing and selling the cargo, came, I think, within this rule, considering all of the facts and circumstances of the case. Upon the arrival of the ship there, the master could "have landed the balance of the cargo, and placed it in charge of a third person, and, if the freight money continued to be withheld, the owner of the vessel could have kept it in that condition, or libeled it, had it sold by a decree of the court, and thus obtained the freight money." *Fox v. Holt*, Id. 299. In this case, after the filing of the libel and cross-libel, the balance of the cargo in question was sold under stipulation of the respective parties. Out of its value, I think, should be paid the balance of the freight earned under the charter-party, together with freight on the 332 500-2240 tons from Santa Rosalia to San Francisco, and the charges incident to the discharging at the latter port. These amounts must be ascertained by proof before the commissioner. Should the freight and charges exceed the value of the coke at San Francisco, the owner of the ship will be entitled to a decree for the difference, and to costs. A reference will be made to the commissioner for the purpose above indicated, and upon the coming in of his report a decree will be entered in accordance with this opinion.

THE AGNES I. GRACE.

PROPELLER TOW-BOAT CO. v. THE AGNES I. GRACE.

(District Court, S. D. Georgia, E. D. January 27, 1892.)

1. SALVAGE—COMPENSATION—EVIDENCE.

A schooner drawing ten feet of water was blown out of her course, and carried over shoals where, for a distance of two miles and more, the water at low tide was from one to three feet deep, and finally went aground in a quicksand, into which she sunk, in a short time, the distance of three feet. From contact with her anchor a hole had been knocked in her bottom, admitting a volume of water into the vessel, which rose and fell with the tide. The water was pumped out of her hold, and she was pulled off the shoal by libellant's steam-tugs, at great risk to the tugs. Cargo to the value of \$7,000 was saved, and the vessel was afterwards sold for the sum of \$1,030. *Held*, that the sum of \$5,000 was not an excessive allowance for salvage.

2. SAME—AGREEMENT OF MASTER.

The agreement of the master to pay \$5,000 salvage, while not binding on the court when deliberately made, will be regarded as a valuable indication of what should be the true amount of the recovery.

In Admiralty. Libel by the Propeller Tow-Boat Company against the schooner Agnes I. Grace for salvage.

Lester & Ravenel and Geo. A. Mercer & Son, for libellant.
Chas. N. West, for respondent.

SPEER, District Judge. It appears in the evidence submitted to the court that on the 26th of April, 1891, the schooner *Agnes I. Grace*, bound for Port Royal, S. C., loaded with a cargo of jute bagging, put into Tybee roads under a stress of weather. The wind was strong, and from the East N. E. According to the testimony of the log-book, the schooner, after she crossed the bar, was running by the range lights on Dafuskie island, near Bloody point, and proceeded in a northerly direction, a little west by north, until she came up on the sands $3\frac{1}{2}$ nautical miles, by the scale, from the channel or anchorage used by vessels seeking shelter. It appears from the chart that the schooner (coming in at high tide) passed over shoals where, at low water, the depth is from one to three feet for more than two miles, by the scale; and the point where she finally went hard aground was a little to the north-eastward of a spot marked on the chart as "dry." It is in evidence on all hands that this left the vessel in an exceedingly perilous condition. She was exposed to the full force of the sea and the winds, should the winds from the north-east, east, or south-east prevail; and, indeed, the evidence is that she was as much exposed to the winds from those directions as if she had been entirely outside of the bar, and on a shoal, exposed to the full force of the Atlantic rollers. Not only was this true, but the nature of the ground on which she went ashore was exceedingly treacherous and dangerous. Sands of this character are described by Judge HUGHES in his opinion in the case of *The Sandringham*, 10 Fed. Rep. 562, in the language following:

"The fact is that there, and all along the coast for several hundred miles, the sand is a fine, movable substance, which, when a heavy body is resting upon it, retreats from under it by the action of the currents of the ocean, which there constantly prevail, leaving a bed into which the body sinks deeper and deeper, the longer it remains in its position. There is no possibility of any substance which, in specific gravity, is too heavy to float upon the surface of the water, being lifted out of its bed in this sand, and floated upon the shore. All the vessels that are beached upon the sands of this long coast invariably continue to sink, deeper and deeper, until they disappear from sight under the sea into the sand. The fate of the United States steam-ship *Huron* wrecked off Kitty Hawk, November 27, 1876, was a notable historical exemplification of this part of the coast."

The evidence of the witnesses—many of them competent and experienced observers—relative to similar instances of stranded vessels upon the sands contiguous to or nearly contiguous to those where the *Grace* went ashore, confirms the statement of Judge HUGHES, just read, and the facts of this particular case also bear it out. The undisputed testimony of one of the witnesses is that at one period of his observation of the vessel the crew were overboard, with their trousers rolled up, wading around in the water, about knee-deep. The testimony of the master of the stranded vessel is substantially to the same effect. The vessel drew 10 feet. She was then sunk into the sand, in the time in which

she had remained stranded, from 2½ to 3 feet. Not only is this true, but it is in evidence that from some cause, and most likely by contact with her own anchor, when it was thrown overboard, a hole was knocked in her bottom, on the starboard side, at the turn of the bilge. The testimony of the ship-carpenter that repaired her proves the existence of this alarming injury, and through this hole a large volume of water was speedily admitted into the hold of the vessel; and, according to the log-book of the vessel itself, the water in the vessel rose and fell with the rise and fall of the tide. In this condition, therefore, the peril of the vessel was exceedingly great, and it is true that there were no means of succor at hand, save that offered by the vessels of the libellant, the Propeller Tow-Boat Company, which services were promptly tendered, and were performed with all the skill and energy the circumstances of the case permitted. Finally, it appears in evidence, through the efforts of the Propeller Tow-Boat Company, that the schooner was dragged off after her cargo was lightered, and after the immense volume of water had been pumped out by their powerful steam-pump, and was afterwards repaired at an expense of \$1,200. A large portion of the cargo, amounting in value to \$7,000, was also saved. The schooner was sold at the price of \$5,030,—manifestly, from the evidence, only a moiety of her value; and it is to recover salvage from these values that this libel is brought. It is also in evidence that, pending the efforts on the part of the libellant, the Propeller Tow-Boat Company, to relieve this vessel, a definite contract was entered into between the master of the vessel and Capt. Avery, who commanded one of the tow-boats, and conducted the operations, by which contract the master of the vessel engaged to pay the Propeller Tow-Boat Company the sum of \$5,000 as salvage, and this contract is put in evidence, and relied upon by the libellant as a circumstance of great value in the evidence, as indicating the amount of salvage which should be allowed by the court. It is true, as is insisted by the respondent's counsel, that a contract of this character is not binding upon the court, and that in all cases of salvage it is competent for the court to adjudge and assess the amount of the recovery in accordance with the equities of the case; and, if it should appear that a contract of this character was an inequitable one, the court would, of course, disregard it. But whenever a contract has been entered into after due deliberation by the parties, and has not been shown to be in any respect an inequitable one, it is exceedingly valuable as evidence to enable the court to arrive at a just determination. The court regards this contract as evidence in that light, and not as a conclusive contract; but it is a most significant and valuable indication of what should be the true amount of the recovery. And, considering all the facts of the case, the court is of the opinion that the contract stipulates but a moderate charge for the services rendered in this case, and it is perhaps true that, if a larger demand had been made, a larger allowance would have been permitted by the court.

Numerous cases have been cited by the respondent's counsel where a smaller sum has been found as salvage services by various courts, upon

various statements of facts presented, respectively, in each case; but in no case thus cited was there a vessel imbedded 2½ to 3 feet in the sand, 3½ nautical miles from its proper channel or anchorage, exposed to all the vicissitudes of the weather and the ocean, with no protection in the nature of a harbor from the wind and the waves, with a hole knocked in her bottom, and with the tide flowing and ebbing in the hold of the vessel as it flowed and ebbed in the ocean around her. In this condition of affairs, the court is of the opinion that the peril of the vessel was extreme; that the chances of success in its rescue were exceedingly slight, and this is plain from the testimony of all the experienced pilots who were disinterested witnesses in this case, and by one other witness, the harbor-master of the city of Savannah, himself a pilot, who was offered on the part of the respondent. It is also true, in the opinion of the court, that the skill exerted and the labor expended were great; that the libellant labored for several days when making this rescue; and, after the rescue was made, it was only by the presence of its powerful steam-pump, continually exerted, that they were enabled to keep the vessel afloat; and only with the presence of that steam-pump,—a wrecking pump,—worked by the assistance of the steam of a tug, and at imminent hazard to the tug, was it possible so to relieve the vessel of the water in her hold as to enable her to float. The testimony of Willink, the ship-carpenter, who repaired her, is that she barely escaped sinking in the river at his yard, when the pumps were stopped for a short time. The promptness, skill, and energy displayed in saving the property were entirely adequate, and, in our opinion, it is clear the Grace could not have been floated before she was. The value of the property employed in rendering the services amounted to many thousand dollars. There were two valuable tugs, worth in the aggregate from \$60,000 to \$70,000; two lighters, of considerable value; and a small additional tug, which generally earned \$25 per day. The risk incurred by the salvors in securing the property from imminent peril was great, and experienced pilots cautioned the master of the tugs not to undertake it. It is true that, if the tugs had been managed with less skill, without mutual assistance to each other, and without the judgment shown by those directing the work, they would, not improbably, have shared the fate which was then imminent to the Grace herself. The value of the property saved was considerable, and has already been described. On the whole, therefore, the court finds for the libellant the whole amount of salvage claimed in the libel, together with the sum of \$210, which has been expended for pumping at the ship-yard, and about which there is no dispute. We also find for the intervener, Joseph A. Roberts, the amount proven as due him upon his intervention. The amount of the decree will be apportioned between the proceeds of the vessel in the registry of the court, and the value of the cargo which has been rescued, for which stipulation is given. The pleadings, it is conceded on both sides, will not permit the application of the doctrine of general average between the owners of the cargo. If, however, application should be made by the owners of the cargo to apportion such portion of the decree as may be assessed

against the cargo between the several owners thereof, the court will, at the proper time, consider that application. The decree will be entered in accordance with the finding.

THE LYDIA.

EASTERN & A. R. Co. v. THE LYDIA, and eight other cases.

(District Court, E. D. New York. February 10, 1892.)

SALVAGE—FIRE IN OIL SHIP—STEAM-TUGS—PUMPING.

Fire broke out about 9 o'clock A. M. in the cabin of the ship Lydia, as she was lying at a wharf in the Kill von Kull, with 2,900 barrels of crude petroleum aboard. Nine tugs, supplied with various kinds of pumps, came, one after another, to her assistance, and pumped water on the flames, at the same time taking the Lydia to an anchorage in mid-stream. The fire was extinguished about 12 o'clock. The court found that without the aid of the tugs the ship and cargo would have been destroyed, that no other help was obtainable, and that the services of all the tugs were useful. The Lydia and her cargo were worth \$31,000 or \$32,000. Held, that \$4,000 was a proper salvage award, which was divided among the tugs according to their merit; special allowances also being given to four men who carried hose to the burning cabin.

In Admiralty. Suits on behalf of the owners of nine tugs to recover salvage compensation of the ship Lydia and cargo.

Wing, Shoudy & Putnam and *Mr. Burlinham*, for the Lydia.

Goodrich, Deady & Goodrich, for the Fisher.

George A. Black, for the Astral.

Benedict & Benedict, for the Elder.

Stewart & Macklin, for the Soper, the Golden Rule, and the Hoffman.

Wilcox, Adams & Green, for the Adelaide and the Carrie.

Carpenter & Mosher, for the Wallace.

BROWN, District Judge. About 9 o'clock in the morning of January 21, 1892, a fire broke out in the cabin of the ship Lydia. It was extinguished a little before noon by the aid of some nine tugs, in behalf of each of which libels have been filed to recover salvage compensation. All the actions were consolidated and have been heard together.

The Lydia was lying in the Kill von Kull at the end of the pier at Bayonne, loading with crude petroleum and iron pipes. She had 2,900 barrels on board, which nearly filled her lower hold. The cargo was highly inflammable, and the gases from it, if confined, were liable to explode. Her hatches had, however, been off, and the ventilation was good, so that the chief danger was not of explosion, but that the fire might spread so as to reach the oily petroleum barrels, in which case I find that the ship and cargo would have been certainly destroyed. The day was clear and cold. The hose upon the dock, which was first sought to be used, was found to be frozen. The small tug-boat Charles E. So-

per was near at hand, and very shortly got out a hose, which was directed through the sky-light of the cabin; but after a few seconds' pumping, the pump gave out. The Soper thereupon sounded whistles. This attracted the attention of the steam-tug Isaac L. Fisher, which had previously passed the Lydia and was proceeding westward. The Fisher thereupon returned, made fast upon the starboard side, and sent up her hose on board the Lydia. It was found too short to run to the fire, whereupon a piece was detached from the hose on the dock and joined to the Fisher's hose. This caused some delay, so that the Fisher got playing upon the Lydia at about half-past 9 o'clock. The steam-tug Elder arrived next after the Fisher.

In the mean time the stevedore's men had cut the Lydia loose from the dock, fearing that she might communicate the fire to the oily barrels there; and the Lydia thereupon surging forward to the eastward with the tide soon grounded at her bows after moving about half a length. The Soper and the Elder were then employed for nearly a half hour in getting her off, and out into the stream, where she anchored at about 10 o'clock. The Fisher meanwhile continued her pumping without cessation, and also aided by her engines in getting the Lydia into the stream. While this was going on, the large steam-tug Astral arrived with powerful pumps, and began throwing water upon the Lydia. This was not of much service until the steamer had come to anchor, when the Astral made fast outside the Fisher, and from that time until the fire was out poured into the cabin a stream of about 1,500 gallons a minute. The Elder, as soon as the Lydia was moved, also made fast outside of and across the bow of the Fisher; and from that time kept up a stream of water through her hose until the fire was out. After these came next the Carrie and the Wallace at about the same time; next the Golden Rule and the Adelaide, all of which went upon the port quarter; and last the Philip Hoffman, which was the forward boat on the starboard side. The fire was extinguished a little before 12 o'clock. All the tugs were then discharged by the master, except the Fisher, which was requested to lie by. About 3 o'clock in the afternoon smoke again made its appearance, and the Fisher played with her hose for about 10 minutes more, after which all traces of fire disappeared, and she was discharged at about 6 P. M.

The evidence shows that the ship and cargo would have been destroyed, except for the aid of the tugs. No other help was obtainable. The value of the ship was from \$8,000 to \$10,000; of the cargo, about \$12,412; in all, about \$21,000 or \$22,000. The aid of the tugs was timely, and prevented any serious loss. The main deck was uninjured; the mizzen-mast only charred, so as to remain still serviceable with repairs only. The repair-bills amount to about \$2,300.

For the whole service I think \$4,000 will be a sufficient and appropriate award. Considerable difference arises in the claims of the different tugs for the merits of their respective services. I find that all were useful. Even the Soper, whose fire apparatus proved to be of no use, rendered an important service, besides her aid in the necessary removal

of the ship, in summoning by her whistles the other tugs that first came. In case of fire the first moments are the most important.

To the Fisher, as the first to arrive upon the ground with an effective pump, the largest share is due. Some drawback, however, must be recognized in the allowance to the Fisher from the fact that she was not fully prepared with sufficient hose for the emergency; and that some 5 or 10 minutes were lost in getting additional hose from the dock sufficient to reach the fire.

Next in importance is the Astral, specially fitted with powerful pumps, and worth about \$40,000, or one-third the value of all the tugs engaged. The great volume of water which she threw was most useful in keeping the decks cool and wet, and in preventing the spread of the fire; and there is no doubt that the scattering of the water all around the cabin, as it dashed against the mizzen-mast from her immense nozzle, directed down the companion way, did effective work.

The Elder is entitled to the credit of being somewhat earlier than the Astral, and of assisting in the removal of the ship, as well as for the use of her hose, though of smaller size, during all the subsequent time; and it was her hose that was used in the cabin and directed to the precise points of the fire.

The above-named three tugs are entitled to the largest allowance, because they arrived on the ground some 15 or 20 minutes before the others, and would very likely have been sufficient alone to extinguish the fire. Of the Carrie, the Wallace, and the Golden Rule, which arrived next, the Golden Rule was the most valuable tug, and her hose also was used directly in the cabin. The Wallace was a smaller tug; her hose had no nozzle; and the master of the Lydia testifies that much of her work was useless in pouring water down the booby hatch remote from the fire. The Hoffman was the last and of the least value; but I have no doubt she used her hose for a considerable time, as her witnesses testify. As the later tugs all rendered some service, they are entitled to share in the award, but in diminished proportions.

To each of the four men, who as soon as possible went into the cabin to play the hose, I award personally \$25 each, in addition to their shares as one of the crew of their tugs respectively. To the Soper I allow \$100. To each of the other tugs, having reference to the services rendered, their value, and the other circumstances appearing upon the trial, I award as follows: To the Fisher, \$1,000; to the Astral, \$850; to the Elder, \$550; to the Golden Rule, \$350; to the Carrie, \$300; to the Adelaide, \$300; to the Wallace, \$250; and to the Hoffman, \$200.

A decree, with costs, may be entered accordingly.

THE PERSIAN MONARCH.

BRIODY v. THE PERSIAN MONARCH.

(District Court, E. D. New York. February 25, 1892.)

SHIPPING—NEGLIGENCE—PERSONAL INJURIES—INSUFFICIENT MACHINE—NOTICE.

The fall-rope of a derrick, rigged upon a boom running in line with the keel, to the mizzen-mast of the steam-ship Persian Monarch, to aid in loading and discharging cargo, was carried outside of the ship to a loaded scow, for the purpose of hauling her along-side by a steam winch. Under the strain, one of the guy-ropes parted, and the boom swung around, injuring libellant, who was a longshoreman engaged in attending to the fall-rope. Such a derrick is not usually designed for, or sufficient to withstand, such lateral strains. But upon evidence that this derrick had been many times so employed on this ship, with the knowledge of her officers; that no other mode of removing such barges was practiced by the ship; and that the boom was supplied and rigged with strong vangs, for the purpose apparently of hauling barges along-side,—held, that the ship was liable for the libellant's damages, which, under the circumstances of his case, were assessed at \$3,000.

In Admiralty. Suit to recover for personal injuries. Decree for \$2,000.

E. H. Mars and *William Allen*, for libellant.

Foster & Thomson, for claimant.

BROWN, District Judge. On the 11th of December, 1890, the libellant was employed as a longshoreman in loading and discharging the steam-ship Persian Monarch in this port. A derrick was rigged upon the mizzen-mast, the boom of which was held up some 12 feet above the deck by a chain running from the end of it to the mast aloft, and kept in position over the keel by a guy or vang of wire rope running from the end of the boom on each side to a block fastened to the deck near the rail. The libellant's duty was to tend the fall-rope. For the purpose of hauling along-side the ship a scow loaded with a cargo of flour, the hook of the fall-rope was carried outside of the ship on the starboard side and fastened upon the further side of the scow. The winch was then set in motion; but the scow being heavy, and the ebb-tide beneath the pier offering additional resistance, the strain became so great upon the guy on the port side, that it parted. Thereupon the boom swung suddenly to starboard, carrying the starboard guy and tackle along with it, and caught the libellant, who was standing by the starboard rail, and pressed him severely against the rail, causing him great injuries, for which the above libel was filed.

Several witnesses on behalf of the claimant testify, and I have no doubt that such is the fact, that a derrick rigged upon the mast is not designed for such lateral strains, or to be used in hauling barges by a longitudinal strain; and that the proper way to use the winch for that purpose is to detach the fall-rope from the block of the boom, or else to use a different hawser, and carry it through the chock on the side of the ship to the barge outside. The stevedore also testifies that the use of the fall from the boom was improper, and was only used when the offi-

cer of the ship was supposed not to be on the watch. On the other hand, considerable testimony for the libelant shows that the derrick on the Persian Monarch had been for several years employed a great many times in a similar manner, and whenever the ship was in port, with the knowledge and under the observation of the ship's officers, as well as under the direction of Mr. Phillips, superintendent of the line. None of the officers of the ship, nor Mr. Phillips have been examined to dispute these statements; and the fact that no other mode of hauling along-side is proved to have been practiced on the Persian Monarch, and that a wire rope calculated to stand the strain of some 8,000 pounds was used as a guy, a strength far beyond that required for merely holding the boom in place for any perpendicular work of the fall, is claimed to be evidence that the derrick was intentionally supplied and rigged for the purpose of convenience and quick dispatch in hauling barges along-side, as well as for its ordinary perpendicular work in loading and unloading cargo.

Taking all the circumstances into account, I am of the opinion that the libelant's theory is most compatible with the evidence, and with the reasonable presumptions of the case; that the purpose for which the derrick was supplied was much extended beyond its original design, and included, by the long and well-known practice of the ship, the hauling in of barges that might need small changes in position for the quick dispatch of the ship's business; and that the guys should, therefore, have been sufficient for hauling in such barges as came there in the ordinary course of business. This must include also hauling at the usual different stages of the tide, and under all other ordinary circumstances, unless some notice in the way of exception was given. None such was given.

Had the break arisen from a manifest gross misuse of the machine, as in attempting to raise ten tons where it was known to be designed only for one ton, or for five, I think such a palpable misuse would be negligence of fellow-workmen which would cast no responsibility upon the owners. But since the hauling of barges must, as the evidence stands, be included among the purposes for which this derrick was supplied, I cannot say that this barge and the circumstances of the attempt to moor it along-side, were so peculiar or extraordinary as to distinguish this case from that of other barges often moored in a similar manner.

There is great difficulty and uncertainty in determining what amount can be properly given as damages. The libelant is now, as is conceded, wholly disabled from severe work, through the enlargement and dangerous condition of the heart. He can only do light work, earning about one-third his former average wages. He is 42 years old. He testifies that before this accident he was strong and rugged, and never sick. I am satisfied that the other supposed troubles do not exist to any material degree. His ribs were not broken as supposed. His own physician believes the condition of his heart to have been produced by this accident. Dr. Flint, on the contrary, an expert of wide experience and high reputation, though admitting that to be barely possible, conceives

it to be in the highest degree improbable, and not at all credible. He thinks the libelant's condition originated in prior disorder of the heart, which might have come from any one of various causes and have been gradually developing. His own physician did not see the libelant until nine days after the accident, when, as he testifies, he found the condition of the libelant's heart for the most part as at present. During those nine days the libelant had been under treatment at the New York Hospital. The surgeons who examined and treated him there were not called as witnesses. Opportunity was given after the trial to either side to examine the surgeon in charge of the patient there, and to prove the record of his case, which is kept at the hospital, and which was produced in court by the defendant, but necessarily excluded under the libelant's objection. Neither side have availed themselves of the privilege of subsequent examination, although the libelant has introduced since the hearing additional evidence on other branches of the case. The burden of proof is upon the libelant to show what is the amount of the injury that he has sustained by the accident. In the difference between the physicians, evidence of the earliest examinations and of the record of his case is presumptively of great importance; and its non-production, when so easily procurable, necessarily leaves the libelant subject to the legal intendments against him from failing to produce important evidence in his power. As this evidence was equally available to the defendant, however, it is not to be taken as equivalent to concealment, or as disproving the libelant's case.

Under such circumstances I must regard the libelant's contention that his present condition has been wholly produced by this accident, as not sufficiently made out, but consider the case as one of previous heart disorder aggravated and accelerated in its development by this accident. Upon such a finding of the facts, there is no satisfactory standard for ascertaining the damages to be awarded. I can only do as a jury would, under similar circumstances, be obliged to do, viz., give such damages as on the whole commends itself to their judgment. I award the libelant \$2,000, and costs.

THE ST. NICHOLAS.

JONES *et al.* v. THE ST. NICHOLAS.

(District Court, S. D. Georgia, E. D. December 14, 1891.

1. RECEIVERS—SUABLE WITHOUT LEAVE.

Under the provisions of Act Cong. March 3, 1887, (re-enacted August 13, 1888,) a receiver may be sued for a marine tort in another district, without leave of the court appointing him.

2. ADMIRALTY JURISDICTION—DEATH BY WRONGFUL ACT—ESTOPPEL.

Many persons were killed and others injured by the collision of a river steamboat with a railroad bridge, in Georgia. The boat was libeled by persons injured,

and, on petition of the owner, under the limited liability act, the representatives of the persons killed were made parties, and enjoined from suing elsewhere. *Held*, that by this action the owner was estopped from denying the right of such representatives to share in the fund realized from the sale of the boat, if negligence was found, though the Georgia statute, giving a right of action for wrongful death, creates no lien therefor.

3. **SAME—EFFECT OF STATE STATUTES.**

A federal court sitting in admiralty may enforce a liability for wrongful death created by state statute, when the death is the result of negligence on the part of a steam-boat navigating a river of the state. *Quere*.

4. **COLLISION—LOOKOUT—RIVER STEAMER.**

Where a river steam-boat which carries no lookout at the bow, as required by rule 10 of the board of supervisors' regulations, collides with a draw-bridge at night, and thus causes injuries to her passengers, the burden is upon her to show that the want of a lookout did not in any manner contribute to the accident. *The Farragut*, 10 Wall. 384, distinguished.

5. **SAME—CUSTOM.**

The fact that other boats running on the same rivers do not carry any lookout except the pilot or helmsman is immaterial, since no practice which is contrary to a rule having the force of a statute can create a valid custom.

6. **SAME—APPROACHING BRIDGE.**

It is negligence for a river passenger steamer to approach the locality of a railroad draw-bridge at night at such a rate of speed as to prevent her complete control by the master, especially when there is no uniformity in the method of placing lights to indicate whether the draw is open or closed.

In Admiralty. Libel by Henry Jones and others against the *St. Nicholas* for personal injuries. Decree for libelants.

Lester & Ravenel, for libelants.

R. R. Richards and *W. R. Leakin*, for respondent.

SPEER, District Judge. The libel filed in this cause alleges that Henry Jones, Louisa Giles, Joshua Giles, her husband, and 37 other persons were passengers on board the steam-boat *St. Nicholas*, Frank Boulineau, master, on July 20, 1889. The *St. Nicholas* was a regularly licensed and enrolled steam-vessel, and was engaged in navigating the inland rivers of Georgia as a common carrier of goods and passengers between the ports of Savannah and Brunswick, in this state. The particular voyage on which she was engaged at the time of the incidents described in the libel was from Savannah to Brunswick through the inland passage. Libelants were recognized as passengers for that voyage, which was commenced about 8:30 o'clock p. m. on the day above mentioned. After proceeding on her course for about one hour, the *St. Nicholas* collided with the draw-bridge across St. Augustine creek, the draw-bridge of the Savannah & Tybee Railway Company, which was at the time closed. That at the time of the collision the vessel had just turned out of the Savannah river into St. Augustine creek, and, after proceeding in said creek from one-half to three-quarters of a mile, collided with the draw-bridge. The collision rendered it impossible for the steam-boat to proceed further on her voyage, and she accordingly returned to Savannah.

It is further averred that by the collision all the forward part of the saloon and hurricane deck of the boat was carried away, or crushed in and caused to fall to the lower deck, causing the libelants, most of whom were on the saloon deck, to be thrown violently against the deck or to

fall to the lower deck, and to be crushed and bruised by the falling timbers of the deck and the timbers of the draw-bridge, under which the boat was forced, thus causing the injuries which are set out in detail in the libel. These are very numerous and various. It will suffice, to indicate their general character, to state briefly that Henry Jones, it is alleged, was crushed and bruised in such a manner that he lost his right eye, and was so crushed and bruised in his body and person as to render him incapable to follow his ordinary vocation, which was that of a porter in a store. He suffered great bodily pain and anguish, and was confined to his house and bed, and had to employ the services of a physician and of a nurse to treat him for his injuries. Louisa Giles, being in that part of the steam-boat which was forced under the bridge, was caught between the bridge and the decks of the steam-boat, and crushed to that extent that her right thigh and right arm were broken, and her face and body badly bruised. Mary Anderson was caught between the bridge and the decks of the steam-boat, and received serious injuries in her spine and left hip, and had her right arm and right shoulder seriously injured. William Brown received serious internal injuries, and since then has not been able to breathe with freedom; has not been able since then to follow his ordinary avocation of mattress-maker and carpenter. Cecilia Beasley was knocked on the head, her left shoulder dislocated, and chest crushed. Her memory and hearing have been affected. Most of the injuries, as described, are serious, and generally expenditures for physicians and nurses have been made necessary, it is alleged; and, wherever the party injured was a married woman, her husband has been joined as a libellant to recover for the loss of the comfort and services of his wife and for his outlay in securing medical attention and nursing for her.

There are several interventions filed seeking to recover damages for the deaths of several passengers who were crushed and bruised in the collision to that extent that they either were taken up dead or died after lingering for a short time. These interventions are brought by parties who, under the laws of Georgia, would be entitled to recover for the unlawful homicide of a person bearing the relation of that occupied by the several passengers who were killed to the several interveners, respectively. There are yet other interventions by which passengers who were injured prefer their claims in that form for damages and compensation.

Since the court has confined its attention to the question whether or not the St. Nicholas is liable, as claimed, it will not be necessary to give a more detailed statement of the character of the injuries and the amount of damages claimed by the libellants.

The grounds of negligence set forth in the libel are as follows: The bridge with which the steamer collided had been constructed across the St. Augustine creek for a considerable time. Its position was well known to those engaged in navigating the inland route between Savannah and Brunswick. That at the time of the collision the draw-bridge was marked by two red lights, one of which, by an amendment to the libel, is described as being in the center of the draw, and the other on

the western side of the draw, or abutment of the bridge. These lights were visible to persons approaching the bridge from the Savannah river through St. Augustine creek. The lights were in the position where they usually were when said bridges were closed. That the master of the St. Nicholas was himself acting as pilot, and so negligently managed her as to cause her to violently collide with the bridge, force her bow under the draw, and thereby injure libelants in the manner described. It was further negligent, it is charged, that the master did not so regulate the speed of his vessel as to have her under full control until he had ascertained that the draw was open; and that it was negligence to proceed so near the bridge at such a rate of speed as to render it impossible for him to arrest his boat, and thereby prevent the collision. A further ground of negligence is that as the steamer was approaching the bridge it was the regular schedule time for the passage of the passenger train of the Savannah & Tybee Railroad. The train was then actually approaching the bridge, and it was negligence, carelessness, and unskillfulness on the part of the master of the boat to approach the bridge at such a rate of speed as, under the circumstances, would render it impossible for him to escape the danger resulting from the fact that the bridge must be closed for the passage of the train. It is further alleged as negligence while the steamer had on board about 500 passengers, thereby crowding her decks and greatly increasing the dangers attendant upon a collision, and while it was necessary to observe extreme care and caution in approaching the bridge at night, and especially to have a lookout at the bow of the boat to see whether said bridge was open or closed, that there was no lookout stationed at the bow, nor any lookout stationed where he could see ahead of the boat as they were approaching the bridge immediately preceding the collision, from which negligence the collision directly resulted, because by the presence of such a lookout it might have been ascertained that the bridge was closed. It is further alleged that the passengers in no manner contributed to the collision, but were quietly occupying the saloon deck which had been allotted to them, and which was a proper place for them.

Henry R. Duval, receiver of the Florida Railway & Navigation Company, has interposed a claim to the St. Nicholas, and answers to the charges of the libel. The answer recites that the St. Nicholas is owned by him as receiver. The collision with the draw-bridge is admitted, but he denies all negligence. He admits that the bridge had been built across the St. Augustine creek for a considerable time. Its position was well known to all persons engaged in navigating the inland route between the ports of Savannah and Brunswick, and also admits that the draw-bridge was marked by two red lights, one of which was in the center of the draw, and the other on the western side of the draw, or abutment of the bridge. He denies that the lights were in the position where they usually were when said bridge was closed, but, on the contrary, states that they were in the position where they usually were when the bridge was open. The master of the St. Nicholas was a pilot, a qualified and authorized navigator. The bridge is a well-known obstruction to navigation. The

tidal currents did not run parallel to the bridge piers, and it is too low, and is not properly protected by fender piles. The currents set in diagonally to the bridge, and with the best management are apt to carry boats against the bridge, so as to cause collisions. The Tybee road crosses the river at a sharp point, and the tide, both ebb and flood, runs diagonally across, compelling vessels to make an angle in going through the draw. It is a strong current, making it difficult to steer a vessel as large as the St. Nicholas through the draw without striking. Such vessel is compelled to approach the draw with some speed in order to pass safely. The master of the St. Nicholas was unable to discover that the draw was closed until said vessel was within 300 feet of the bridge, or other short distance. He then discovered that the draw was closed, and used every precaution to avoid a collision. He was in the pilot-house, and gave the proper signals to the engineer to back her all he could, which signals were immediately obeyed, and despite all their precaution, and the utmost care and diligence to avoid the collision, it was inevitable, and immediately thereafter took place.

The collision was wholly due to the neglect of the parties in charge of the bridge, who kept the draw closed, and placed the lights in such a position as to cause him to believe it was open. The usual signals were given to warn those in charge of the bridge of the coming of the steam-boat. It was a dark night, with a background of trees to the bridge and the shadows from the bridge, and it was impossible for the master to discover that said draw was closed any sooner than he did. He denies that it was the schedule time of the Tybee road. He denies that it was necessary to have any special lookout, except the master himself, who was in the pilot-house; that all and singular the premises in the answer are true, and are within the admiralty and maritime jurisdiction of the court. The answer proceeds to recite the facts that the claims of libelants and interveners exceed the full value of the steam-boat, her tackle, etc., and her freight for the voyage; that others than said libelants and interveners claim to have been injured by said collision, and threaten suit therefor. Respondent is the owner and representative under his receivership; and while contesting the liability of his vessel, yet desiring a limitation of liability under the act of congress made March 3, 1851, entitled "An act to limit the liability of ship-owners, and for other purposes," as amended by the act of June 26, 1884, (section 18,) and of June 19, 1886, (section 4,) respondent petitions the court, and propounds and alleges as follows. Then follows a recital of the facts of the collision and claims of the libelants and other usual and necessary averments to a petition to limit liability under the acts of congress aforesaid, with the prayer that, if the libelants, interveners, and all others are found entitled to recover, they may have a decree for only such proportion of the damage sustained by them as the value of the steam-boat bears to the whole amount of damages sustained by all the parties to the collision. He further prays that all claims for loss, damage, or injury to persons or property by reason of the premises, and for repairs, may be here determined in this court, and proportioned according to law,

and that due appraisement may be ordered made of said steam-boat, her machinery, tackle, furniture, etc., and her pending freight at the time of the loss, he offering a proper stipulation therefor; and that further prosecution of all and any suit or suits, or the commencement of any suit or suits, against the respondent and those whom he represents as owners, in respect to any such claim or claims, may be restrained by order of this court, and enjoined therefrom.

In support of this answer, it is insisted for the respondent that the United States circuit court in Florida, by which the respondent was appointed receiver, alone has jurisdiction of any matter relating to the liability of property in its custody, and, unless that court has given leave to the plaintiffs to sue its receiver, the libel and interventions should be dismissed. In support of this proposition, *Barton v. Barbour*, 104 U. S. 126, 130, 131; *Heidritter v. Oilcloth Co.*, 112 U. S. 294, 303, 304, 5 Sup. Ct. Rep. 135, are cited. It will be sufficient, upon the last proposition, to suggest that these cases were decided before the act of congress of March 3, 1887, (re-enacted August, 13, 1888,) by which it is provided that receivers may be sued without the leave of the court appointing them, (24 U. S. St. p. 554; 25 U. S. St. p. 436,—by which it is provided that a receiver may be sued without the permission of the court by which he was appointed.)

It would be moreover, in our opinion, true, that if a receiver appointed in one district of the United States should send into another a vehicle of commerce like the *St. Nicholas*, that vessel would be liable, altogether irrespective of authority to sue, granted by the court by which the receivership was created, for any marine tort which it might commit. This statute, however, is controlling. *Central Trust Co. v. St. Louis & T. R. Co.*, 40 Fed. Rep. 426, 427.

A more interesting question presented by the answer and the arguments of the proctors for the respondent is this: Can a suit in admiralty be maintained in the courts of the United States to recover damages for the death of a human being on the high seas or on waters navigable from the sea, which death is caused by negligence? It is insisted that such a suit could not be maintained, in the absence of an act of congress or of a state statute giving a lien on the vessel therefor, and the cases of *The Harrisburg*, 119 U. S. 199-213, 7 Sup. Ct. Rep. 140, and *The Alaska*, 130 U. S. 201, 9 Sup. Ct. Rep. 461, are cited in support of this proposition. It cannot be doubted that, concerning the injuries sustained by libelants which did not result in death, it is competent for a court of admiralty, under the general admiralty and maritime jurisdiction, to adjudicate the question of liability, and to assess compensation in proper cases to the parties injured. It is, moreover, true that the laws of Georgia give a right of action in all cases for the homicide of a wife, or of a husband, or of a parent, or of a child, where the death results from a crime, or from criminal or other negligence. Code Ga. § 2971; Act Gen. Assem. Oct. 27, 1887. It is true that no lien is created by this statute on account of the death by negligence. The libelants, who were merely injured, were therefore properly before the court,

and the interveners, having the right by the Georgia statute to proceed against the receiver by an action *in personam*, if service could be effected, for the recovery of damage resulting from the death of those persons on whose account the statute of the state created the right of action, were, on motion of the respondent, and by his petition for limiting the liability under the acts of congress, necessarily made parties to this proceeding, and were restrained and enjoined from proceeding to enforce their rights elsewhere. The respondent is therefore, in the opinion of the court, estopped by his own action from denying the right of these parties to distribution, if liability is found, of the fund which he has paid into court. *Ubi jus ibi remedium*. He may not restrain and enjoin them from suing in the state courts, compel them to join in the proceeding of which this court has properly jurisdiction, and then deny that they may proceed here. Had the state law created a lien upon a vessel navigating the waters of which it has territorial jurisdiction for death resulting from negligence, it would seem that the doctrine as announced by Judge DEADY in *Re The Oregon*, 45 Fed. Rep. 62, would be applicable, where it was held that, under the statute of Oregon giving the right of action to an administrator for the death of his intestate, and giving a lien on the vessel navigating the waters of the state for any injury caused thereby, a suit in admiralty may be maintained in the United States district court for such death. In the absence of such lien, the intervenors, who sue on account of the death, being compelled by the act of congress, and the proceeding of respondent invoking it, to become parties to this proceeding, are, in the opinion of the court, entitled to proceed here, and to ask for the distribution of the fund which the respondent has provided for settlement of all liability which may be adjudged against him because of the collision from which the injuries resulted. We know that, so far as the decisions of the supreme court of the United States have gone, it is yet an open question whether a state law may have the force of creating liability in maritime cases at all, within the dominion of the admiralty and maritime jurisdiction, where neither the general maritime law nor an act of congress has created such liability. Indeed, in the case of *Butler v. Steam-Ship Co.*, 130 U. S. 555, 556, 9 Sup. Ct. Rep. 612, the learned justice, in delivering the opinion, remarked for the court: "On this subject we prefer not to express an opinion." And it is further true that, if a state law cannot have the force to create a liability in a maritime case at all, the interventions dependent upon death filed in this cause could not be maintained.

The question, however, is one which must be decided when it is presented, and perhaps the case at bar may afford an occasion for an authoritative declaration by one of those appellate courts whose deliverances upon the subject will be accepted with satisfaction everywhere. The passengers injured and killed had embarked on an inland voyage. It was to be entirely within the territorial jurisdiction of this state. A homicide at any point of the route which the St. Nicholas would traverse would be triable in the courts of the state, if a criminal case, or, if death ensued from criminal or other negligence at any point of the

waters traversed, the courts of the state would have jurisdiction to adjudicate all questions of liability, and of compensatory damages. Why, then, upon principle, should it be urged that because the case is maritime the state may not create a liability so necessary to compensate for the immensity of injury resulting from the death, suffering, loss, and expenditure of the unfortunate libelants, who, if their averments be true, were the victims of the most culpable disregard of duty and caution by those in charge of the *St. Nicholas*? Can it be that the courts of the state are entrusted with a jurisdiction which, if this were not a maritime case, could compensate the poor creatures whose relatives, in a moment of unsuspecting happiness, were crushed to death by the negligence of those to whom their safety was committed, and, merely because it is a maritime case, the courts of the United States, although having general jurisdiction of torts on waters within the admiralty jurisdiction, have no authority to assess a liability at all? Can it be further true that the court of the United States has authority under the limited liability law to enjoin them from proceeding elsewhere, and may then hold that they have no standing in that court? We think not. The courts of the United States have repeatedly enforced, in maritime cases, the liabilities created by the state statutes, such as ship-builders' liens, liens for supplies, etc. Why may they not enforce a liability in a maritime case for a homicide resulting from criminal or other negligence in a locality, and under circumstances where the state law creates the right. It is insisted that this would defeat the uniformity of practice in admiralty throughout the country; but the same argument would be as applicable to equity, and it is too late to deny that a court of equity of the United States may enforce an enlarged equitable right created by the state statute. Five hundred passengers charter a steam-boat for the purpose of a church excursion. They are, to use the language of the state law in describing them, "persons of color." Their long habits of deference to the white race make them wholly unsuspecting of the possibility of danger while their safety is in charge of white men. For months they have anticipated the pleasures of the voyage. We are told by the witnesses that as the steamer glided over the placid waters of the broad, inland stream, in the fullness of their happiness, they were engaged in singing one of the hymns of their church, when in an instant, without a moment's warning, through the culpable negligence of the officers of the vessel, there was brought about a scene of agony and despair which is rarely equaled,—bruising, laceration, mutilation, death, are inflicted upon the happy company of a moment before. It was upon a vessel licensed by the United States, under the control of the United States laws. The officers through whose negligence the wrongs were inflicted were licensed by the United States. As an original question, if these intervenors could not attach the *St. Nicholas* either by the process of the state court or by a proceeding in admiralty, they must go to a foreign jurisdiction,—to the state of Florida,—and make service upon the receiver, and sue him; and, as we have seen, to deny them the right to proceed now, after they have been enjoined, at

the solicitation of the respondent, from proceeding elsewhere, is wholly to deny them all redress whatever,—a denial of justice for which we will not willingly accept responsibility. We hold, therefore, the premises considered, that it is the duty of the court to entertain the interventions depending upon death.

In determining whether the negligence on the part of the St. Nicholas caused the collision, we have little difficulty. The steamer was negligent in not having a lookout at the bow of the boat, as required by rule 10 of the General Rules and Regulations of the Board of Supervisors, etc., page 42. These rules are promulgated by authority of the Revised Statutes of the United States, (section 4405,) and have received the approval of the secretary and the treasurer, and have all the force of law. A disregard of the rule having been shown, and the accident being occasioned by a manifest want of knowledge of the situation of the draw-bridge, the presumption is that it resulted from the absence of a lookout, and the facts of the case, moreover, sustain this presumption. The master of the St. Nicholas, who was also a pilot, and engaged at the wheel navigating the vessel, was really, by his position above the bridge, probably unable to see the draw. At night, on account of the trees and the darkness of the water, it was difficult, if not impossible, for him to see it, whereas a lookout stationed in the bow of the vessel, not charged in any manner with the duty of directing its course, or of following the sinuosities of the channel, could readily have discovered the closed bridge looming, as it must have done, between him and the sky. The failure to station a lookout in the bow appearing to be a positive breach of the statute, and of the rule made in pursuance thereof, it is the duty of the steamer to show that this neglect certainly did not contribute to the disaster. *The Pennsylvania*, 19 Wall. 125-135. The case of *The Farragut*, 10 Wall. 334, does not change the application of this rule, because here the proper inquiry of the master was whether the draw was open or closed, and nothing could have afforded such satisfactory evidence on that subject as the lookout in the bow of the steamer. The testimony of Ramon Noble, one of the pilots of the steamer, is that a man at the jackstaff could have seen anything on the water better than elsewhere. Richardson had been piloting the St. Nicholas, and testified that the reason why the bridge could not be seen on a dark night was because this was a low, flat place. There the railroad is very near the water. It is evident to any man of experience that one below the bridge, or on a level with it, could see it better at night than one stationed above it. Capt. Boulineau, of the St. Nicholas, himself testified that a man could not see the St. Augustine bridge from the pilot-house as well as in the bow. He would look over it in the dark. A lookout is always necessary. 1 Pars. Shipp. & Adm. p. 577; *The Gray v. The French*, 21 How. 184, 192, 193; *St. John v. Paine*, 10 How. 535; *The Sea Gull*, 23 Wall. 165. He should not be the helmsman. *The Ottawa*, 3 Wall. 268, 272, 273; *The New York*, 18 How. 223, 225; *The Genesee Chief*, 12 How. 443. Much more is it true that the lookout should not be helmsman, master, and pilot, commanding a passenger steamer running where there are danger-

ous obstructions and difficult currents, in a dark night, with a cargo of 500 passengers. It is no reply to this for the respondent to cite the testimony of several masters of vessels that they never employed a watch or lookout except the pilot or helmsman, both of whom are stationed in the wheel-house. No such practice can be accepted as a custom, because it is in plain violation of the law.

We find, further, that the *St. Nicholas* was negligent in approaching the bridge at such a rate of speed as would take her from under the control of the master. The officers knew that the bridge was before them,—a dangerous obstruction, and, according to the answer of the respondent, with dangerous currents. They were bound to take measures to avoid a collision. *The Roanoke*, 19 How. 241. The distance of the *St. Nicholas* from the bridge when the first signal was given to stop her was not sufficiently great to prevent the collision, and, as the bridge was immovable, the fault is wholly with the steamer. *Usina* and *Boulineau*, officers of the *St. Nicholas*, say the steamer was 300 feet from the bridge at the time of the signal to stop. *Ramon Noble*, a pilot of the *St. Nicholas*, says she was 15 feet. *Williams*, deck-hand, says she was 40 or 50 feet. The engineer testifies that the wheel made about two turns, or one and a half, before the *St. Nicholas* struck the bridge after the signal was given. The diameter of the wheel is 22 feet. *Richardson*, a pilot formerly on the *St. Nicholas*, says she could turn in her own length easily, and stop in her own length. *S. J. Armstrong* testifies that after the signal to stop, the steamer struck before he had walked 10 feet, before he had gone from near the engine-room to the shaft. Witnesses for the libelants testify that they saw the bridge-man waving his light, and walking across the draw, before the signal was given. Two of them, *Lewis* and *Miller*, testify that they told *Capt. Boulineau* that the bridge was closed, before he discovered it. If, in fact, *Boulineau* had discovered that the bridge was closed when the steamer was within 300 feet of it, he might easily have turned into the marsh,—a thing commonly done by those steamers; or might have stopped the steamer altogether. As a general rule, a steam-boat can be stopped in her own length, or near that. *The Perth*, 3 Hagg. Adm. 414.

With reference to the question so much mooted in the argument, whether the lights indicated that the bridge was open or closed, while it is quite conflicting, the weight of the evidence both for the libelants and respondent indicates that the lights were in a position to show that the bridge was closed. The evidence is exceedingly voluminous, but a close analysis of it enables us to reach no other conclusion.

It is also clear from the evidence that the boatmen generally understood that there was little regularity about the lights on the bridge. *Usina* testified that at times he had seen no light at all. *Avery* testified nothing definite about the lights,—hardly ever saw them two alike; never depended on lights, because there is nothing definite about them. *Swift* testified: "I have seen one red light and the bridge closed, and one red light and the draw open." *Ramon Noble* testified: "When I don't see the lights anywhere, I stop and inquire, until they are

pointed out,—one on the east and one on the west.” It is evident, therefore, that there was no uniformity about these lights, and the master of the St. Nicholas was the more culpable in steaming against the draw-bridge in the dark night at the rate of seven miles an hour. On the whole, there can be no doubt whatever, in our opinion, as to the negligence of the St. Nicholas, and that the libelants are entitled to recover the entire amount of the stipulation.

A master will be appointed to apportion this fund among the libelants, after providing for the cost and expenses of the litigation, and, when his report is filed and approved, a decree will be entered in accordance therewith.

The decree was satisfied in full, without appeal.

THE HARRY AND FRED.

KING v. THE HARRY AND FRED.

(District Court, E. D. New York. February 24, 1892.)

TUGS AND TOWS—TOWING OVER BAR—GROUNDING—DUTY OF TUG—KNOWLEDGE OF TOW.

A tug-boat, in undertaking to tow a boat over a bar, the conditions of which are unknown to the tow, is bound to ascertain her draft, and not attempt to tow her if the water is insufficient. But when a tow is taken as usual in a long course of dealing, the requirements of which as to draft were well known to the tow, and the master of the tug had no reason to suppose that the tow was loaded deeper than allowed, and took her in the best water, and the tow, in consequence of her unusual draft, grounded, the tug was held not liable.

In Admiralty. Suit against a tug to recover for grounding tow. Libel dismissed.

James Parker, for libelant.

Alexander & Ash, for claimants.

Brown, District Judge. On July 25, 1890, the libelant's canal-boat D. M. Long, loaded with coal, ran aground while passing over the bar in going up Coney Island creek in tow of the tug Harry and Fred, and sustained damages for which the above libel was filed.

The evidence leaves no doubt that the libelant had repeated and abundant notice that to go up that creek his boat must not be loaded deeper than 5½ feet. Though the depth of water on the bar a little before high water varied somewhat with the changes of the weather and the season, 5½ feet was the well-known limit of draft that it was safe to undertake to tow over the bar. The weight of testimony is clearly to the effect that the libelant's boat at this time drew six feet at the stern, and still more at the head. She grounded at the bow and easily swung around so that her stern pointed up the creek, and she could not be got off even with an additional hour's rise of the tide up to high water. This fact, coupled with the swing of the stern, itself having six feet draft, confirms the several other witnesses that the draft at the bow was considerably more than six feet. The pilot testifies that the Long had the best of the water; and

the libellant's measurements after the grounding, showing that at a point 30 feet distant abreast of the bow to the right, the water was three inches less, confirm the pilot's statement in this respect.

The libellant testifies that he had repeatedly sent up the creek a greater tonnage load than was aboard the canal-boat at this time. Opposed to this is the testimony of the consignee's son, that when the boat arrived up the creek on this trip she drew 5½ feet after 30 tons had been removed for the purpose of getting her off. Some explanation of these apparent discrepancies may, perhaps, be found in the fact that the canal-boat had been leaking before she arrived at the bar, so much so that in the absence of the boat's captain, two men were employed to pump; and in coming down the two women on board were seen working the pump. With the boat much loaded by the head, the water from any leak would accumulate there and increase the draft forward.

It is urged that the captain of the tug, before taking the boat in tow, ought to have examined her draft, and should not have taken her in tow if the water was insufficient. This would undoubtedly be so if this had been a first trip, and the captain and the owner of the Long had no knowledge of the circumstances. In that case it would be the business of the tug-boat to inquire into her draft before trying to take her over the bar. But in the present case there had been a long previous course of dealing; the boat had been up the creek many times in charge of this tug; the requirements were well understood by all parties; and the captain had no reason to suppose the boat was loaded deeper than usual, or contrary to the known usage. No intimation of it was given to him. In coming to be towed in accordance with the previous custom, it was the duty of the tow to conform to the well-known requirements, and she was presumed to have done so. The tug was not put upon inquiry, and had no reason to make inquiry or investigation concerning the canal-boat's draft. As the grounding arose from overloading, either by too much cargo, or lack of proper pumping, the fault was with the canal-boat; there was no negligence or fault on the part of the tug. I have examined the various authorities cited by the libellant's counsel, but do not find them applicable to facts like the present. As the tug is not an insurer, but liable for negligence only, the libel must be dismissed with costs.

THE JOHN A. CARNIE.

THE OLINDA.

ANDRESEN v. THE JOHN A. CARNIE.

(District Court, E. D. New York. February 13, 1892.)

TUGS AND TOWS—STEAM-SHIP IN TOW—COLLISION WITH PIER—RESPONSIBILITY.

In hauling a steam-ship, with steam up, out of a basin, it is the usual practice to have a single tug haul her stern foremost on a hawser, the vessel to check her sternway, if too great, by going ahead on her own engine. The steam-ship *Olinda* was being so taken out of the Atlantic basin when her stern struck one of the piers of the outlet, doing damage for which this libel against the tug was filed. It appeared

that her master and a pilot were on the bridge, also that her screw had been going full speed astern for a time before the collision. On conflicting evidence, *held* that the master of the steam-ship, not the master of the tug, was in charge of the ship's engines, and was responsible for the excessive sternway caused by the steamer's backing "full speed" astern, which was the proximate cause of the collision; that the navigation of the tug was in no way improper; and that the libel against her should be dismissed.

In Admiralty. Suit by owner of steam-ship *Olinda* against the steam-tug *John A. Carnie* to recover damages caused to the steam-ship by colliding with a pier while in tow of the tug. Libel dismissed.

Wing, Shoudy & Putnam, for libellant.

Carpenter & Mosher, for claimant.

BROWN, District Judge. About half past 9 o'clock in the morning of November 4, 1890, the libellant's steamer *Olinda*, while being towed stern first out of the Atlantic basin by the steam-tug *John A. Carnie*, ran against the outer corner of the southern pier of the outlet, thereby breaking her propeller blades, bending her rudder and doing other damage, for which the above libel was filed. The tide was the first of the flood, running up at the rate of about a knot an hour. The *Carnie* had made fast her hawser of from 20 to 25 fathoms to the port quarter of the *Olinda*. The steamer was of 1,020 tons register, 250 feet long by 36 feet beam, and 17 feet deep. She was light, in water ballast, and had steam up all ready for sea.

The testimony shows that the usual practice in hauling out of the basin is to employ but a single tug when the vessel has the use of her own steam; the tug pulls the vessel out stern first, and the vessel is to check her sternway, if too great, by the forward turning of her own engine. If the steamer has not steam up, one or more additional tugs are employed, which are lashed alongside the steamer to check her way, if too great, and to counteract any sheer of the steamer. In the latter case, the captains of the tugs along-side, according to the testimony of the claimants' captain, have charge of the navigation of the steamer; while in the former case, where there is but a single tug forward on a hawser, her duty is only to pull on the steamer, while the officers of the latter exclusively have the charge and management of her helm and engines; and he further testifies that in such cases the steamer should not increase her own sternway at all by working her engines astern, but should leave the hauling astern solely to the tug, and only work her own engines *ahead* to check her sternway, if necessary.

In the present case the evidence shows that the steamer, assisting by some backing of her own engine, was hauled right to go straight through the outlet until she got near to the gap, when she took a sheer to the southward towards the southerly pier; that to prevent collision her engines were then put ahead full speed, and her helm to port; but that either through too rapid sternway, or delay in the forward action of her engine, there was not time to check her way sufficiently to prevent collision, though she came within a couple of feet of clearing. The tug was already angling to the northward as was proper, and when it was seen that the vessel was likely to strike the pier, the tug pulled ahead sharply in a northerly direction away from the pier in order to haul the

stern away; although the captain of the steamer shouted to the tug to stop. It is impossible for me to say which of these contrary orders would have been best; but I am satisfied that the sharp pull of the tug away from the dock was not the cause of the collision, and that it would have occurred just the same had the tug stopped; and that the tug was pulling in the right way to check any sheer to the south, and that there would have been no difficulty but for the excessive sternway caused by the steamer's engine going full speed astern.

The chief questions in the case, and the only remaining ones are, who is responsible for this excessive sternway; and whether the tug, or the steamer, is to be held answerable for the management of the steamer's engine under the circumstances stated. The captain of the steamer testifies in a general way that all his orders to the engine were received from the captain of the tug, who gave them verbally and by motions with his hands. But in neither of his accounts of specific orders, does he say that the tug captain ever told him "full speed astern." The pilot of the tug, on the contrary, who stood upon the after part of the tug, testifies that he gave no orders whatsoever in relation to the management of the steamer's engine, or of her helm; that he had no charge or responsibility in respect thereto; that his only orders and motions were to his mate in his own pilot-house, except that when he saw that the steamer was getting too much sternway, he checked his own tug, so as to slacken his hawser; and that as soon as he noticed the sheer, and that collision with the pier was likely, he shouted to the steamer and signaled by hand to put the steamer's engine ahead full speed; that he did not previously give any direction to the steamer in reference to her engines, though she was coming back rather fast, because he supposed that the captain and the Sandy Hook pilot, both of whom were on the bridge, knew what to do and how to manage her. Mr. Weaver, the Sandy Hook pilot, who was accustomed to hauling out of the basin, says that though he had gone on board to take the ship out to sea, he was not in command while in the basin, and had nothing at that time to do with the navigation of the ship, or giving orders; but that when he saw the ship take a sheer and likely to hit the abutment, he said to the captain that he had better go ahead and put the wheel to port.

The second engineer, who was at the engine, testifies that he kept a record of the working of the engine in going out; it was produced at the hearing, and the following is a copy of the record:

9:41 A. M. slow astern.	9:49 A. M. stop.
9:43 " stop.	9:50 " full speed ahead.
9:45 " slow astern.	9:52 " stop.
9:46 " full speed astern.	

The witness testified that the figure 9 in the above "49" min. was a figure 7. The 9 is perfect, showing no resemblance to the figure 7, and it is difficult to credit the witness in this very material point. The last order to stop at 9:52 was just after he felt the blow of the collision. As regards the time between the order "full speed ahead" and the collision, he says: "I can't say just the time, but about half a minute; the engine was working a minute or a half a minute."

In the present case the responsibility for the management of the engine of the steamer must be held to lie with her own officers, and not with the captain of the tug. It is unnatural and unreasonable to suppose that when the officers and pilot of the steamer are on the bridge to give orders in respect to hauling out of such a place, the management of the engine of the steamer, by so many changing orders at short intervals, should be undertaken by the pilot of a tugboat at so great a distance. The engineer's record shows seven different orders, with as many changes in the movement of the engine. All the orders to the engineer were given from the steamer's bridge by the captain of the steamer; and the bridge must have been about 250 feet from where the captain of the tug stood on his boat. It is moreover, scarcely probable that when the tug captain had checked the tug's speed so that his hawser was slack in the water, he should have sought to increase the steamer's way astern by ordering her engine "astern full speed," which was the order that caused collision. The captain of the tug, as I have said, strenuously denies giving any such orders, and contends that it was the business of the ship not to move her own engines at all, except to move them *ahead* as might be necessary to check too great sternway, or to correct any sheer.

Had the captain of the tug given these numerous orders, either by words or by signs, in reference to the engine or to the helm, the orders must have been observed by the second mate and by the seamen who, as the testimony shows, were at the stern of the steamer. None of these witnesses have been called to confirm the captain of the steamer, as would naturally have been done if they had heard any such orders. Nor does the pilot give any confirmation of the master's testimony; for the only motions he speaks of as made by the captain of the tug, relate to going ahead after the sheer was seen. Nor does any other witness say that the management of the steamer's engine is understood to be under the direction of the tug in cases like the present. The hail given by the captain of the tug at the last moment when collision seemed likely, has no weight on this point. The nearly universal practice in foreign ports is to treat the tug in such cases as the servant of the steamer when her officers are on board and have the use and the immediate direction of their own power, as in this case. The captain of the tug, moreover, testifies that if he were charged with the management of the steamer's engine and helm, his proper place would be on the steamer.

My conclusion is that the management of the steamer, so far as depended upon the use of her own engine in this case, was with her own officers, and not with the tug; that the collision arose from too great sternway caused by running the steamer's engine full speed astern for a period of at least one minute, if not for three minutes, (till 9:49;) and that for this the steamer, and not the tug, is responsible.

The course of the steamer so near the southerly pier is explained to have been necessary and in accordance with the usual custom for the purpose of avoiding the danger of being swung against the northerly abutment upon entering the flood tide outside of the gap. No fault appearing in the tug, the libel must be dismissed, with costs.

THE T. W. SNOOK.¹GRISWOLD *et al.* v. THE T. W. SNOOK.

(District Court, N. D. Illinois. October 19, 1891.)

COLLISION BETWEEN STEAMER AND TOW.

A steamer going up the Chicago river passed a canal-boat propeller going down stream, just at the lower entrance to a draw 50 feet wide, and struck a canal-boat which was being towed by the propeller. The propeller had signaled the steamer to stop below the draw, but the latter had paid no attention to the signal. The canal-boat was visible from the steamer before the latter reached the propeller. The canal-boat was at the proper side of the draw, leaving ample room for the steamer to pass between her and the bridge. *Held*, that the steamer was responsible for the collision.

In Admiralty. Libel by Guy C. Griswold and others against the propeller T. W. Snook, for damages caused by a collision.

Charles E. Kremer, for libellant.

H. W. McGee, for respondent.

BLODGETT, District Judge. By the libel in this case libellant seeks to recover the damages sustained by him, as owner of the canal-boat Georgia, by reason of a collision which occurred upon the waters of the south branch of the Chicago river, on or about the 9th day of September, 1887, between the Snook and the Georgia, whereby the Georgia was sunk. The proof shows that the canal propeller City of Henry was proceeding down Chicago river about 10 o'clock in the morning of the day the collision occurred, with the canal-boats Georgia, Illadore, and Onward in tow in the order named. That about the time the Henry passed through the Ft. Wayne railroad bridge, she sounded a long single blast of her whistle, and at about that time the Snook was coming up the river, and just passing through the east draw of the Sixteenth-Street bridge. The work of constructing the new bridge was in progress at Eighteenth street, and the west draw of the bridge at that point was obstructed by scows, dredges, and other apparatus connected with the construction of a new bridge, so that vessels passing up and down the river were obliged to pass through the east draw of the Eighteenth-Street bridge. When the Henry was about 200 feet—or between 100 and 200 feet—above the entrance into the Eighteenth-Street draw, she sounded four blasts of her whistle, to indicate danger to the Snook, and request the Snook to stop, or "hold on," as the witness expressed it. The Snook disregarded these signals, which were repeated at least three times, and came on with no perceptible abatement of her speed until she passed the Henry just at the lower entrance to the Eighteenth-Street draw. As the propellers were approaching each other, the Henry blew one blast of her whistle, to indicate that she would pass on the port side of the Snook, and the Snook responded with a single blast, indicating that she would pass on the port side of the

¹ Reported by Louis Boiset, Jr., Esq., of the Chicago bar.

Henry. The Henry did pass close to the east bank or shore of the river at a very slow rate of speed, without having wholly stopped her wheel, and the Snook passed on up the river, and struck the bow of the Georgia a severe blow, which caused her to sink almost immediately.

I think the fault for this collision lies wholly with the Snook. The Snook had ample opportunity to know, and must be charged with knowledge, of the approach of the City of Henry with tows. It is true, the officers in charge of the Snook say they did not see the canal-boats, but the characteristics of a canal-boat propeller or tow-boat are so different from those of the ordinary river boats that the experienced captain of the Snook must have anticipated that the canal propeller had canal-boats in tow, and before he got around the point and was abreast of the Henry the canal-boats were in plain sight of him, strung out the length of their tow-lines astern of the Henry. There was at this time ample opportunity for the Snook to have stopped, and, therefore, have avoided the collision; but I am satisfied that the Snook, while she slowed up her speed to some extent, did not stop, and was moving upward when she came in contact with the Georgia. It is possible, as the witnesses for the defendant say, that the Georgia was also moving, but the Georgia was where she had a right to be; she was clear over on the east side of the draw, leaving ample room for the Snook to past between the canal-boats and the protection piles of the bridge,—the draw being over 50 feet wide at this point,—and the proof showing that the Georgia was running so close to the dock or piling upon the east side of the draw that the men could have stepped readily ashore from her deck onto the dock. The Snook therefore, was blamable in not stopping below the draw until these canal-boats had passed clear through. The Snook was going up the river, and could more readily have stopped than the canal-boats could stop. In fact, as the proof shows, with the long tow-lines which are used in towing canal-boats, as well upon the river as on the canal, it is impossible for the tug having them in tow to stop their headway, and this fact must have been well known to those in charge of the Snook. Hence, knowing that he was to meet and pass these canal-boats, the master of the Snook should have stopped his boat, and waited until they had passed through the draw, before he attempted to pass through; or, at least, if he did not do that, should have kept so far over to starboard as to have avoided any collision or contact with them. For these reasons I think the Snook is at fault, as charged in the libel, and a decree will be entered adjudging the Snook liable for the damages.

THE WEST BROOKLYN.

BROWN *et al.* v. THE WEST BROOKLYN.

(Circuit Court of Appeals, Second Circuit. December 14, 1891.)

COLLISION—FERRY-BOAT AND TUG—OBSTRUCTION OF FERRY SLIPS.

A tug has no right unnecessarily to maneuver at the entrance of the slip of a ferry-boat so as to obstruct the latter while making her slip, and a ferry-boat, which has given in season the proper signals to indicate her approach to a tug so situated, is justified in assuming that the tug will get out of the way, and is not liable, if collision ensue.

In Admiralty. Appeal from a decree of the circuit court of the United States for the southern district of New York. The district court for said district dismissed the libel, (45 Fed. Rep. 60,) and libellant appealed to the circuit court, which affirmed *pro forma* the decree of the district court, and libellant appealed to this court.

The ferry-boat West Brooklyn was entering her slip between piers 2 and 3, East river. The pilot of the ferry-boat had previously observed the tug R. S. Garrett backing towards the slip, and had given her two whistles to indicate that the ferry-boat would go astern of the tug, and, just before entering her slip, she gave a danger signal. The Garrett had been moored alongside pier 4, with her head up-stream, inside of another tug, which prevented the ferry-boat from seeing her at a distance. Receiving orders for Harlem, the Garrett cast off and backed to get out under the stern of the other tug. The stern of the Garrett struck the starboard paddle-wheel of the ferry-boat, after the latter was half-way in her slip.

Carpenter & Mosher, (Joseph F. Mosher, of counsel,) for appellants.

Burrill, Zabriskie & Burrill, (J. Archibald Murray, of counsel,) for appellee.

Before WALLACE and LACOMBE, Circuit Judges.

PER CURIAM. We think the collision in this case is to be attributed solely to the fault of the tug. The ferry-boat was excusable in not discovering the tug before she did, and when she did discover her it was too late to reverse without danger of injury to the tug, more by doing so than by proceeding with her engines stopped. As soon as she did discover the tug, she gave proper signals to indicate her approach, and immediately followed them with danger signals. If those in charge of the tug had been reasonably vigilant they would have observed the ferry-boat, even before she gave the signals; and there was sufficient time after the signals were given for the tug to go ahead and avoid the ferry-boat, if an order to do so had been promptly given and obeyed. We accept the version of the occurrence substantially as it is given by the witnesses Denoyelles and Little. We agree with the learned district judge that the tug had no right unnecessarily to maneuver at the entrance of the slip of the ferry-boat so as to obstruct the ferry-boat while making her slip, and that the pilot of the ferry-boat was justified in assuming that the tug would go ahead as soon as it was apparent that otherwise a collision would probably ensue.

The decree is affirmed, with interest and the costs of the appeal.

O'DONNELL v. ATCHISON, T. & S. F. R. Co.

(Circuit Court, S. D. Iowa, C. D. March 3, 1892.)

1. REMOVAL OF CAUSES—APPEARANCE IN STATE COURT—EFFECT.

An appearance in the state court to file a petition and bond for removal does not waive the right to present in the federal court any question of jurisdiction which might have been urged in the state court, and concerning which the federal court has power to act.

2. SAME—WAIVER OF DEFECTIVE SERVICE.

Where service of notice of commencement of action in the Iowa courts could have been made upon defendant in the district to fill every requirement of the state statutes, a general appearance by defendant in the federal court, after removal of the cause, is a waiver of any defect of service on him.

3. SAME—VENUE—DISCRETION OF COURT.

Polk county, Iowa, is in the central division of the circuit court for the southern district of Iowa, while Lee county is in the eastern division. Defendant railroad company, sued in the state court in Polk county, had the right, by the Iowa statute, to have the place of trial transferred to Lee county. *Held*, that defendant, by procuring the removal of the cause from the state court, and in filing the transcript in the central division of this court, was precluded from asserting that the cause was pending in the wrong division, and that it has the right to demand a removal to the eastern division.

4. SAME.

The fact that defendant is a Kansas corporation, whose railroad touches only Lee county, in Iowa, and that the cause of action did not grow out of nor was it connected with any office or agency within the central division, is not sufficient to impel to action the discretion of the court to grant a transfer.

At Law. On petition for change of venue and plea to jurisdiction.
Overruled.

Cole, McVey & Cheshire, for plaintiff.

G. Lathrop, J. D. M. Hamilton, and J. C. Davis, for defendant.

WOOLSON, District Judge. This is an action for personal injuries brought into this court on removal from state court. The petition, originally filed in the district court of Polk county, Iowa, states as cause of action that defendant is a Kansas corporation, whose line of operated railway extends through Colorado, Kansas, Iowa, and other states; that in July, 1891, plaintiff's decedent, at Pueblo, Colo., while exercising due care on his part, and while employed by defendant in the operation of its railway, was killed, by reason of the negligence of the defendant. Service of notice was made on defendant by serving notice upon "S. M. Osgood, general agent for the state of Iowa of the defendant, Atchison, Topeka, and Santa Fe Railroad Company, at his office, and the general office of defendant company, in the city of Des Moines, Polk county, Iowa." Upon the first day of the term to which the notice was returnable, defendant filed in said Polk county district court its petition and bond for removal to the federal court, and said court ordered removal accordingly. Upon the day on which the certified pleadings, etc., herein were filed in this court, the attorneys for defendant filed herein in this court a paper entitled "*præcipe* for appearance," the body of which is as follows: "The clerk of said court will please enter our appearance for defendant in the above-entitled action, and docket the same on proper docket,"—which *præcipe* was duly signed by all the attorneys whose
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names are given above as appearing for defendant. At the present term of this court, defendant filed its "petition to remove cause to eastern division for trial," and also filed "plea to the jurisdiction." Briefly stated, petition for change of venue alleges, as grounds for removal, that defendant is a Kansas corporation, whose line of railway touches, in Iowa, but one county, viz., Lee county, which county is in the eastern division of the district; that Polk county, in which the suit was brought, is in the central division of the district; that no part of the said road lies within the central division; that the cause of action is shown by plaintiff's petition not to have grown out of nor been connected with any office or agency of defendant within said central division; that this suit was originally brought in the wrong county of the state, and, under the statutes of the state, defendant would have been entitled, on motion in the state court, to have had the action transferred to Lee county for trial. The ground alleged in the plea to the jurisdiction is that the notice of commencement of suit was served upon defendant's agent in Polk county, and the cause of action is shown by plaintiff's petition neither to have grown out of nor been connected with the business of such Polk county office or agency, and no part of defendant's line of railway touches Polk county; and therefore, under the statutes of Iowa, the service of notice was insufficient to give the court jurisdiction of defendant. Plaintiff is resisting both plea and petition, and exhibits in full the removal proceedings.

1. As to the plea of the jurisdiction. Plaintiff contends that the service attacked was regularly and legally made, under the Iowa statutes; but that, if irregularly made, nevertheless the appearance of defendant in this action cures all defects pertaining to the service. Code Iowa, 1873, § 2626, par. 3, provides that an appearance for any purpose connected with the service or insufficiency of the notice shall be taken in the case as the appearance of defendant; and that "an appearance, special or otherwise, to object to the substance or service of the notice, shall render any further notice unnecessary." This Code also provides, as one of the statutory methods in which a defendant may enter his appearance, (paragraph 1, § 2626,) "by delivering to the clerk a memorandum to the effect that the defendant appears, signed either by the defendant in person or by his attorney, dated the day of its delivery, and to be filed in the case." These provisions of the Iowa Code have been formally adopted as the rules of this court. The Iowa courts, in applying these Code provisions, have distinguished between an appearance (1) for the purpose of objecting to the jurisdiction of the court on the ground that the defendant *could* not, by service of notice, be brought into the action, and under the jurisdiction of the court; and an appearance (2) to object to the jurisdiction, on the ground that defendant *had* not, by the service attempted, been brought under such jurisdiction, (whether because of alleged defect in substance of notice or in method or fact of service.) As to the former, the appearance of defendant does not cure defect in jurisdiction. *Spurrier v. Wirtner*, 48 Iowa, 486. As to the latter, appearance does cure such defect, which relates, not to the

power of the court to obtain the jurisdiction attempted, but to insufficiency or irregularity in substance or service of notice. The reasoning applied seems to be that, as the sole purpose of the notice is to bring the defendant into court, the notice has accomplished its purpose whenever the defendant comes into court, even though he comes in only to object to the service of the notice as insufficient to compel him to come in. *Bank v. Van*, 12 Iowa, 523; *Van Vark v. Van Dam*, 14 Iowa, 233; *Childs v. Limback*, 30 Iowa, 398.

While contending that service of notice on the Polk county agent was insufficient to give the court jurisdiction over defendant, defendant conceded that, had the same notice been served upon any of defendant's station agents in Lee county, Iowa, such service would have given this court jurisdiction of defendant, (though in another division of the district than that in which the case is now pending.) While plaintiff contends that the service was correctly made, but that, if the service was irregular, yet since, by service in Lee county, this court might have obtained undoubted jurisdiction, the appearance of defendant has waived whatever defect existed in service of notice herein; and plaintiff contends, further, that this is true as to the appearance of defendant in the state court with his petition for removal, and also his appearance in this court by the *præcipe* filed.

As to the first point concerning appearance, it may be admitted that there is some disagreement in the holdings of the courts. But the decided current of decision in the federal courts is that an appearance in the state court to file petition and bond for removal does not waive the right to present in the federal court any question of jurisdiction which might have been urged in the state court, and concerning which the federal court has the power to act. *Atchison v. Morris*, 11 Fed. Rep. 585; *Hendrickson v. Railroad Co.*, 22 Fed. Rep. 570; *Elyin Canning Co. v. Atchison, T. & S. F. R. Co.*, 24 Fed. Rep. 868; *Reifsnider v. Publishing Co.*, 45 Fed. Rep. 433. This first point, therefore, is not well taken.

The second point is that the *præcipe* for appearance herein is a waiver of any defect of service on defendant. It should be borne in mind that service upon defendant, which should fill every requirement of the Iowa statute, could have been made in this district. Jurisdiction was possible over defendant. No language could make the appearance of defendant more general than that contained in defendant's *præcipe* for appearance; for that language excludes all idea of such appearance being special only. And the conclusion necessarily follows that, in view of the Iowa decisions above noted, the *præcipe* for appearance herein confers upon this court full jurisdiction over defendant in this action, even if service of notice herein should be found insufficient to confer such jurisdiction.

2. As to the motion to change the venue to the eastern division of the district. Had defendant so elected, it is probable that he could, in the state court, have availed himself of the Iowa statute, (section 2589, Code 1873,) and had the venue changed to Lee county. This section provides that a defendant, when sued in the wrong county, may, on proper application, have the cause transferred, at costs of plaintiff, to the county

where defendant could rightfully have been sued; but that, if defendant does not thus apply for and obtain this transfer, the action may rightfully proceed to judgment in the county wherein the suit was brought. The district court of Polk county, with defendant's *præcipe* for appearance filed in this action, might rightfully have proceeded to judgment if defendant did not apply for transfer to Lee county. This must be conceded as the logical force of the Iowa statute. By filing his application to so transfer, the place of trial might, under the statute, have been changed accordingly. Defendant now contends, since Polk county is in the central division and Lee county is in the eastern division of this district, that this right of transfer, which defendant might have exercised under the state statute in the state court, remains to it in the federal court. But counsel do not point us either to any rule of this court, or any provision of federal statute giving this right of transfer as claimed, except section 914, Rev. St., which, in effect, incorporates into the "mode of proceeding" of this court, as it is claimed, this mode of proceeding in the state court. At the threshold of this argument, we encounter the insurmountable fact that this court does not deal with county lines as jurisdictional boundaries; but that the divisions—of which this district has three—are its smallest jurisdictional sections. And the federal statute creating these divisions contains no provision, with reference to removing a cause from one division to another, analogous to the state statute above referred to. Defendant, by electing to remove this cause to this court, thereby deprived himself of whatever right he might have exercised, in the state court, of removal under the state statute.

Defendant further contends that, as neither plaintiff nor defendant is a resident of the central division of this district, defendant has the right to have the cause transferred to the eastern division, in which, and in which alone, in Iowa, lies defendant's road. The petition for removal, filed by defendant in the state court, expressly asks that this cause may be removed into the circuit court of this district, "central division, at Des Moines." Such, under the statute redistricting the state, (section 9, p. 172, 22 St. U. S.,) must have been the effect of an order of removal from the Polk county district court, had not defendant expressly asked such action. While this action was pending in the state court, (if the facts asserted by defendant be conceded to be correctly stated,) defendant might have exercised the right, either (1) to have the place of trial transferred from Polk county to Lee county under the Iowa statute, or (2) to have the action removed from the Polk county district court, to this court in the central division. Defendant elected to exercise the right to remove from the state to the federal court; and the act of defendant in procuring the removal of the cause from the state court, and in filing the transcript in the central division, precludes the defendant from now asserting that the case is now pending in the wrong division, and that it has the right to demand a removal to the eastern division. Unless some sufficient reason is presented to move the discretion of the court in a different direction, this cause should be sent to trial in the division in which, on demand of defendant, it entered this court. The facts pre-

sented by defendant, as bearing on this point of transfer, are not directed to the discretion of the court, nor are they calculated to impel that discretion to action. The petition for a change of venue to the eastern division is therefore overruled. Defendant is ruled to file answer herein within 30 days from the date of filing hereof.

FINANCE CO. OF PENNSYLVANIA *et al.* v. CHARLESTON, C. & C. R. Co.

Ex parte MOORE.

(Circuit Court, D. South Carolina. March 11, 1892.)

1. RAILROAD COMPANIES—FORECLOSURE OF MORTGAGE—RECEIVERS—PRIORITIES OF LIENS.

The order which a court of equity, on appointing a railroad receiver, makes for the payment of wages due employes for a reasonable period prior to the receivership, is merely a personal protection, given *ex gratia* to those who depend upon their daily labor for support, and will not cover a claim by a merchant for rations furnished to such laborers, under contract with the company, and for which the company alone is liable, although the company charges the rations to its laborers as part of their wages.

2. SAME.

The claim is entitled to payment before the payment of interest on the mortgage bonds, and if any sums applicable thereto have been paid out for such interest, or for permanent improvements whereby the bondholders have been benefited, the claim will be a charge, to the amount of the moneys so diverted, upon any earnings in the hands of the receiver, or, failing these, upon the proceeds of the sale of the road. 48 Fed. Rep. 188, followed.

In Equity. Suit by the Finance Company of Pennsylvania and others against the Charleston, Cincinnati & Chicago Railroad Company to foreclose a mortgage. Heard on the petition of G. M. Moore, claiming priority of payment for supplies furnished to laborers. For other phases of the litigation, see 45 Fed. Rep. 436, and 48 Fed. Rep. 45, 188.

Mitchell & Smith and B. A. Hagood, for petitioner.

A. T. Smythe, opposed.

SIMONTON, District Judge. The petitioner is a merchant at Blacksburg, a town on the line of the Charleston, Cincinnati & Chicago Railroad. In 1890 he entered into a contract with the defendant company to furnish rations to hands employed by it. The company charged these rations to the hands as part of their wages. The items were all charged to the railroad company. The accounts were regularly made out against and presented to the company, audited, and passed. Upon bill filed by the mortgage bondholders, a temporary receiver was appointed on 10th December, 1890. On 26th February, 1891, the permanent receiver was appointed. In the order appointing the permanent receiver is this provision: "That the receiver pay all wages due to the employes at the date of the order appointing a temporary receiver herein for labor or services, within ninety days before the same." The petitioner presents

and proves an itemized account wherein it appears that, within the 90 days before December 10, 1890, he had furnished to the company, under his contract, \$321.72; and that prior to that date, from May 14, 1890, he had furnished the rest of the items on his account. The whole account, including both periods, foots up \$902.80. He claims that, inasmuch as he furnished rations which were used in part payment of wages to employes, he comes within the equity of this order of 28th February, and that as to the rest of his account he comes within the equity established in *Fosdick v. Schall*, 99 U. S. 235. As I understand the current of cases which began with *Fosdick v. Schall*, the rule is this: When holders of railroad bonds, secured by mortgage, come into a court of equity, and ask not only the foreclosure of the mortgage, but also the appointment of a receiver, into whose hands the corporation shall be compelled to deliver all its property, the court, as a condition precedent to granting this last request, can impose terms in reference to the payment from the income during the receivership of such outstanding claims as address themselves peculiarly to the protection of the court. Ordinarily a mortgagor is entitled to the possession of his property until the execution of a decree for foreclosure. When the mortgagor is a railroad company, the employer of many persons on weekly wages, both the employer and employed can enter into engagements relying upon this normal condition. If, therefore, the court, at the instance of mortgage creditors, interrupts the possession of the railroad company, and suddenly removes the employer from control of current earnings, it may well see to it that the employed are not put at a disadvantage, or be made to suffer from this unexpected change. Without considering liens or equities, acting only in its discretion, it imposes upon the suitors, as the condition of granting their request, that such employes be paid, not only accruing wages, but such as have accrued within a reasonable period. This is not a right vested in the employes, or an equity administered in their favor. It is a personal protection given to them by the court *ex gratia*, moved thereto by the fact that this class depend upon their daily labor for their daily food. Afterwards when the court has assumed the administration of the property, and it appearing that there are certain outstanding claims in the hands of persons who furnished equipment materials, supplies, or anything which was necessary to keep the railroad a going concern, then the court administers an equity, and the benefits of this equity inure as well to the original parties keeping up the road as to their assignees. *Trust Co. v. Walker*, 107 U. S. 596, 2 Sup. Ct. Rep. 299. In the present case, when the complainants made their application for a receiver, the court took into consideration what conditions should be imposed on the grant of their prayer. These conditions were payment of wages due to the employes within 90 days before 10th December, 1890. There are no wages due. The petitioner did not pay them any wages; did not deal with nor credit them. He furnished the company with goods, charged them to the company, and looked to the company only. There is nothing like subrogation here; and, as the employes themselves are paid, not as a matter of right, but as a matter of grace, nothing to be subrogated

to. Dealing with the interest of mortgagees in railroad property, we encounter vested rights. They cannot be displaced upon any mere idea of right, or on any refined notions of equity. In managing the property, the court is not the owner, nor can it entertain sentiments of benevolence or humanity in disbursing the funds,—luxuries in which the owner alone can indulge. So much of the petition as prays special priority under the order of 28th February, 1891, is disallowed. The claim comes under the principles laid down in *Fosdick v. Schall*. We have already passed upon several claims of this character in the intervention of the *Pocahontas Coal Co. et al.* in the main cause, (48 Fed. Rep. 188.) Let the claim of the present petitioner be included with those claims to the amount proved, \$902.80, and share the same fate.

MILLER v. CLARK et al.

(Circuit Court, D. Connecticut. March 12, 1892.)

BILL OF REVIEW—PAYMENT OF COSTS—REASONABLE DELAY.

The supreme court dismissed an appeal from the circuit court, with a mandate requiring appellant to pay the costs. Thereafter the appellant, without paying the costs, brought a bill in the circuit court to review its judgment, which was demurred to for want of an allegation that the costs were paid. The court held that this was not a ground of demurrer, but that the proper remedy was to stay proceedings until payment of the costs. No order was asked fixing a time for such payment, and payment was made and accepted by defendant's counsel two months and twelve days thereafter. *Held*, that the delay was not so unreasonable as to debar plaintiff from filing a supplemental bill alleging such payment.

In Equity. Bill of review by Martha A. Miller against Emma J. Clark and others. For opinion on demurrer to the bill, see 47 Fed. Rep. 850. The hearing is now on a motion to strike out a supplemental bill. Overruled.

John M. Buckingham, for plaintiff.

W. B. Stoddard, for defendants.

SHIPMAN, District Judge. This is a motion to strike from the files the supplemental bill in this case, which alleges the payment of costs, upon the ground that the payment and the supplemental bill were delayed for an unreasonable time. Two other grounds were suggested in the motion, but were not pressed in the argument. In the decision, which was made after the argument of demurrer, and which was filed November 3, 1891, I said that the omission to state the payment of costs in the bill was not a subject of demurrer, for the rule requiring payment of costs was one of procedure, rather than jurisdictional, but could be taken advantage of by a motion to stay proceedings; and also said: "Before a decision upon the other questions contained in the demurrer, proceedings under the bill of review should be stayed until the mandate of the supreme court has been complied with," etc. No order of stay

was asked for, and therefore no time was fixed for the payment of costs. They were paid January 15, 1892, and the supplemental bill was filed on the next day,—a delay of two months and twelve days. Inasmuch as no order was asked or made fixing the time of payment, and as the defendants' counsel accepted the costs, when paid, I cannot say that this delay debars the petitioner in the bill of review from filing her supplemental bill. The decision upon the demurrer was postponed until this payment should be made or excused. Inasmuch as the case was argued some time ago, if the respective counsel have any views in addition to those which were contained in their briefs, I should be glad to receive them in writing.

SOUTHERN PAC. CO. v. RAUH.

(Circuit Court of Appeals, Ninth Circuit. March 7, 1892.)

1. JURORS—CHALLENGES—EXAMINATION—REVIEW—RECORD.

Under Code Civil Proc. Or. § 187, providing that an opinion already formed by a juror is not alone sufficient to sustain a challenge, but that the court must be satisfied from all the circumstances that the juror cannot try the case impartially, the ruling of the court on the juror's qualifications will not be reviewed unless all of the evidence taken at the examination be presented in the record, although the testimony produced shows the juror to have a fixed opinion on the merits of the cause. *State v. Tom*, 8 Or. 179, followed.

2. SAME—CHALLENGES.

Under Code Civil Proc. Or. § 231, providing that the point of exception to a juror must be particularly stated, it is not sufficient to challenge for cause without stating the particular reasons for such challenge.

3. SAME—REVIEW.

The discretionary finding of the trial judge in passing upon a juror's qualifications will not be reviewed unless it appears to have been exercised arbitrarily.

4. SAME—EXCEPTIONS.

Rejection, by the court, of a challenged juror for insufficient reasons, is no ground for exception when it appears that the remainder of the jury was made up of persons to whom the excepting party made no objection.

5. SAME—REVIEW.

To base error upon the court's ruling that a juror need not answer as to his prejudice against corporations, it must appear that the party making the challenge was thereby prevented from ascertaining whether the juror had such prejudice as would interfere with his conclusions in arriving at a verdict.

6. PERSONAL INJURIES—EVIDENCE AS TO FAMILY.

In an action for personal injuries it appeared that plaintiff had no external hurt except a slight bruise, but that he had been in bed ever since the accident,—a period of several months. Evidence was admitted without objection that he had a wife and home. *Held* proper to admit further evidence that he had two children, of seven and five years respectively, not for the purpose of increasing the damages, but as explaining why the members of his family were not called to testify as to his condition during that time, and as tending to show that he was not shamming illness.

7. SAME—MEDICAL EXPERTS—VERDICT.

In a damage suit for personal injuries, where the evidence points to some internal hurt, manifesting itself in symptoms of hysteria, the medical testimony being conflicting, an instruction that the testimony of defendant's witnesses, who had had experience in similar cases, was entitled to the greater weight, is not necessarily disregarded in a verdict for plaintiff, where the latter had produced other testimony tending to show the serious nature of his injuries.

8. SAME—EXCESSIVE VERDICT.

A verdict for \$10,000 for personal injuries to an adult is not excessive where the testimony of the attending physician, corroborated by that of another medical ex-

pert, was that plaintiff could not regain his health, and other evidence tended to show the serious nature of the injuries, even though physicians called by defendant testified that plaintiff ought to recover soon.

Error to the Circuit Court of the United States for the District of Oregon.

At Law. Action by John B. Rauh against the Southern Pacific Company for damages for personal injuries. Judgment for plaintiff. Affirmed.

W. C. Belcher, for plaintiff in error.

Doolittle, Pritchard, Stevens & Grosscup and Cox, Teal & Minor, for defendant in error.

Before HANFORD, HAWLEY, and MORROW, District Judges.

MORROW, District Judge. This was an action by John B. Rauh, the plaintiff in the court below, (the defendant in error here,) against the Southern Pacific Company, to recover damages for personal injuries received by him while traveling as a passenger on a train belonging to the company between Portland, Or., and Albany, in that state. While the train was in motion, a bridge over which it was passing gave way. The bridge was at a point on the road known as "Lake Labish," in Oregon. The plaintiff, at the time of the disaster, was sitting in a car which became involved in the wreck, and in falling and colliding with other cars raised the plaintiff from his seat, and immediately threw him back and against the side of the car with such force that he was bruised on the side of his head, and injured in his side and back. The case was tried before a jury, and the plaintiff had a verdict and judgment for \$10,000 and costs. The company sued out this writ of error. For the reversal of the judgment errors of the court are assigned relating to the impaneling of the jury, the admission of evidence, and the verdict of the jury.

1. *The Examination of Jurors.* In the selection of the jury 23 persons were called and examined as to their qualifications to sit as jurors in the case. Plaintiff and defendant were each entitled to three peremptory challenges. Two of the persons called were challenged peremptorily by the plaintiff, and three by the defendant. Three were challenged by the plaintiff for cause, and, the challenges being sustained by the court, the defendant excepted. Two were challenged for cause, but by whom is not disclosed by the record. The challenges were, however, sustained without exception. One juror was excused by the court on account of bodily infirmity. To the remaining 12 persons who were accepted and finally sworn as jurors to try the case, the defendant interposed two challenges for cause, which were disallowed, and defendant excepted. To three others defendant propounded certain questions, which the court stated the jurors need not answer, the defendant excepting to the rulings of the court in that behalf. The same proceedings occurred in the examination of another juror, but the ruling of the court is not assigned as error, and will therefore be considered as waived. The other six jurors were examined and accepted without objection. Section 800 of the Revised Statutes of the United States provides that jurors to serve in the courts of the United States, in each state respectively, shall have the

same qualifications as jurors of the highest courts of law of such state at the time when such jurors for service in the courts of the United States are summoned. We must therefore look to the law of the state of Oregon to determine the qualifications of the jurors in this case. The Code of Civil Procedure of that state, regulating the method of forming juries, provides as follows:

"Sec. 183. A challenge for cause is an objection to a juror, and may be either (1) general; that the juror is disqualified from serving in any action; or (2) particular; that he is disqualified from serving in the action on trial. * * *

"Sec. 185. Particular causes of challenge are of two kinds: * * * (2) For the existence of a state of mind on the part of the juror, in reference to the action, or to either party, which satisfies the trier, in the exercise of a sound discretion, that he cannot try the issue impartially, and without prejudice to the substantial rights of the party challenging, and which is known in this Code as 'actual bias.' * * *

"Sec. 187. A challenge for actual bias may be taken for the cause mentioned in the second subdivision of section 185. But on the trial of such challenge, although it should appear that the juror challenged has formed or expressed an opinion upon the merits of the cause from what he may have heard or read, such opinion shall not of itself be sufficient to sustain the challenge, but the court must be satisfied from all the circumstances that the juror cannot disregard such opinion, and try the issue impartially."

"Sec. 192. The challenge may be excepted to by the adverse party for insufficiency, and, if so, the court shall determine the sufficiency thereof, assuming the facts alleged therein to be true. The challenge may be denied by the adverse party, and, if so, the court shall try the issue and determine the law and the fact.

"Sec. 193. Upon the trial of a challenge the rules of evidence applicable to testimony offered upon the trial of an ordinary issue of fact shall govern. The juror challenged, or any other person, otherwise competent, may be examined as a witness by either party. If a challenge be determined to be sufficient, or found to be true, as the case may be, it shall be allowed, and the juror to whom it was taken excluded; but, if determined or found otherwise, it shall be disallowed."

"Sec. 230. An exception is an objection at the trial to a decision upon matter of law, whether such trial be by jury or court, and whether the decision be made during the formation of a jury or in the admission of evidence, or in the charge to the jury, or at any other time from the calling of the action for trial to the rendering of the verdict or decision. But no exception shall be regarded on a motion for a new trial, or on an appeal, unless the exception be material, and affect the substantial rights of the parties.

"Sec. 231. The point of the exception shall be particularly stated. * * *

Eight of the errors assigned relate to the formation of the jury under the provisions of the Code just cited. Three of these have reference to the examination and qualifications of three persons,—Craybill, O'Connor, and Holman,—who were called and examined, but not accepted as jurors; and the other five have reference to the examination and qualifications of five persons,—Griffin, Bacon, Cimino, Foster, and Richardson,—who were called and examined and accepted as jurors to try the case.

The Examination of Persons who were not Accepted as Jurors. We will first consider the exceptions taken in the examination of those persons who were excluded from the jury. The second person called to the jury-

box was a Mr. Craybill, who, being examined on his *voir dire* as to his qualifications to sit as a juror in the case, was asked by counsel for defendant, "among other questions," the following:

"*Question.* Have you read or heard or talked about the accident that occurred at Lake Labish? *Answer.* I have. *Q.* Have you conversed with any one who claimed to have been at the wreck and examined it, or stated anything about the facts and circumstances connected with it? *A.* I believe I had a short talk with Mr. Faul, one of the railroad commissioners, after he made the examination. I am not positive whether it was with him or with his partner; one or the other. *Q.* Did the party who talked with you claim to state to you what was the cause of the wreck as he understood it? *A.* No, I do not think he did. The talk was the situation of the wreck after it occurred. *Q.* Now, from what you read in the newspaper, and this conversation or any other conversation you might have had or heard, have you formed or expressed at any time an opinion as to the cause of this wreck, or the liability of the railroad company for it? *A.* I do not know that I ever expressed an opinion; possibly I have. But it is quite natural for me, and, I suppose any one else, to form an opinion or draw some conclusion when they read an article, and especially in a case of this kind. *Q.* Then you have formed some opinion? *A.* I think so; yes. *Q.* Have you that opinion now? *A.* Yes, to a certain extent. *Q.* Is that such an opinion as would require evidence to remove it? (The court stated that the juror need not answer that question, and the juror did not answer the same; to which ruling and action of the court counsel for the defendant excepted. Counsel for defendant proceeded with the examination as follows:) *Q.* Is that a fixed opinion? *A.* Well, it is an opinion that would certainly take evidence to remove it. *Q.* Then you think it is a fixed opinion at the present? *A.* Yes, I think so. (Counsel for the defendant submitted a challenge to the juror for cause. Counsel for plaintiff cross-examined the juror as follows:) *Q.* What was the nature of the reports you read, from which you drew this opinion? *A.* Well, I read the reports that were published in the Oregonian and other papers, and I also read the report of the railroad commission. I read it pretty carefully. *Q.* Did you read the entire report? *A.* I think I did. *Q.* Did you place credence in the report of the facts? *A.* I certainly placed credence in the report. *Q.* And from that you formed your opinion? *A.* Yes, sir."

The court overruled the defendant's challenge for cause, to which ruling of the court the defendant excepted. Defendant challenged said Craybill peremptorily, and thereby exhausted one of his three peremptory challenges allowed by law.

As to the first exception, it is sufficient to say that the question that was asked and ruled out by the court was subsequently answered by Craybill in response to further interrogatories propounded by defendant's counsel; and the challenge for cause, which was denied by the court, and is made the ground of the second exception, is based upon that answer. There is, therefore, nothing remaining of the first exception upon which to base a claim of error. The challenge for cause is predicated upon the statement of Craybill that he thought he had a fixed opinion, but the record does not contain the whole of the examination of this juror. The examination, as set forth in the bill of exceptions, is qualified by the introductory statement that, "among other questions," he was asked those reported in the record. In the absence of a record containing all the evidence taken upon the trial of the challenge, we can-

not say that the court, in the exercise of a sound discretion, and from all the circumstances, was in error in determining that the juror could disregard whatever opinion he may have had, and try the issue impartially, and without prejudice to the substantial rights of the defendant. In the case of *State v. Tom*, 8 Or. 179, the supreme court of that state affirmed the decision of the lower court in overruling challenges to certain jurors, where their qualifications, as appears from the records, were as doubtful as in the case under consideration. The jurors in that case stated that they had formed opinions as to the guilt or innocence of the prisoner; that they thought their opinions were fixed opinions, and that it would take evidence to remove them; but it did not appear from the bill of exceptions that all the evidence taken in the examination of the jurors had been reported to the supreme court. The court said:

"As to whether the juror was impartial or not was a question to be tried by the court from the evidence before him. Before we can judge whether the discretion exercised by him in overruling the challenge was a sound discretion, and properly exercised in this case, we must have all the evidence before us in this court that was adduced on the trial of the challenge in the circuit court."

To the same effect is *State v. Brown*, 7 Or. 186; *Hayden v. Long*, 8 Or. 244; *State v. Saunders*, 14 Or. 300, 12 Pac. Rep. 441. This construction of the statute by the supreme court of Oregon is binding on this court.

There is still another reason why the ruling of the court upon the challenge to the juror cannot be disturbed. The challenge was for cause, but without further statement or explanation as to the particular ground of the challenge. This is not sufficient. The ground of the challenge must be specifically stated. This is the requirement of section 231 of the Oregon Code of Civil Procedure, providing that "the point of the exception shall be particularly stated." But it may be said that the examination had already disclosed the ground of the challenge. The juror had said that he thought he had a fixed opinion, and this was manifestly the particular cause from which a bias was to be inferred. The answer to such a suggestion is that the inquiry in reviewing such proceedings on appeal is not so much as to the character of particular statements made by the juror concerning his opinions in relation to the merits of the cause as it is to determine whether the court exercised a sound discretion in concluding from all the circumstances that the juror could try the issue impartially, and without prejudice to the substantial rights of the parties. This inquiry must therefore include the consideration of all the facts involved in the juror's qualifications that can be made a matter of record; and even then such a record may be imperfect, since the court, in passing upon the question, is to consider the appearance of the person called as a juror, his manner, tone, and character, as exhibited under examination, and all the peculiarities and circumstances that tend to establish the presence or absence of the qualifications of a fair and impartial juror. It has therefore been held that the findings of the court upon the qualifications of jurors will not be reviewed unless it

clearly appears that the court has exercised its discretion arbitrarily. *State v. Tom*, 8 Or. 177; *State v. Saunders*, 14 Or. 300, 12 Pac. Rep. 441. In *Freeman v. People*, 4 Denio, 9, the court said:

"When a juror is challenged for principal cause or for favor, the ground of challenge should be distinctly stated, for without this the challenge is incompetent, and may be wholly disregarded by the court."

In *Mann v. Glover*, 14 N. J. Law, 195, it is declared to be the duty of the challenger to—

"State why the juror does not stand indifferent. He must state some facts or circumstances which, if true, will show either that the juror is positively and legally disqualified, or create a probability or suspicion that he is not or may not be impartial."

In *Paige v. O'Neal*, 12 Cal. 492, the court said:

"It is not sufficient to say, 'I challenge the juror for cause,' and then stop. . . . in the present case. The ground upon which it can be sustained, if at all, must be also stated."

In *People v. Reynolds*, 16 Cal. 130, the court defined an insufficient challenge with still more precision. The court said:

"It is not enough to say, 'I challenge the juror for implied bias,' and then stop. The particular cause from which such bias is to be inferred must be stated."

The law upon this point is well established by authority. *People v. Hardin*, 37 Cal. 259; *People v. Dick*, Id. 279; *People v. Rensfrow*, 41 Cal. 37; *People v. McGungill*, Id. 429; *People v. Walsh*, 43 Cal. 447; *People v. Buckley*, 49 Cal. 241; *People v. Cochran*, 61 Cal. 548; *State v. Squaires*, 2 Nev. 226; *Estes v. Richardson*, 6 Nev. 128; *State v. Chapman*, Id. 320; *State v. Raymond*, 11 Nev. 98; *State v. Knight*, 43 Me. 11; *Powers v. Presgroves*, 38 Miss. 227; *State v. Dove*, 10 Ired. 469; *Bonney v. Cocke*, 61 Iowa, 303, 16 N. W. Rep. 139; *State v. Munchrath*, 78 Iowa, 268, 43 N. W. Rep. 211.

The fourteenth person called to the jury-box was Thomas O'Connor, who, after examination as to having taxable property, was challenged by plaintiff for cause, and the challenge denied by defendant. The court sustained plaintiff's challenge. It is assigned as error that this challenge was made by defendant, and assumes that the juror remained on the panel; but the juror was in fact excluded, and the assignment need not, therefore, be further considered.

The fifteenth person called to the jury-box was Herbert Holman, who, on examination, testified that he was a steam-boat man, running with the Kellogg Transportation Company. He was thereupon accepted by the defendant; but, on further examination by plaintiff's counsel, the juror testified that he was a stockholder in the company, and that the company had a general traffic arrangement with the Southern Pacific Company. Plaintiff thereupon challenged the juror for cause, on the ground that the company in which the juror was a stockholder had such relations with the Southern Pacific Company as to remove him from the position of a perfectly unbiased juror. The court sustained the challenge, and defendant excepted. The claim that this challenge should

have been denied involves not only the determination that the juror was qualified, but that the defendant was entitled to have him remain on the panel. At this time seven jurors had been accepted and sworn to try the case. After Holman had been rejected, the panel was completed by the selection of five jurors, to whom no objection was offered, or even suggested, by the defendant. The allowance of this challenge did not, therefore, result in any prejudice to defendant's interests, since a competent and unbiased juror was selected in the place of the one excluded. In the case of *Railroad Co. v. Herbert*, 116 U. S. 646, 6 Sup. Ct. Rep. 590, the relations of a juror to the defendant were very much of the same character as the relations of the juror Holman to the defendant in this case. In the case cited the juror was a lumber dealer, and the company gave him a place on its right of way for a lumber-yard, without rent. He had also heard the accident to the plaintiff spoken of or explained. It was not shown, however, that he had any actual bias for or against either party, or any belief of opinion touching the merits of the case. He was, nevertheless, challenged, but it did not appear whether the challenge was for cause or was peremptory. The supreme court, in passing upon the question, said:

"It is for the party asserting error to show it. It will not be assumed. But, if we regard the challenge as for cause, its allowance did not prejudice the company. A competent and unbiased juror was selected and sworn, and the company had, therefore, a trial by an impartial jury, which was all it could demand."

Thompson, in his work on Trials, § 120, states the law as follows:

"As already pointed out, the right to reject is not a right to select. No party can acquire a vested right to have a particular member of the panel sit upon the trial of his cause until he has been accepted and sworn. It is enough that it appear that his cause has been tried by an impartial jury. It is no ground for exception that, against his objection, a juror was rejected by the court upon insufficient grounds, unless, through rejecting qualified persons, the necessity of accepting others, not qualified, has been purposely created."

The Examination and Qualification of Jurors Accepted and Sworn to Try the Case. Having disposed of the exceptions relating to the qualifications of persons called, examined, and excluded from the jury, we will now proceed to consider the qualifications of those persons who were examined, accepted, and sworn to try the case. The first person called to the jury-box was Robert Griffin. His examination, as it appears in the record, contains the introductory statement that, "among other questions," he was asked the following by counsel for defendant:

"*Question.* Have you any such bias or prejudice against corporations, as such, or railroad companies, as would interfere with your conclusion in finding a verdict in a cause in which such corporation or company was a party? (The court stated that the juror need not answer the question, and the juror did not answer the same; to which ruling and action of the court counsel for the defendant excepted. Thereupon the counsel for the defendant submitted a challenge for cause. The court overruled the challenge, to which ruling of the court the defendant excepted. Thereupon the said person was taken as a juror.)"

In determining whether the court was justified, under the circumstances, in stating to the juror that he need not answer the question as to his bias or prejudice against corporations or railroads, we are met, at the outset, with the difficulty that the whole of the examination is not reported in the record. It may be that this feature of the examination had been covered by other questions, or that the court deemed the scope of the question too general, and that the examination of Griffin, like that of any other witness, should have been directed to the discovery of facts from which the court might determine whether he was qualified to serve as a juror in the case or not. But, in any view, the record is not sufficient to enable this court to pass upon the exception. To base an error upon such instruction as was given to the juror in this case it should appear that by reason of it the defendant was prevented from ascertaining whether the juror has such bias or prejudice against corporations or railroads as would interfere with his conclusions in arriving at a verdict in the case on trial. The challenge for cause, which might have furnished information upon the point, is also defective. The ground of the challenge is not specifically stated. Whatever objections the defendant may have had to this juror, they are not disclosed in the record. In *Ford v. Umatilla Co.*, 15 Or. 313, 16 Pac. Rep. 33, the plaintiff brought an action against the defendant to recover damages for injury to certain personal property. Plaintiff alleged that he was traveling through said Umatilla county, transporting a quantity of household goods and stock cattle and horses, and that, while his team of four horses and a wagon with a load of household goods, merchandise, and library were being driven over and across the county bridge over Butter creek, in said county, the bridge broke and fell, precipitating the team of horses and wagon, and load of goods, merchandise, and library, into the creek. Two of the horses were killed, and the other two horses, the wagon, household goods, merchandise, and library were badly damaged. In impaneling the jury to try the case, one R. Sargeant, a juror, was asked by counsel for the defendant if there was any prejudice or ill feeling then existing in his mind against the county court of Umatilla county; also if there was any such prejudice or ill feeling growing out of the transaction in question; which several questions were objected to by the plaintiff's counsel, and the objections severally sustained by the court, and exceptions were taken to the rulings. On appeal, the supreme court said:

"The question put by the appellant's counsel to the juror R. Sargeant, as to whether there was any prejudice existing in his mind against the county court of Umatilla county, and whether there was any such prejudice or ill feeling growing out of the transaction then before the court, were proper questions, under a practice that has been permitted in trial courts in this state, though we are not aware of its being authorized by statute. Questions of that character are asked in order to ascertain whether or not any grounds of challenge exist. But, being a mere question of practice that has been permitted by sufferance of the trial courts, this court will not undertake to enforce it. The appellant's remedies, where the court refused to allow the said questions to be asked the juror, was to have submitted a challenge to the

juror for actual bias, and specified the grounds upon which it was taken. Then, if the respondent's counsel had excepted to the challenge, and the circuit court determined that it was insufficient, the decision thereon could have been reviewed by this court. Title 2 of chapter 2 of the Civil Code prescribes the mode of procedure in such cases, but, as the matter now stands, this court cannot consider it."

The fourth person called to the jury-box was C. P. Bacon, who, among other questions, was asked the following by counsel for defendant:

"*Question.* Have you heard or read anything in regard to the supposed cause of the wreck, or anything in regard to whether the railroad company, in your judgment, should be held liable or not for the wreck? *Answer.* I have. *Q.* Where did you obtain that information? *A.* From reading the newspapers. *Q.* From what you read, did you form or express any opinion as to the liability of the company or otherwise? *A.* I have; both. *Q.* Is that a fixed opinion? *A.* It is. (Thereupon the counsel for the defendant submitted a challenge for cause to the juror, and the court overruled the challenge, and the defendant excepted.)"

What we have said respecting the insufficiency of the record in not containing all the evidence taken upon the trial of the challenge and the failure to state the grounds of the challenge for cause disposes of the objection to this juror.

The fifth juror called to the jury-box was V. Cimino, who, "among other questions," was asked the following by counsel for defendant:

"*Question.* Do you think you would be governed by the evidence that would be given in this case, and the law as given you by the court, without regard to anything you may have read or heard about? (Thereupon the court stated that the juror need not answer the question, and the juror did not answer the same. To which ruling defendant excepted.)"

There was no challenge for cause. The whole of the examination of the juror is not here, and the assignment of error rests entirely upon the statement of the court to the juror that he need not answer the question. This, as we have seen, is not sufficient to bring the ruling of the court before us for review.

The sixth juror called, H. P. Foster, and the eighth juror called, D. C. Richardson, were asked questions by counsel for defendant which the court stated the jurors need not answer. Challenges for cause were not interposed, and, for the reasons already stated, we cannot, on the record before us, review the rulings of the court with respect to the errors assigned in the examination of these jurors.

2. *Admission of Testimony.* Upon the trial of this case the deposition of plaintiff was read to the jury. He testified that he resided at Tacoma, in the state of Washington, and was 29 years of age. In reply to interrogatories, he detailed the circumstances connected with the accident to the train on which he was traveling as a passenger, and described the injuries he received at the time. He gave an account of his return home, and, in reply to questions put to him by his counsel, he testified as follows:

"*Question.* What was then done with you? *Answer.* I tried to eat breakfast with my wife, but I could not eat, so I got to bed when the doctor came. * * * *Q.* On what day, if you remember,—on what day of the month,—did

you arrive home after your hurt? A. I reached home on the 14th of November, 1890, at about 6:30 or 7 o'clock in the morning. Q. Where have you been since the time you have last mentioned? A. From that day up to this time I never left this bed. * * * Q. You may now state what family you have. (Objected to by counsel for defendant as immaterial. The court ruled upon this objection as follows: 'I think this may be admitted for this reason: Of course, it cannot be admitted to affect the question of damages sought to be recovered. But we will take some notice of human nature, and its tendencies, the affection of men and women; and I think it may be assumed that a father and husband, ordinarily, if his family needs his services to support their lives, would naturally give it to them if he could. It does not always follow that he will, because we know that there are a great many men who do not; but we may assume that to be the rule. If this man remained in bed a certain length of time, or all the time, since this accident occurred, I think the fact that he has a family dependent upon him, and no resources, might go to the jury for what it is worth, to say whether he is shamming or not.') A. I have a wife and two children. Q. How old is the oldest? A. Seven years, the one; and five, the other."

Defendant allowed an exception, and the ruling of the court is assigned as error. It is contended, in support of this ruling, that it was based upon the authority of *Caldwell v. Murphy*, 11 N. Y. 416. In that case the plaintiff had been injured by the overturning of a stage or omnibus of the defendant's, in which plaintiff was a passenger. On appeal it was claimed as error that on the trial the plaintiff's counsel put this question to plaintiff: "Had he the means of support for himself and family except his labor?" It was objected to. The objection was overruled, and the defendant excepted. The witness answered: "He had no means of support except what he got from the charity of his friends." The judge then put some questions to ascertain the number of persons in the plaintiff's family, and in what manner they were supported after the injury; it having been shown that before that he had constant employment. The evidence was objected to, and an exception was taken to its admission. The court held the evidence admissible to show that the plaintiff's circumstances were such that he would probably have been engaged in laboring in his calling if he had not been disabled by his injuries, and that he was in a considerable degree unable to labor. The supreme court sustained the ruling of the lower court in admitting his testimony, and observed "that the evidence was not offered, as the argument suggests it to have been, to influence the amount of the recovery, under the notion that a poor man would be entitled to a measure of damages different from that which would belong to one in other circumstances." In the present case the plaintiff, without objection, had already disclosed the fact that he had a wife and home, and had been confined to his bed ever since his return from the accident,—a period of several months. He had been attended by three physicians, and examined by others. His symptoms pointed to some injury of the spine, but the precise nature of the hurt was not manifest. The extent and character of the injury were in issue in the case, and testimony concerning the evidence of physical disorder usually attendant upon real disability were material to that issue. His wife and other members of his

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family, or such of them as were old enough to observe and describe the manifestations of disease in a sick person, were competent witnesses to such matters; and his wife was, in fact, subsequently placed on the stand, and gave testimony upon this feature of the case. She also stated, without objection, that they had two children. The testimony of the plaintiff that the oldest child was only seven years of age accounted for the fact that the two children were not produced as witnesses. In the case of *Pennsylvania Co. v. Roy*, 102 U. S. 460, it did not appear that testimony concerning plaintiff's family had any legitimate bearing upon any issue in the case, and its admission was held to have been error for that reason. We think that, under the circumstances of this case, the testimony was material and relevant, and did not have the effect of increasing the damages, but served rather to inform the jury as to plaintiff's real condition.

3. *The Verdict against the Instructions of the Court.* In charging the jury the judge gave the following instruction:

"The medical witnesses who have testified on behalf of the plaintiff, while expressing the opinion that he is a very sick man, all admit that they were unable to discover any positive present sign of injury to his person, or any symptom in his case other than what frequently attends hysteria, and say that they are unable to determine what is the matter with him; while the medical witnesses on the part of the company all say that the plaintiff's case is one of clearly defined traumatic hysteria, or a hysterical condition following an injury, which condition, under proper advice and treatment, should not have existed; that his real injury at the time of the wreck was only slight, and that his present apparent condition is unnecessary and unreal. No medical witness on part of the plaintiff claims to have had any previous experience in treating any apparently similar injury from a railroad accident, while two of defendant's medical witnesses testified to having had very considerable experience in such cases. If, therefore, you believe that these medical witnesses are all equally honest and equally capable in their professional qualifications, the testimony of those of them who have had experience in such cases is entitled to greater weight than is the testimony of those who have not had any such experience; and on arriving at your verdict you should be governed always by the better evidence."

It is assigned as error that the jury disregarded the foregoing instruction in finding their verdict against defendant and in favor of plaintiff for \$10,000. It is contended that there was no evidence tending to show any injury to the plaintiff beyond a slight bruise, the inconvenience produced by the interruption of the journey, and the pain experienced at the time of the accident. The medical testimony shows that plaintiff had been under the constant care of a physician since the day of his arrival home after the accident. His regular physician had been absent for a time, but during such absence another physician was in attendance, and a third physician was called in once. The bills for medical attendance amounted to \$907, and for drugs, \$57. For the purpose of furnishing medical testimony, in addition to that of his regular physician, plaintiff was examined by three other physicians, who testified in his behalf. He was also examined by still three others, who testified for the defendant. It will not be necessary to refer to this testimony in

detail. Three of the physicians who testified for the plaintiff described symptoms of functional disorders, and gave it as their opinion that he was seriously sick. The fourth physician testified that he was sick, and seriously injured; if there had been an excretion of pus accompanied with the symptoms as represented. The three physicians who testified for the defendant stated, in substance, that, in their opinion, plaintiff was suffering from a nervous disorder, defined as traumatic hysteria, and that his real injury was slight. Two of these witnesses testified to having had experience in cases of this character, one being the regularly employed physician and surgeon of the railroad company. The court instructed the jury that the testimony of those who had had experience in such cases was entitled to greater weight than the testimony of those who had not had such experience; but there was nothing in the charge that limited the jury to the weight of the medical testimony. There was other testimony tending to prove the serious character of plaintiff's injury. Before the accident he was a strong, active man. He had become feeble and helpless, and required nursing. He had not improved under treatment, but was sick and disabled at the time of the trial, and had been in that condition ever since the accident,—a period of more than six months. We cannot, therefore, upon the record before us, say that the jury, considering all the testimony in the case, disregarded the instructions of the court in finding a verdict for the plaintiff.

4. *Excessive Damages.* The last assignment of error is as follows:

"The damages allowed by the jury are excessive, and so contrary to the testimony of the medical witnesses as to show that the jury were governed by passion and prejudice in fixing said damages."

What we have said respecting the verdict of the jury under the instructions of the court is applicable here, with the further comment bearing upon the question of excessive damages. The physicians who testified for the defendant stated that, under proper treatment, the plaintiff ought to recover soon; but his attending physician, who had observed the case from the beginning, testified that he did not think plaintiff would recover from the injury so as to be a well man again; and in this opinion he was corroborated by the testimony of another physician, whose judgment was the result of information obtained in the course of two examinations. This testimony, considered in connection with the other evidence, tended to prove a serious and permanent disability; and, if the jury believed it, there was sufficient basis for the damages awarded. "The finding of the jury on the whole evidence in a cause must be taken as negating all facts which the party against whom their verdict is given has attempted to infer or establish from the evidence." *Hepburn v. Dubois*, 12 Pet. 375. In this view of the testimony, there is nothing in the proceedings to justify this court in saying that the jury were governed by passion or prejudice in fixing the damages, or that the damages are excessive. The judgment of the circuit court is affirmed.

LEWIS et al. v. CHICAGO, S. F. & C. Ry. Co.*(Circuit Court, E. D. Missouri, N. D. December 7, 1891.)***1. CONSTRUCTION OF CONTRACT—PERFORMANCE.**

The provision in a contract for railroad grading that the measurements and calculations by the railroad company's chief engineer of the quantity and amount of the several kinds of work, and his classification of the materials contained in excavations, shall be final and conclusive, is a valid provision, and is binding upon the parties to the agreement, and there can be no recovery in excess of his final estimate, in the absence of fraud, gross error, or mistake.

2. SAME—RELIEF AGAINST MISTAKE.

The court will relieve against mistakes in measurements and calculations apparent upon the face of the estimates, or clearly proven, though not so apparent, or from oversight to measure or estimate any particular part of the work, or from wrong constructions put upon the provisions of the contract by the engineer; but will not relieve against alleged mistakes in determining the kind of materials found in the several cuts, the parties being bound by the judgment of the engineer selected by them for special skill and attention as the umpire on such questions; nor will it relieve against slight discrepancies in measurements.

3. SAME—RAILROAD GRADING.

Under the provisions of a contract for railroad grading, excavations were to be measured and paid for either as earth, loose rock, or solid rock; loose rock to comprise "shale or soapstone lying in its original or stratified position, coarse boulders in gravel, cemented gravel, hardpan, or any other material requiring the use of pick and bar, or which cannot be plowed with a strong, ten-inch grading plow, well handled, behind a good six mule or horse team." *Held*, that the materials mentioned were to be classified as loose rock, irrespective of the plowing test, which was only applicable to the "other material," not specifically named.

4. SAME.

It appeared that the material in all cuts, except rock cuts, varied much in consistency and hardness, and lay in irregular strata, and that the largest part of it was broken up by the plow. *Held*, that the practice of the engineer in estimating loose rock by percentages was justifiable in the circumstances.

In Equity. For prior report, see 39 Fed. Rep. 52.

STATEMENT BY THAYER, DISTRICT JUDGE.

This was a suit to recover a balance claimed to be due for grading a portion of defendant's railroad in the state of Missouri. The plaintiffs were subcontractors under McArthur Bros. The contract under which the work was done contained the following clause:

"The work shall be executed under the direction and supervision of the chief engineer of said railway company and his assistants, by whose measurements and calculations the quantities and amounts of the several kinds of work performed under this contract shall be determined, and whose determination shall be conclusive upon the parties hereto; * * * and said chief engineer shall decide every question which can or may arise between the parties in the execution of this contract, and his decision shall be binding and final upon both parties. And whereas, the classification of excavation provided for in the annexed specifications is of a character that makes it necessary that special attention should be called to it, it is expressly agreed by the parties to this contract that the classifications, measurements, and calculations of the said engineer of the respective quantities of such excavation shall be final and conclusive."

The defendant pleaded this provision of the contract, and further alleged that the chief engineer of the railway company had made a final estimate of the quantity of work done, and that the railway company

had paid the amount of such estimate, and were not further liable. The plaintiffs contended that the provision of the contract was not binding upon them; and, furthermore, that the estimate of the chief engineer ought to be disregarded for fraud and mistake on the part of the engineer. Plaintiffs also claimed that they had done certain extra work, not embraced by the provisions of the contract. The specifications attached to the contract under which the work was done contained the following clause:

"*Excavation in Loose Rock.* * * * Loose rock shall comprise: *First.* Shale or soapstone lying in its original or stratified position, coarse boulders in gravel, cemented gravel, hardpan, or any other material requiring the use of pick and bar, or which cannot be plowed with a strong, ten-inch grading plow, well handled, behind a good six mule or horse team. *Second.* Detached rock or boulders in masses exceeding $1\frac{1}{2}$ cubic feet and less than one cubic yard."

By the terms of the contract, all of the material found in the excavations was to be measured either as earth, loose rock, or solid rock. The grubbing specification referred to in the opinion was as follows:

"Measurements for grubbing will include all area under embankments and within six feet of slope stakes; also all area within slope stakes of excavations, and within area of all necessary borrow pits where grubbing is necessarily done."

It appeared in the evidence that the engineers of the railway company, in classifying the material found in the various cuts along the line of plaintiffs' work, had measured the total quantity of material found in the cuts, and allowed a certain percentage thereof as loose rock, based upon their observation of the number of animals that were used in plowing it. As the engineers construed the specifications, shale, cemented gravel, hardpan, etc., were not classified as loose rock, unless more than six horses or mules were required to plow such substances.

Craig, McCrary & Craig, for plaintiffs. *Gardiner Lathrop, Ben Eli Guthrie*, and *T. L. Montgomery*, for defendant.

THAYER, District Judge, (*after stating the facts as above.*) For the information of counsel the court states the conclusions it has reached concerning the various questions of law and fact that have arisen in this case as follows:

First. The second clause in the contract, declaring that the engineer's measurements and calculations of the quantity and amount of the several kinds of work, and also that his classification of the material contained in excavations, shall be "final and conclusive," is a valid provision, and is binding upon the parties to the agreement. Therefore there can be no recovery in excess of the engineer's final estimate, unless such estimate is successfully assailed for fraud, gross errors, or mistake. *Railroad Co. v. March*, 114 U. S. 549, 5 Sup. Ct. Rep. 1035; *Wood v. Railroad Co.*, 39 Fed. Rep. 52, and citations; *Sweet v. Morrison*, 116 N. Y. 19, 22 N. E. Rep. 276; *Brush v. Fisher*, 70 Mich. 469, 38 N. W. Rep. 446.

Second. The estimate may be impeached for fraud; that is to say, it may be shown that the engineers in charge intentionally underestimated or overestimated the work. It may also be impeached by proof of gross errors in the measurements and calculations. If the evidence shows such errors, it either creates the presumption of fraud, or warrants the conclusion that the engineers did not exercise that degree of care, skill, and good faith in the discharge of their duty which the law exacts; and in either event the court will disregard the estimate so far as is necessary to do substantial justice. The meaning of the word "mistake," as above employed, must be carefully defined.

(a) The court will relieve against mistakes in measurements and calculations that are apparent on the face of the estimate, or that are clearly proven, though not so apparent.

(b) If it is satisfactorily shown that the engineers failed, through oversight, to measure or estimate any particular part of the work, the court will grant relief as to such mistakes.

(c) If it appears that the engineer in charge put a wrong construction on any provision of the contract, the court will correct any substantial errors resulting from such mistake, for the reason that the parties did not make the decision of the engineer as to the proper interpretation of the contract final and conclusive. It is the province of the court to construe the agreement. *Bridge Co. v. City of St. Louis*, 43 Fed. Rep. 768.

(d) But in determining the kind of material found in the several cuts, the engineers were called upon to exercise their judgment. That was a matter, as the contract in substance recites, which involved the exercise of special skill and attention as the work progressed, and for that reason the parties selected an umpire, by whose judgment they agreed to be bound. *Ranger v. Railway Co.*, 1 Eng. Ry. Cas. 1; 13 Sim. 368. The court will not undertake to revise the decision of the engineer on questions of that character if it appears that he acted in good faith. The utmost it can do is to correct errors of classification that may have resulted from an erroneous interpretation of the contract.

(e) Slight discrepancies in measurements made by the respective parties must also be disregarded; and even when there are discrepancies of some magnitude the court must accept measurements made by the engineers of the railway company, unless the proof clearly shows that they are erroneous. The presumption is that all measurements made by such engineers are correct, and the burden is on the plaintiffs to overcome that presumption. *Torrance v. Amsden*, 3 McLean, 509; *Bumpass v. Webb*, 4 Port. (Ala.) 65; *Pleasant v. Ross*, 1 Wash. (Va.) 156.

Third. After an attentive consideration of the question, the court concludes that the engineers put a wrong construction on the second clause of the specifications, in so far as they construed the "plowing test" to be applicable to shale, soapstone, cemented gravel, and hardpan, as well as to other hard, earthy substances. The right interpretation of the clause is as follows: Shale, soapstone, cemented gravel, and hardpan were known substances, and were known to be hard to handle. Therefore it was declared that they should be classified as loose rock. And, inas-

much as it was thought probable or possible that other hard earths might be encountered in the progress of the work, it was agreed that any other material requiring the use of pick and bar, or that could not be plowed "with a strong, ten-inch grading plow, * * * behind a good six horse or mule team," should likewise be classified as loose rock. This is the correct exposition, and truly expresses the thought in the mind of the draughtsman.

But the court is of the opinion that the practice pursued by the engineers of estimating loose rock by percentages was justifiable and proper. Under all the circumstances of the case, that seems to have been the only fair and practicable method of classifying much of the material when the plowing test was applied. The evidence satisfies me that the material handled varied much in consistency and hardness, and lay in irregular strata. By far the largest portion of all the material found in the various cuts, except the rock cuts, was broken up, I think, by the use of a team of not more than six horses. Probably that was the most practicable and economical method of working the cuts, as an eight-horse team is usually cumbersome. Nevertheless, if the engineers had classified every cubic yard of earth that was so broken up with six horses "as earth excavation," it would not have accorded with the spirit of the contract. The application of that rule to the work of those contractors who had much hard material to handle, and very little easy plowing, would have been manifestly unjust. On the other hand, it would have been contrary to the spirit of the agreement, and equally unfair to the railway company, to have classified all of such material as loose rock. In short, the contract must be interpreted in a reasonable manner, with a due regard for the rights of both parties, and with a proper appreciation of the nature and magnitude of the undertaking, and the difficulties encountered in applying the plowing test to the subject-matter. In the light of such considerations as these, the specifications will not admit of the construction that it was the duty of the engineers to draw a rigid line, under all circumstances, between earth and loose rock, and to classify a given material as all loose rock, unless a six-horse team was able to plow therein continuously, from day to day, and to turn a full ten-inch furrow. As the contract did not define what should be esteemed plowing, or describe to what extent it should be impossible to plow with six horses, to entitle the contractor to loose rock classification, there was a grave difficulty in applying the force test to much of the material, and upon the whole I am satisfied that the engineers properly solved that difficulty in accordance with the spirit of the agreement by allowing a given percentage of loose rock, basing the percentage upon their observation of how the material was handled, and the difficulties actually encountered in moving it. This conclusion is fortified by the fact that these plaintiffs did not object to the method of classification by percentages while the work was in progress. Such objections as they made were to the amount of the allowance, rather than to the method by which it was ascertained. Finally, while expressing

my views on questions of interpretation, I will add that the grubbing specification was properly construed by the engineers. The fair reading of that specification is that "measurements for grubbing will include all areas under embankments, and within slope stakes of excavations, and the areas of all borrow pits, where grubbing is necessarily done." Any other view would be taking advantage of a mere error of punctuation in framing the grubbing clause.

Fourth. Having announced some general propositions in accordance with which the court has considered the evidence, I may as well say at the outset that there is very little testimony in the case tending to show that any of the engineers in charge of the work intentionally underestimated it. I am well satisfied, and accordingly find, that the chief engineer and his assistants intended to deal fairly with the contractors, and that in making measurements, computations, and classifications for the final estimate they aimed to allow them all that was due under the terms of the contract as they construed it.

Fifth. The evidence in the case fails to satisfy me that there are any substantial errors in the measurements or calculations as made by the engineers. By this I mean to say that the gross contents of the excavations and embankments, the total haul and overhaul, and the total amount of clearing, grubbing, and close chopping, seem to have been ascertained with substantial accuracy. At all events, the testimony is insufficient, at this late day, to warrant a contrary conclusion. Nor has it been shown to the satisfaction of the court that the engineers failed, through oversight or otherwise, to measure or estimate any work that was actually done by the plaintiffs.

Sixth. In view of the unsatisfactory character of the testimony, I have not felt at liberty to allow any of the claims for extra work. I can only take time to mention a few of the more important items of this kind.

(a) The rock ditch on section 192 was a part of the contract work, and was properly estimated and paid for at contract rates. It was a hard job, and the contractors undoubtedly lost money on the work; but the court cannot, for that reason, allow the claim.

(b) I have found it impossible to determine from the testimony before me how much material was handled in the spring of the year 1888 in filling up and finishing the house track at Revere station. It is most probable, I think, that the final estimate was based on measurements that included that work; and that it was work necessary to be done to complete the contract.

(c) With reference to the claim for carrying and piling up rock ballast on section 193, it will suffice to say that the railway company paid rock prices for the excavation and haul, and the evidence leaves it uncertain whether any piling was in fact done, or whether it was merely dumped from cars.

(d) The company seems to have made the contractor an allowance for the broken rock placed in cut No. 2 to bring it up to grade, and I am unable to say that the allowance for that work was inadequate.

Seventh. It must have become apparent to all persons who have been concerned in the trial of this suit, and others of a similar character, that the litigation owes its origin to differences of opinion on questions of classification. If conflicting views on that point had been reconciled, no controversy would probably have arisen as to other matters. It is also probably true that the railway company and the contractors underestimated the cost of grading and excavation on some sections of the road, for the reason that much of the material encountered proved to be more difficult to handle than either party had anticipated. After carefully re-reading all of the testimony, I have reached the conclusion that the engineers did not classify some of the excavations made by the plaintiffs (particularly on sections 188 to 191) as highly as they should have done, or as highly, perhaps, as they would have done, had they properly construed the second clause of the specifications. I am far from entertaining the view that all the material found in the cuts, lying underneath the subsoil, or even below the gumbo, was hardpan, within the meaning of that term as employed in the specifications. In my judgment the word "hardpan," as ordinarily understood among railroad contractors, means something more than clay or very hard clay. It is no doubt difficult to give an exact definition of the word, because the substance varies somewhat in composition in different localities. Nevertheless I feel satisfied that there was some material found in the cuts on the Lewis, Wood & Penny work which the engineers might fairly have classified as "loose rock," without regard to the plowing test, because it was hard-pan, or cemented gravel; and my best judgment is that the classification of some cuts was too low, and that the plaintiffs sustained injury, because the plowing or "force test" was applied indiscriminately to all the material, on the erroneous assumption that it was the only test applicable to the case. In a letter written by McArthur Bros. to Mr. Robinson, the chief engineer, under date of March 21, 1888, after the final estimate was received, I find the following statements, to-wit:

"The classifications which you give for cuts on sec. 187 to 191 are, we think, uniformly too low; much lower than classifications elsewhere on the work. To these we wish to call your particular attention."

Then, after suggesting a considerable increase in the classification of certain cuts, (which was not allowed,) they say of the proposed increase, this "is as low as we think any competent and fair man who saw the work done would put them. * * * This part of the work was distant from Mr. Lamborn's office, and not often seen by him in its progress." McArthur Bros. appear to have been fair-minded men, and to have acted very impartially in the course of all the disputes that arose concerning questions of classification. They had also had large experience in railroad construction, and were thoroughly conversant with the subject to which they alluded. I am satisfied that they expressed their honest convictions in the paragraphs of the letter above quoted, and their views under the circumstances are entitled to great weight. The result has been that the court has determined to raise the classification

on cuts Nos. 5, 9, 10, 11, 13, 14, 15, and 16 in sections 188 to 191 to the following extent:

On cut	5	to 60 per cent. of the total contents of the cut.
" "	9	" 40 " " " " " " " " " "
" "	10	" 40 " " " " " " " " " "
" "	11	" 60 " " " " " " " " " "
" "	13	" 40 " " " " " " " " " "
" "	14 & 15	" 50 " " " " " " " " " "
" "	16	" 60 " " " " " " " " " "

The other cuts were estimated with substantial accuracy and fairness. The court has taken Mr. Brooker's estimate of the total contents of these cuts, and has ascertained the amount already paid according to the old classification, and has also computed the amount due according to the new classification. The sum due is found to be \$3,578.19, for which amount and interest from the time this suit was brought a lien is allowed.

SUMMERS v. CHICAGO, S. F. & C. RY. CO.

(Circuit Court, E. D. Missouri, N. D. December 7, 1891.)

In Equity. Suit by James W. Summers against the Chicago, Santa Fe & California Railway Company to recover for grading defendant's road.

F. T. Hughes and C. B. Matlock, for plaintiff.

Gardiner Lathrop, Ben Eli Guthrie, and T. L. Montgomery, for defendant.

THAYER, District Judge. What has been said in deciding the *Lewis Case*, 49 Fed. Rep. 708, is applicable in a measure to this case. The contracts involved in the two cases are practically the same, but the work done by Summers was done 65 miles west of the Lewis, Wood & Penny work, and, as a whole, appears to have been of a less difficult and expensive character. The total amount of material taken from all the cuts on the six sections of the road constructed by Summers was only about 22 per cent. of the gross amount taken from the cuts on the five sections constructed by Lewis, Wood & Penny in Missouri. A very considerable portion of Summers' work was in the valley of the Chariton river, and the court is satisfied that the bulk of the material handled was much easier to move than on the Lewis, Wood & Penny sections. The court had the advantage of hearing all of the oral testimony in this case, and it will suffice to say that it created a very strong impression that Mr. Summers' work was liberally estimated under any construction of the contract. That impression has been confirmed by a careful perusal of the testimony since the case was argued. It is true that the division engineer in charge of this portion of the work construed the "plowing test" as applicable to hardpan, cemented gravel, etc.; but that is not an adequate reason for disturbing the final estimate, unless the plaintiff sustained some injury. If the test actually applied gave him all the loose-rock classification that he was fairly entitled to, the estimate should not be disturbed. At the conclusion of the work, and evidently with a full knowledge of all the facts, Mr. Summers

expressed himself as well pleased with the manner in which he had been treated by the engineers. He also stated, in substance, that there was not much material on his portion of the road, entitling him to loose-rock classification, and that he had made a very considerable sum (either \$10,000 or \$16,000) out of the contract. This, in itself, is very persuasive evidence that plaintiff sustained no injury by reason of the misconstruction of the contract. Taken in connection with all the other testimony in the case tending to show the character of the material, how it was handled, and the amount of loose rock actually estimated and paid for, it has served to convince the court that the recovery in this case should be limited to the sum admitted to be due and already paid into court. Judgment may be entered for that amount, with costs up to the time the money was deposited with the clerk. Subsequent costs will be taxed against the plaintiff.

BATTLE *et al.* v. McARTHUR *et al.*

(Circuit Court, E. D. Missouri, N. D. December 7, 1891.)

1. CONSTRUCTION OF RAILROAD—CONTRACTOR'S LIEN—FILING ACCOUNT.

Under Rev. St. Mo. 1879, § 3202, providing that the lien of a railroad contractor must be filed within 90 days next after the completion of the work, etc., and that all actions to enforce such liens must be commenced within 90 days after filing the lien, and prosecuted without unnecessary delay to final judgment, and that no lien shall continue to exist for more than 90 days after it is filed unless suit is instituted within such time, (Id. § 3205,) successive liens for the same labor and materials cannot be filed. The filing of one account, sufficient to create a lien under the statute, exhausts the contractor's power to incumber the property; and the 90 days run from such time, and cannot be extended by the filing of an amendment or a new lien within the original 90 days.

2. RECEIPT IN FULL—EFFECT.

During the execution by subcontractors of a contract for railroad grading frequent complaints were made by them as to the manner in which the chief engineer estimated certain kinds of excavation, and these complaints were made to the contractor, and by him to the railroad company; and the contractor succeeded in having the estimates raised in some instances. *Held*, that a receipt "in full," given by the subcontractors to the contractor after knowledge of all the facts, and tender and payment of an amount on the basis of the engineer's final estimates, was binding between the parties.

3. COMPROMISE—CONSIDERATION.

Even though a person does not receive all that is legally due to him, yet, where the sum actually due is in dispute, the avoidance of litigation is a sufficient consideration to support a settlement fairly made with full knowledge of all the facts.

In Equity. Suit by Battle & Cameron against McArthur Bros. and the Chicago, Santa Fe & California Railway Company to enforce a mechanic's lien.

James H. Anderson, for plaintiffs.

James C. Davis, for McArthur Bros.

Gardiner Lathrop and Ben Eli Guthrie, for Chicago, S. F. & C. Ry. Co.

THAYER, District Judge. Two questions are presented in this case which do not arise in either of the other cases just decided,—*Lewis v. Railway Co.*, 49 Fed. Rep. 708, and *Summers v. Same*, Id. 714.

1. In the first place, the railway company contends that these plaintiffs did not bring their suit against it within the period limited by law, and that their alleged lien was for that reason lost. The court concludes that this point is well taken. So far as the railway company is concerned, the suit is simply one to enforce a lien against the property of the company located in this state, which lien exists, if at all, by virtue of local laws. *Vide* article 4, c. 47, Rev. St. Mo. 1879. These plaintiffs have no lien against the property of the railway company, either at common law or in equity; nor have they any right of action against the railway company, except such as is given by the Missouri statute creating a lien. In other words, the proceeding, as against the company, is purely statutory, and, to be effectual, must have been brought in the manner and within the period prescribed by the laws of this state. The federal courts can enforce liens created by local laws, but they will only do so where the proper steps have been taken under such laws to render them enforceable in the state courts. To entitle a railroad contractor to a lien under the laws of this state, the lien must be filed "within ninety days next after the completion of the work, or after the materials were furnished," (section 3202, Rev. St. Mo. 1879;) and all actions to enforce such liens must be commenced "within ninety days after filing the lien, and prosecuted without unnecessary delay to final judgment," (section 3205, *Id.*) As if to render the injunction more emphatic, section 3205 further declares that "no lien shall continue to exist * * * for more than ninety days after the lien shall be filed, unless within that time an action shall be instituted thereon. * * *" Now, it cannot be admitted that a railroad contractor may file any number of liens for the same labor and materials, and against the same property, within the 90 days after his work is completed, and subsequently elect on which of the liens so filed he will bring suit. An account for work and materials, when filed with the clerk of the circuit court of any county through which the railroad runs, operates to fix a definite charge upon the property outside of as well as within the county, for the sum stated in the account. It operates as a mortgage upon the entire line of road within this state, and is even more far-reaching in its effects than a mortgage or other incumbrance. *Vide* section 3201, *Id.* In the very nature of things, successive liens for the same labor and materials cannot be filed. The filing of one account that is good and sufficient to create a lien under the statute and satisfy its requirements exhausts the contractor's power to incumber the property. The first good and sufficient lien so filed, sets the statute of limitations in operation, and, unless suit is brought within 90 days thereafter, the lien ceases to exist by the express provisions of the statute. It is unnecessary to decide whether a lien account, when filed, may be corrected in matters of mere detail by subsequent amendments, filed within the 90 days allowed for filing a lien, for, even if such amendments are permissible, they should obviously be filed in the same county where the original account is recorded; and, in any event, the time limited for bringing suit must be computed from the date of the first filing. The amendments would take effect by relation

as of that day, if it is permissible to amend such statements of account. The construction which the court thus gives to the railroad lien law seems to be the only reasonable interpretation of the statute, and it is also the construction heretofore placed upon the local mechanic's lien law by the supreme court of this state. *Mulloy v. Lawrence*, 31 Mo. 583; *Davis v. Schuler*, 38 Mo. 24. It is proper to add, in this connection, that the mechanics' lien law was passed in the year 1857, the railroad lien law in 1873, and it is a well-known fact of local history that the later law, in all of its essential features, was modeled after the former, so that it may be safely assumed that the supreme court of the state would construe the railroad lien law as this court construes it. Inasmuch, therefore, as the record in this case shows that a good and sufficient lien account was filed by Battle & Cameron in Scotland county on June 4, 1888, and that no suit to enforce such lien was instituted until September 22, 1888, the lien had ceased to exist before this action was instituted, and these plaintiffs are entitled to no relief as against the railway company.

2. McArthur Bros., (against whom there may be a recovery in this suit notwithstanding the failure of the lien,) on their part, insist that they have made a settlement with Battle & Cameron which is final and conclusive. The facts bearing on that issue are found to be as follows: The controversy concerning loose rock classification was one which arose early in the progress of the work, and continued to the end. Very soon after that controversy arose (certainly as early as July 1, 1887) these plaintiffs, as well as other subcontractors, became aware of the manner in which the amount of loose rock was being estimated by the engineers; that is to say, they knew that the amount was being estimated on the percentage theory, and that the engineers regarded the plowing test as applicable to hardpan, cemented gravel, etc. The court cannot conceive it to be possible, in view of all the facts and circumstances of the case, that they did not have such information for some months prior to January 1, 1888. These plaintiffs made numerous complaints after May, 1887, with respect to the quantity of loose rock allowed in the various monthly estimates. They appear, on one occasion at least, to have distinctly made the claim that hardpan should be estimated as loose rock without reference to the plowing test, although, as a rule, their complaints seem to have been directed rather to the amount of the allowance than to the method of estimation. Such complaints as Battle & Cameron addressed to McArthur Bros. the latter firm likewise made to the railway company, sometimes in even more forcible language. McArthur Bros. were equally interested in securing a more liberal classification, and they seem to have made an honest effort on all occasions to accomplish that result. Thus matters stood until the work was practically concluded. It admits of no doubt that a conference was held between Battle & Cameron and McArthur Bros., after the work was about finished, with a view of ascertaining what percentage of loose rock in the classification of certain cuts on the line of plaintiffs' work would be satisfactory to them, or would be accepted as a settlement of the existing controversy. There can be no doubt, I think, that Battle & Cameron at

that conference agreed to a certain classification, which was put in the form of a tabulated statement, showing the percentage of loose rock claimed in the several cuts, and this statement was undoubtedly forwarded to the chief engineer of the railway company by McArthur Bros. The percentage of loose-rock classification thus demanded was not allowed, but it caused the chief engineer to raise the classification some 20 per cent., and that increase entered into the final estimate. When the final estimate was received, McArthur Bros. exhibited it to the plaintiffs. The latter were not satisfied, and disputed its accuracy. On the other hand, McArthur Bros. represented that, even if it was unsatisfactory, it was the best allowance that they had been able to obtain after proper efforts, and that, upon the whole, they considered it a fair estimate. They also contended (as they had always done with their sub-contractors) that by the terms of their contract with Battle & Cameron the decision of the engineer on questions of classification was conclusive, and that they were not bound to pay more than the amount shown to be due by the final estimate. The result of the interview was that Battle & Cameron accepted the sum of \$6,746.39 tendered to them, (that being the amount due according to the final estimate,) and gave a receipt to McArthur Bros., which was expressed to be "in full for the balance due us on contract for grading sections 155 to 165, inclusive." When Battle & Cameron signed this receipt, it is possible, I think, that they may have intended to sue the railway company. They may have supposed at the time that they could maintain such a suit notwithstanding the settlement with McArthur Bros.; but the court is fully persuaded that they did intend to release McArthur Bros. from further liability under the contract, and that they left the members of that firm under the impression, when the money was paid, that, so far as they were concerned, the controversy was finally adjusted and settled. In view of the premises, the court concludes that there can be no recovery against McArthur Bros. Even though a person does not receive all that is legally due to him, yet, where the sum actually due is in dispute, the avoidance of litigation is a sufficient consideration to support a settlement fairly made with a full knowledge of all the facts on which the person's legal right to exact a larger sum depends. If this was not the law, no compromise would ever be binding. In this instance there was a controversy as to how much McArthur Bros. were liable to pay these plaintiffs under the terms of the construction contract. All of the facts on which the decision of that question depended were as well known to one party as the other, and they were quite as well known in May, 1888, as they are to-day. No facts known to McArthur Bros. were concealed; no undue advantage was taken of these plaintiffs; and no fraud was practiced. Under these circumstances it must be held that the settlement effected in May, 1888, is conclusive as between the parties thereto, and the complaint will accordingly be dismissed as to both of the defendants.

DILLINGHAM v. NEW YORK COTTON EXCHANGE.

(Circuit Court, S. D. New York. February 6, 1892.)

1. BENEFIT ASSOCIATIONS—MEMBERSHIP—TRANSFER OF CERTIFICATE.

The charter and by-laws of the New York Cotton Exchange provide that death benefits arising from assessments shall not extend to a person who had ceased to be a member, and that deaths in the membership are to be reported by the trustees to the managers who levy the assessments. *Held* that, the liability to levy an assessment appearing to be absolute, the investigation of the trustees is not conclusive as to whether decedent was a member or not.

2. SAME.

Hypothecation of a membership in the New York Cotton Exchange for a debt, with power of attorney to transfer the same, which is not exercised, but the debt is continued on the creditor's books, is not such a sale of the membership as will relieve the exchange from liability to make an assessment on the member's death.

3. SAME—EVIDENCE.

In an action on such membership certificate, statements made by the creditor holding the certificate are admissible for the purpose of showing the nature of his claim thereto, but are not conclusive as to decedent's title to the membership.

At Law. Action by Nathaniel Dillingham against the New York Cotton Exchange on a membership certificate. Judgment for plaintiff.

G. A. Clement, for plaintiff.

J. McL. Nash and *Stephen P. Nash*, for defendant.

WHEELER, District Judge. This suit is brought upon the membership of Horace E. Dillingham in the defendant corporation, and has been heard on waiver in writing of a jury. He became a member, and stood upon the books as such, but had an account with Crosby & Co., and in January, 1886, delivered his certificate of membership, with a power of attorney for transferring it to them, for security, and they, after that, paid the dues on it, and charged them to him. On October 1, 1886, their balance against him was \$3,389.25. The membership was worth \$1,400. They credited his account, by profit and loss, \$1,989.25, and carried forward the balance, \$1,400, against him. The charter and by-laws provided that the benefits in question here should not extend to a person who had ceased to be a member, "by expulsion or by a voluntary or forced sale of his membership." The defendant claims that by this transaction of October 1, 1886, he ceased to be a member by sale of his membership. The evidence does not show any express agreement between him and Crosby & Co. that they should then or ever have the membership for \$1,400, or for what it was worth; he was not credited with that amount for the membership; but that part of his account which the membership would not be good security for was carried to profit and loss, and that part for which it would be good security was continued against him; the charging of dues paid to him was continued; he continued to enjoy the privileges of a living member, and stood upon the books as such to the time of his death. The trustees of the gratuity fund are to report deaths of members to the board of managers, who are by resolution to levy assessments for the next of kin, which the plaintiff is. The trustees, after investigation, reported that

the deceased was not a member, and the board thereupon decided not to levy any assessment. The defendant claims that this investigation and decision were within the discretionary and quasi judicial powers of the trustees and board, and that their decision thereupon was conclusive. But the obligation to levy the assessment appears to be absolute upon the death of those who are in fact members, and not to be qualified to those who may be found by the trustees or board to be members; and the investigation appears to have been for the information of those acting for the defendant, and not for determining between the plaintiff and defendant the ultimate question of the defendant's liability, and therefore not at all conclusive. What Crosby & Co. said and wrote about the manner of their holding the certificate and power of attorney, while they had them, is offered in evidence, and objected to. It seems to be admissible for the purpose of showing what their claim to them was, but not conclusive as to that, and less so as to the right of the plaintiff. *Lazensky v. Supreme Lodge*, 24 Blatchf. 533, 31 Fed. Rep. 592. When considered, however, this evidence does not vary the facts stated. The continuation of the debt for which security has been given is always important upon any question whether the property in the security had been passed to the creditor absolutely. This debt remained; therefore the membership had not become the property of Crosby & Co., and paid it. The power of attorney had not been exercised. It would have been revocable on redemption of the certificate, and the membership would have remained as before. On the whole, that the membership had not been sold satisfactorily appears, and is found; that Dillingham was a member at his death follows, and is also found. The other facts entitling the plaintiff to recover are admitted by the pleadings or agreed to. The plaintiff recovers for the failure to perform the duty of levying an assessment upon the other members for him as next of kin to the deceased member. *Hankinson v. Page*, 31 Fed. Rep. 184. If the assessment had been made, payment of the sum that should "actually be collected and received," without liability for interest upon it, would have been, by the express terms of the charter, all that the defendant could be holden for. That sum, without interest, is what the plaintiff lost by the failure to assess, and is the measure of damages here. It is stipulated to be \$4,000. Judgment for plaintiff for \$4,000 damages.

BANGOR SAVINGS BANK v. CITY OF STILLWATER.

*(Circuit Court, D. Minnesota, Third Division. March 31, 1892.)***MUNICIPAL INDEBTEDNESS—INVALID NEGOTIABLE CERTIFICATES—MONEY HAD AND RECEIVED.**

Where negotiable certificates of indebtedness issued by a city have been sued upon by the payee, and declared invalid for want of power to issue negotiable instruments, the payee may maintain an action for money had and received, provided the city had power to make the contract out of which the indebtedness arose; and the fact that the payee was not a party to that contract is immaterial when the certificates were issued to him at the request of the contractor, and the money was received by the city and paid over to the contractor.

At Law. Action by the Bangor Savings Bank against the city of Stillwater for money had and received. On demurrer to amended complaint. Overruled.

F. H. Lemon & Co. made a contract December 21, 1887, with the city of Stillwater, whereby they agreed to "vest" title in the city to two strips of land, each 50 feet wide, and to widen Main street 50 feet a certain distance, and to do all the excavating and filling that may be necessary to reduce the 50 feet to the present grade, and to secure the relocation of certain railroad tracks and certain sewer privileges. For the services to be performed and the land so acquired the city agreed to vacate and abandon certain condemnation proceedings, and vacate and surrender all its right to certain parts of Laurel, Cherry, and Linden streets; and, furthermore, on the completion of the contract by Lemon & Co., to pay them \$21,250, in three certificates of indebtedness, to become due, respectively, on July 1, 1889, July 1, 1890, and July 1, 1891. Subsequently, on October 27, 1888, the certificates of indebtedness were issued to the Bangor Savings Bank as payee, reciting on their face that they were so issued at the request of Lemon & Co., and that a resolution of the city council was passed, and duly approved by the mayor, authorizing the making and delivering of the certificates to the bank. An action to recover on the certificates failed for the want of power in the city to issue them. Suit is now brought for the money paid to the city of Stillwater, the certificates having been decided illegally issued. A demurrer to the complaint is interposed.

Sanders & Bowers and Owen Morris, for plaintiff.

Fayette Marsh, for defendant.

NELSON, District Judge. It is the settled doctrine that if a municipal corporation has received money for an authorized purpose, derived from the issue of illegal and void bonds, and has applied it to that purpose, an action will lie as for money had and received, although the corporation had no authority to issue the bonds. *Louisiana v. New Orleans*, 102 U. S. 204; *Chapman v. County of Douglas*, 107 U. S. 348, 2 Sup. Ct. Rep. 62; *Hitchcock v. Galveston*, 96 U. S. 341. The contract with Lemon & Co. was valid. It was within the scope of the chartered powers of the city of Stillwater. (See Judge THAYER's opinion in this case, v.49f.no.9—46)

46 Fed. Rep. 899, citing City Charter, c. 8, § 2, etc.) The city certificates are in the hands of the payee, and contain a recital that they were issued in consideration of the performance of the Lemon & Co. contract. The observation of Justice Strong in *Hitchcock v. Galveston*, 96 U. S. 341, forcibly applies. In that case the city of Galveston made a contract with Hitchcock & Co. to pave streets. The charter gave the city power to contract for this purpose, but the city agreed in the contract to pay for the work in negotiable city bonds, payable at a future day. There was no express power under the charter to issue bonds for this purpose. The court, *inter alia*, said:

"It is enough for them [the plaintiffs] that the city council have power to enter into a contract for the improvement of the sidewalks; that such contract was made with them; that under it they have proceeded to furnish material and do work, as well as assume liabilities; that the city has received and now enjoys the benefit of what they have done and furnished; that for these things the city promised to pay; and that, after having received the benefit of the contract, the city has broken it. It matters not that the promise was to pay in a manner not authorized by law. If payment cannot be made in bonds, because their issue is *ultra vires*, it would be sanctioning rank injustice to hold that payment need not be made at all."

There is a striking similarity in the above case and the one at bar. It is true that in the former the action was brought by a party to the contract with the city, but that fact does not change the principle involved. The demurrer interposed to the complaint in this case admits the contract made with Lemon & Co., its performance by them, and that the certificates, drawing interest, and payable at a future day, were issued to plaintiff in consideration of the performance by Lemon & Co. of its contract with the city. The counsel for the defendant has very forcibly presented his views, which must prevail, unless the contract with Lemon & Co. was authorized under the charter. Having determined that the city could lawfully make the contract, and by the demurrer the receipt of the money being admitted, and the use of it in payment on the contract, I am constrained to overrule the demurrer, with leave to the defendant to answer in 20 days; and it is so ordered.

NEW JERSEY & N. Y. R. Co. v. YOUNG.

(Circuit Court of Appeals, Second Circuit. January 18, 1892.)

1. **MASTER AND SERVANT—PERSONAL INJURIES—IMPUTED NEGLIGENCE.**
Negligence cannot be imputed to a fireman because he does not endeavor to enforce upon the engineer obedience to the regulations of the railroad.
2. **SAME—KNOWLEDGE OF DEFECTS—CONTINUANCE IN SERVICE.**
For a fireman, knowing of a defect in the air-brake, to remain upon a locomotive is not conclusive of negligence on his part, and it is a proper question for the jury whether the defect is such that a man of ordinary prudence and intelligence would not have remained, and also whether the accident would have happened had the brake been in proper order.
3. **SAME—PROMISE TO REPAIR.**
That a servant continues in a dangerous service in consequence of the master's assurances that the danger shall be removed precludes any argument that the servant, by remaining, assumes its risks, and recovery can be had for an injury caused by the defect after the lapse of a reasonable time for its correction.
4. **SAME—FELLOW-SERVANTS.**
The negligence of a fellow-servant does not excuse the master from liability for an accident which would not have happened had the master performed his duty. 46 Fed. Rep. 160, affirmed.

On Writ of Error from Circuit Court, Eastern District of New York.
Action by William H. Young against the New Jersey & New York Railroad Company, for damages for personal injuries. The cause was originally brought in the supreme court of New York, and subsequently removed to the federal court. Verdict and judgment were there rendered for plaintiff, and a new trial was denied. Defendant brings error. Affirmed.

Robert W. De Forest, for plaintiff in error.

Charles C. Suffren, (*Irving Brown*, of counsel,) for defendant in error.
Before WALLACE and LACOMBE, Circuit Judges.

WALLACE, Circuit Judge. This is a writ of error by the defendant in the original suit to review a judgment for the plaintiff rendered upon a verdict of the jury. The plaintiff, a fireman in the employ of the defendant, while firing the locomotive of an express train on the defendant's railway on a trip from Jersey City to Haverstraw, was injured by a collision between his train and some cars upon a side track of the railway. The side track was not disconnected from the main track at the time, and this fact was indicated by a danger signal of a red light, indicating that the switch was open. A white light would have indicated that it was closed. The track was straight for a considerable distance ahead of the switch. The side track was at a station where there is a junction between the tracks of the defendant's railway and those of another railway. Among the regulations of the defendant, furnished to its engineers, were the following:

"All trains must approach * * * junctions * * * prepared to stop; and must not proceed until the switch or signals are seen to be right, or the track is plainly seen to be clear. * * * He [the engineer] must always run upon the supposition that at any station he may find a switch out of place, and he must have his train well in hand, on approaching a switch or station."

As the train was approaching the switch, at the rate of 25 miles an hour, and when several hundred feet distant, the plaintiff noticed the signal was a red light, and the engineer immediately reversed his engine and applied the air-brake. The testimony upon the trial authorized the jury to find that the air-brake was out of repair; that if it had been in proper order the train could have been stopped between the place where it was applied by the engineer and the switch; that both the plaintiff and the engineer knew the brake was out of order; that within the previous week the engineer, in the presence of the plaintiff, had notified the defendant's superintendent that the brake was out of order; and that the superintendent, through the engineer, had directed the defendant's repairer to put it in order, but the repairer had neglected to do so. The testimony also authorized the jury to find that, owing to the fog at the time, the color of the signal was not distinguishable further away than the place at which the brake was applied. At the close of the testimony the defendant's counsel requested the judge to instruct the jury to render a verdict for the defendant on the grounds (1) that no negligence on the part of the defendant was shown; (2) that the accident was caused by the negligence either of the plaintiff or of the engineer, his fellow-servant; and (3) that the proximate cause of the accident was the negligence of the engineer or fireman with reference to the danger signal, irrespective of any defect in the brake. The court refused these instructions, and the defendant took an exception. The defendant assigns error because of the refusal of the trial judge to give these instructions. We think the instructions were properly refused.

It is not fairly open to discussion that the facts in evidence would authorize a recovery by the plaintiff if he had not been aware of the defective condition of the air-brake, or if the engineer had not been guilty of negligence in running his train in violation of the regulation; especially so when he knew that the brake was out of order. A fireman has no authority to interfere with the engineer in the management of a train, and therefore negligence cannot be imputed to the plaintiff because he did not endeavor to enforce obedience to the regulations upon the engineer. His personal negligence, if there was any, is to be found in his conduct in remaining as a fireman upon a locomotive which was so defectively equipped that it could not be seasonably stopped. It was clear after the accident that the brake was so defective that the train could not be stopped within a distance at which, on a foggy night like the one in question, danger signals could be discerned. But there is nothing in the evidence to indicate that this was manifest to the plaintiff before the accident took place. It was a question for the jury to determine whether the defect was such that a man of ordinary prudence and intelligence would not have remained upon a locomotive as a fireman after knowledge of it. That the plaintiff knew of the defect in the appliance was not, under the circumstances, and as a matter of law, absolutely conclusive of negligence on his part, even though there had been no assurance from the defendant that it should be repaired. *Ford v. Railroad Co.*, 110 Mass. 240, 261; *Laning v. Railroad Co.*, 49 N. Y.

521; *Daley v. Printing Co.*, 150 Mass. 77, 22 N. E. Rep. 439; *Myers v. Iron Co.*, 150 Mass. 125, 22 N. E. Rep. 631; *Hough v. Railway Co.*, 100 U. S. 213; *District of Columbia v. McElligott*, 117 U. S. 621, 6 Sup. Ct. Rep. 884; *Railroad Co. v. McDade*, 135 U. S. 554, 10 Sup. Ct. Rep. 1044. But the evidence authorized the jury to find that the plaintiff had been assured that the defendant would repair the air-brake. "If the servant, having a right to abandon the service because it is dangerous, refrains from doing so in consequence of assurances that the danger shall be removed, the duty to remove the danger is manifest and imperative, and the master is not in the exercise of ordinary care unless or until he makes his assurances good. Moreover, the assurances remove all ground for the argument that the servant, by continuing the employment, engages to assume its risks." Cooley, Torts, 559. This doctrine is cited with approval in *Hough v. Railway Co.*, *supra*, as is also the following language from Shear. & R. Neg. (3d Ed.) § 96: "There can be no doubt that, where a master has expressly promised to repair a defect, the servant can recover for an injury caused thereby within such a period of time after the promise as it would be reasonable to allow for its performance, and, as we think, for an injury suffered within any period which would not preclude all reasonable expectation that the promise might be kept." See, also, *Holmes v. Clark*, 10 Wkly. Rep. 405; *Laning v. Railroad Co.*, *supra*; *Greenleaf v. Railroad Co.*, 33 Iowa, 52; *Railroad Co. v. Platt*, 89 Ill. 141. If it should be assumed that the engineer was guilty of negligence, either by his disregard of the regulations or otherwise, which contributed to the accident, such negligence would not necessarily defeat the action, if the negligence of the defendant was also contributory. *Railway Co. v. Cummings*, 106 U. S. 700, 1 Sup. Ct. Rep. 493. The defendant would not be liable if the negligence of the engineer was the sole cause of the accident, because, being a fellow-servant with the plaintiff, his negligence was one of the risks for which the defendant, as master, did not assume to be responsible. But negligence of a fellow-servant does not excuse the master from liability to a co-servant for an injury which would not have happened had the master performed his duty. *Coppins v. Railroad Co.*, 122 N. Y. 557, 25 N. E. Rep. 915. It was a fair question of fact in the present case whether the accident would have happened if the air-brake had been in proper order, because, notwithstanding the train was proceeding at an improper rate of speed and in violation of the instructions, there was evidence to indicate that the train could have been stopped before reaching the switch after the brake was applied.

The judgment is affirmed.

In re MILLS et al.

(Circuit Court, S. D. New York. December 4, 1891.)

CUSTOMS DUTIES—CLASSIFICATION—ELASTIC CORDS AND BRAIDS—SILK AND INDIA RUBBER—SILK CHIEF VALUE.

Elastic cords and braids, manufactured of silk and India rubber, silk being the component material of chief value, are dutiable at 50 per centum *ad valorem*, under Schedule L, tariff act of March 3, 1883, (Heyl, Tariff Ind., New, par. 383,) and not at 30 per centum *ad valorem*, under the provision for India rubber fabrics, etc., in Schedule N of said tariff act, (Heyl, Tariff Ind., New, par. 453.)

At Law.

Application by the collector of the port of New York, under the provisions of section 15 of the act of congress of June 10, 1890, entitled "An act to simplify the laws in relation to the collection of the revenues," for a review by the United States circuit court of the decision of the board of United States general appraisers at the port of New York, reversing the decision of the collector of said port relating to the classification for duty of certain elastic cords and braids, which were entered at said port by the importers July 28, 1890, and were classified for duty by the collector as "manufactures of silk and India rubber, silk chief value," and duty accordingly assessed thereon at the rate of 50 per centum *ad valorem* under Schedule L of the tariff act of March 3, 1883, (Heyl, Tariff Ind., New, par. 383,) which provision is as follows:

"All goods, wares, and merchandise, not specially enumerated or provided for in this act, made of silk, or of which silk is the component material of chief value, fifty per centum *ad valorem*."

Against this classification the importers duly protested, claiming that the merchandise was dutiable at no more than 30 per centum *ad valorem* under the provision in Schedule N of said tariff act, (Heyl, Tariff Ind., New, par. 453,) which is as follows:

"India rubber fabrics, composed wholly or in part of India rubber, not specially enumerated or provided for in this act, thirty per centum *ad valorem*."

The board of United States general appraisers in their decision sustained the protest of the importers, and reversed the decision of the collector, finding as matters of fact that "the merchandise consisted of fabrics in the piece, composed of silk and India rubber, of which the silk was the component of chief value; that it was invoiced as elastic braids and elastic cords, and belongs to a class of goods commonly and commercially known as 'India rubber fabrics.'" The collector procured the return of the board of United States general appraisers to be filed in the circuit court, pursuant to the above-mentioned statute of June 10, 1890, and thereafter further procured an order of the court referring the matter to one of the said board of general appraisers as an officer of the court to take testimony therein, no testimony having been taken in the proceedings before the board of general appraisers. Upon the reference it was proved in behalf of the collector and the government by competent trade witnesses that in March, 1883, and immediately prior thereto, the

merchandise in question was known in the trade as "silk elastic strands" or "silk braid," "satin oval braids or elastics," and "silk elastic cord," and that these articles were never known at that time in the trade as "India rubber fabrics." It appeared also by the trade testimony that, so far as the term "India-rubber fabrics" had any specific meaning in trade, it applied to a class of dry goods which were commonly non-elastic. It also appeared that the articles involved in this proceeding came in the piece, running about 36 yards in length, wound on cards, and a quarter gross in a box. On the trial it was contended on behalf of the government that the testimony of the trade witnesses examined before the officer of the court had disproved the fact found by the board of general appraisers that these articles were known in the trade as "India-rubber fabrics;" that the term "India-rubber fabrics," as used in the statute, not having any distinct or special trade signification, was not as specific a designation of the merchandise as the description, "all goods, wares, and merchandise not specially enumerated or provided for in this act, made of silk, or of which silk is the component material of chief value," as contained in paragraph 383 of the Silk Schedule L; and that under the decision of the United States supreme court in the case of *Hartranft v. Meyer*, 135 U. S. 237, 10 Sup. Ct. Rep. 751, the enumeration in the silk paragraph was a special enumeration, rather than the term "India-rubber fabrics," as used in paragraph 453; and consequently that the rate of duty provided for in the silk schedule as assessed by the collector was the correct one, and that the decision of the board of general appraisers should therefore be reversed.

Edward Mitchell, U. S. Atty., and *James T. Van Rensselaer*, Asst. U. S. Atty., for collector and the United States.

Ourie, Smith & Mackie, for importers.

LACOMBE, Circuit Judge. These articles seem fairly within the dictionary meaning of the word "fabric," and I do not find sufficient in the testimony of the trade witnesses to show a specific trade meaning for the term "India-rubber fabrics," such as would take these out of such ordinary meaning. The word "fabric" is rather a broad one in common speech. It is certainly as broad, if not broader, than the word "cloth." I feel constrained by the decision in the supreme court in *Hartranft v. Meyer*, 135 U. S. 237, 10 Sup. Ct. Rep. 751, to reverse the decision of the board of general appraisers in this case, in view of the fact that the court in that case had before them a cloth which was composed in part of wool, and still found that it was dutiable under the provision of Schedule L, for the reason that silk was the component material of chief value. It appears that silk is the component of chief value in this case, and I understand that I am but following the rule of the supreme court in holding that the silk clause should control here as against the term "India-rubber fabrics," just as in the other case it controlled the classification of a "cloth" which was "composed in part of wool." The decision of the board of appraisers is reversed, and the articles should be classified under paragraph 383. This decision applies to the articles covered by the collector's appeal.

In re GOURD et al.

(Circuit Court, S. D. New York. January 11, 1892.)

CUSTOMS DUTIES—CLASSIFICATION—"BENEDICTINE CORDIAL."

The *liqueur* cordial known as "Benedictine," prepared in France after a secret formula derived from Benedictine monks of the abbey of Fecamp, in that country, and put up in bottles with labels signed and trade-marked by the proprietors, and accompanied, in the case of each bottle, by a circular claiming for the liquor certain therapeutic and prophylactic qualities; but the fact appearing in evidence that the "Benedictine" was a pleasant after-dinner drink, taken in small *liqueur* glasses, and that the greater part of it was sold to grocers, liquor dealers, and private families, and used as a beverage, *held*, that it was dutiable under Schedule H (paragraph 313, Tariff Ind. New) of the tariff act of March 3, 1883, as a cordial containing spirits, at two dollars per proof gallon, and not as a proprietary preparation under Schedule A (paragraph 99, Tariff Ind. New) of the same act.

(Syllabus by the Court.)

At Law. Application by the importers under the provisions of section 15 of the act of congress entitled "An act to simplify the laws in relation to the collection of the revenue," approved June 10, 1890, for a review by the United States circuit court of the decision of the board of United States general appraisers affirming the decision of the collector at the port of New York in the classification for duty of certain Benedictine entered at said port, September 22, 1890, which was assessed for duty as "cordial (not proof) cases of 12-1 and 24-2 bottles each, 3 gallons to the case," at the rate of two dollars per gallon, under the provisions of Schedule H (Heyl's Tariff Ind. New, par. 313) of the tariff act of March 3, 1883, and at three cents per bottle on the bottles containing the same, under the provisions of paragraph 310 of the same schedule and act. Said paragraph 313 reads as follows:

"Cordials, liquors, arrack, absinthe, kirschwasser, ratafia, and other similar spirituous beverages or bitters, containing spirits, and not specially enumerated or provided for in this act, two dollars per proof gallon."

The importers duly protested, claiming that the merchandise was dutiable at 50 per cent. on the value of the Benedictine, as a proprietary preparation, under Schedule A (Heyl's Tariff Ind., New, par. 99) of said tariff act, and at 30 per cent. on the value of the filled bottles containing the same, under Schedule B of said act, (Heyl's Tariff Ind., New, par. 133.) Said paragraph 99 provides as follows:

"Proprietary preparations, to-wit, all cosmetics, pills, powders, troches or lozenges, sirups, cordials, bitters, anodynes, tonics, plasters, liniments, salves, ointments, pastes, drops, waters, essences, spirits, oils, or preparations or compositions, recommended to the public as proprietary articles, or prepared according to some private formula as remedies or specifics for any disease or diseases or affections whatever, affecting the human or animal body, including all toilet preparations whatever, used as applications to the hair, mouth, teeth, or skin, not specially enumerated or provided for in this act, fifty per centum *ad valorem*."

Testimony was taken before one of the board of the United States general appraisers, as an officer of the court, in behalf of the importers and of the government, by which, and from the sample of the *liqueur* pro-

duced, it appeared that the article was known as "Benedictine," and was manufactured at Fecamp, in France, by a company who claimed to have derived the Latin formula for its production from the Benedictine monks who formerly inhabited the abbey at Fecamp, and that such formula was a secret, and the article was protected by trade-marks in Europe and the United States. A circular accompanying each bottle contained in French a high-sounding advertisement regarding the excellence and attractiveness of the liquor, and laying claim on its behalf to certain therapeutic and prophylactic qualities, and stating that it was, (translated,) "in short, a beneficent and agreeable liquor, of which the daily and moderate use can only facilitate the functions of the organism." It was, however, admitted by the importers' witnesses that the article was known and recognized as a cordial, and that it was a pleasant after-dinner drink, taken in small *liqueur* glasses, and that by far the greater part of it was sold in the trade to grocers, liquor dealers, and private families. In behalf of the government, it was shown by the testimony of an expert chemist that an analysis of the cordial in question gave: Absolute alcohol, by volume, 42.24 per cent.; by weight, 32.82 per cent. A practicing physician also gave evidence that many of the favorite cordials and beverages, such as peppermint cordial, (*creme de menthe*,) anisette, kirschwasser, and absinthe, contained substances which were medicinal; two of these, absinthe and kirschwasser, being specifically enumerated in the paragraph (313) of the tariff relating to "spirituous beverages," under which the collector had classified the Benedictine. It was also proved by the testimony of the manager of the bar in one of the largest and oldest hotels in New York city that the Benedictine was served at his bar in small *liqueur* glasses to customers, as were also the other cordials which had been testified to by the physician above referred to; that they were all used as beverages, and sometimes mixed in punches.

Hartley & Coleman, for importers.

Edward Mitchell, U. S. Atty., and *James T. Van Rensselaer*, Asst. U. S. Atty., for collector.

WHEELER, District Judge. As to this article in the bottle, Benedictine, paragraphs 99 and 313 of the act of 1883 use the same words, to some extent, "cordials" and "bitters." One names cordials as "beverages," and the other names cordials and quite a lot of other things as "proprietary articles," or articles recommended for medicine, or "prepared according to some private formula." It seems to me, in looking this over, that the idea of congress in those two paragraphs was to separate these things into beverages and medicinal preparations; and that whatever was medicine was to come in under one paragraph, and whatever was a beverage was to come in under the other paragraph. On the proofs, I think this is a beverage, not a medicine; and therefore I think it should fall under paragraph 313, and not under paragraph 99. "Spirituous beverages or bitters" of certain classes come under 313, while 99 is for "proprietary articles," including things recommended to the pub-

lie as "proprietary articles, or prepared according to some private formula, as remedies or specifics for any disease or diseases or affections whatever." And that, I think, is the idea,—that whatever is medicinal, recommended as such,—it may be good for something, or it may not,—but if it is of that kind of stuff that is got up to make folks think it will cure them,—that comes under paragraph 99; but if it is for a drink, for use as a beverage and not for cure, then it will come under 313; and I so decide this case. The decision of the board of United States general appraisers is affirmed.

In re STERN.

(Circuit Court, S. D. New York. February 17, 1892.)

1. CUSTOMS DUTIES—COLLECTION OF ANTIQUITIES—ACT OCT. 1, 1890, CONSTRUED.

Two articles, produced at a period prior to the year 1700, do not constitute a collection of antiquities, within the meaning of the provision for such collections contained in paragraph 524 of the tariff act of October 1, 1890, (26 U. S. St. p. 567.)

2. SAME.

Whether or not an article produced at such period is within this provision does not depend upon the fact whether it has belonged to a collection of antiquities, or is imported to add to such a collection, but whether it is a part of such a collection when it is brought in.

(*Syllabus by the Court.*)

At Law. Appeal by Louis Stern for a review of the decision of United States general appraisers.

The above-named Louis Stern imported April 27, 1891, by the Spree, from a foreign country into the port of New York, two antique Gobelin tapestries, made of wool and silk, wool being the component material of chief value. These two tapestries were classified for duty as manufactures made in part of wool under the provision for such manufactures contained in paragraph 392 of the tariff act of October 1, 1890, (26 U. S. St. p. 567,) and duty at the compound rates prescribed thereby for manufactures of that kind was exacted thereon by the collector of that port. Against this classification and this exaction the importer protested, claiming that these tapestries were a collection of antiquities and products of a period prior to the year 1700, were suitable for souvenirs, were purchased by him for the purpose of adding to his collection of antiquities in New York, and were, therefore, entitled to entry free of duty, under the provision for such collection contained in paragraph 524 of the same tariff act, which reads:

"Cabinets of old coins and medals, and other collections of antiquities; but the term 'antiquities,' as used in this act, shall include only such articles as are suitable for souvenirs or cabinet collections, and which shall have been produced at any period prior to the year seventeen hundred."

The board of United States general appraisers, after taking evidence, found that these two tapestries were made of wool and silk, wool being

the component material of chief value; that they were produced at a period prior to the year 1700; that they and two other antique Gobelin tapestries, produced at a like period, were all purchased by the said Louis Stern for the purpose of adding them to a collection of curiosities and bric-a-brac, which he owned at the time in New York; that the two tapestries in suit were placed by the said Stern in his apartment in a foreign country, while temporarily residing there, being thus designedly separated from the other two tapestries, so as to destroy the unity of assemblage; that the two in suit were ordered to be shipped to this country, and were shipped on a different vessel from that in which the other two were imported; that these tapestries were not suitable for souvenirs, or for a cabinet of collections of antiquarian curiosities, within the meaning of paragraph 524, and were not free of duty thereunder; and the board affirmed the decision of the collector as to the aforesaid classification and exaction made by him. From this decision of the board the importer appealed to the United States circuit court for a review of the questions of law and fact involved, and thereafter, upon the return made by the board, this case was tried.

W. Wickham Smith, of Curie, Smith & Mackie, for appellant.

Edward Mitchell, U. S. Atty., and Thomas Greenwood, Asst. U. S. Atty., for appellee.

WALLACE, Circuit Judge. Inasmuch as the question in this case can very readily be reviewed by the circuit court of appeals, I am not disposed to feel trammelled by any of the previous decisions in this circuit, or in any other circuit, in respect to it. I think a "collection" means something more than two articles. I also think that whether an article is dutiable or not under this particular clause does not depend upon the fact whether it has belonged to a collection or is imported to add to a collection, but whether it is a part of a collection when it is brought in. Therefore I hold that these tapestries were dutiable, and I affirm the decision of the board of appraisers.

In re Boyd et al.

(Circuit Court, S. D. New York. February 18, 1892.)

CUSTOMS DUTIES—ACT OF OCTOBER 1, 1890—CLASSIFICATION—COTTON LACE APRONS.

Aprons made of cotton lace held not to be dutiable, as articles of wearing apparel, at 50 per cent. *ad valorem*, under paragraph 849 of the act of October 1, 1890, but dutiable, as "articles made wholly or in part of lace," at 60 per cent. *ad valorem*, under paragraph 873 of said act.

(Syllabus by the Court.)

At Law. Appeal by collector of the port of New York from decision of the board of United States general appraisers under the act of June 10, 1890.

Boyd, Sutton & Co. imported into the port of New York, per steamer Cufic, November 3, 1890, certain merchandise, consisting of cotton lace aprons made up and ready to be worn, upon which the collector of customs at that port levied and assessed a duty of 60 per cent. *ad valorem*, as an "article made wholly or in part of lace," under the provisions of paragraph 373 of Schedule J of the act of October 1, 1890.

"Par. 373. Laces, edgings, embroideries, insertings, neck ruffings, ruchings, trimmings, tuckings, lace window curtains, and other similar tamboured articles, and articles embroidered by hand or machinery, embroidered and hemstitched handkerchiefs, and articles made wholly or in part of lace, ruffings, tuckings, or ruchings, all of the above-named articles, composed of flax, jute, cotton, or other vegetable fiber, or of which these substances, or either of them, or a mixture of any of them, is the component material of chief value, not specially provided for in this act, sixty per centum *ad valorem*: provided, that articles of wearing apparel, and textile fabrics, when embroidered by hand or machinery, and whether specially or otherwise provided for in this act, shall not pay a less rate of duty than that fixed by the respective paragraphs and schedules of this act upon embroideries of which they are respectively composed."

The importers protested, and appealed to the board of United States general appraisers, under the act of June 10, 1890, claiming the same to be dutiable at 50 per cent. *ad valorem*, as cotton wearing apparel, under the provisions of paragraph 349 of Schedule I of said act:

"Par. 349. Clothing ready made, and articles of wearing apparel of every description, handkerchiefs, and neck-ties or neck-wear, composed of cotton or other vegetable fiber, or of which cotton or other vegetable fiber is the component material of chief value, made up or manufactured wholly or in part by the tailor, seamstress, or manufacturer, all of the foregoing not specially provided for in this act, fifty per centum *ad valorem*: provided, that all such clothing ready made and articles of wearing apparel having India-rubber as a component material (not including gloves or elastic articles that are specially provided for in this act) shall be subject to a duty of fifty cents per pound, and in addition thereto fifty per centum *ad valorem*."

The board of United States general appraisers reversed the decision of the collector, and found as matters of fact that the articles were aprons composed of cotton, and made chiefly of lace, and were wearing apparel. They decided that the merchandise was more specifically provided for under the term "wearing apparel" than under the term "articles made of cotton lace," and reversed the decision of the collector. From their decision, appeal was duly taken by the collector to the United States circuit court.

Edward Mitchell, U. S. Atty., and Henry C. Platt, Asst. U. S. Atty., for appellant.

Curie, Smith & Mackie, for defendants.

WALLACE, Circuit Judge. In the case of Boyd, Sutton & Co., I have come to the conclusion that the cotton lace aprons in controversy were properly classified by the collector, and I reach this conclusion almost wholly because of the force which I think must be given to the proviso in section 373. We know very well that the effect of a proviso is to

carve an exception out of the enacting clause, and therefore I must read the enacting clause as including wearing apparel among the articles made wholly or in part of lace. I think the question is a close one, yet I cannot arrive at any other conclusion, giving to the proviso in section 373 what I deem to be its due force and effect. The decision of the board of appraisers should be reversed. So ordered.

UNITED STATES *v.* ADLER *et al.*

(District Court, S. D. Iowa, C. D. March 3, 1892.)

1. PENSIONS—FRAUDULENT PRESENTATION OF CLAIM—INDICTMENT.

An indictment under Rev. St. § 4746, for knowingly procuring the presentation of a false affidavit concerning a claim for pension, is sufficient if it alleges the presentation of an affidavit with a signature known to be false and forged. It need not allege that the pension claim was false.

2. SAME.

The indictment charged that defendants on a certain day, "at the county of Wapello, in the southern district of Iowa, did then and there present to the commissioner of pensions at Washington, in the District of Columbia," etc. At its close it charged: "And that at the time and place aforesaid, that is to say, on * * * at the county of Wapello, state of Iowa, the said * * * did then and there present and cause to be presented to the commissioner of pensions aforesaid," etc. *Held*, construing the parts of the indictment together, that it charged the presentation of the false affidavit at Wapello county, Iowa, and not at Washington, D. C.

At Law. On demurrer to indictment. Overruled.

Lewis Miles, Dist. Atty., for the United States.

J. F. Lacey and *M. J. Williams*, for defendant Adler.

Before *SHIRAS* and *WOOLSON*, District Judges.

WOOLSON, District Judge. The indictment herein charges that on the 8th day of July, A. D. 1890, defendant—

"At the county of Wapello, in the southern district of Iowa, did then and there cause to be presented and present to the commissioner of pensions at Washington, in the District of Columbia, a certain false, forged, and counterfeited affidavit, in writing, which said false, forged, and counterfeited affidavit is in writing, and is in words and figures as follows, [here follows an affidavit, being a declaration for an invalid pension (in the ordinary form) for Daniel Boone, and purporting to be signed by Daniel Boone as affiant;] that said false, forged, and counterfeit affidavit is false, in this: that is to say, that the said false, forged, and counterfeited affidavit was never signed by Daniel Boone, but that in truth and in fact the same was signed by said George S. Boone, and that said George S. Boone signed the name Daniel Boone to said false and forged affidavit, which said false, forged, and counterfeited affidavit has marked thereon the receiving mark of the pension office of the United States, of date July 11, 1890; that at and long prior to the signing of the name Daniel Boone to said false and forged affidavit the said Daniel Boone, whose name was purported to be signed to said false and forged affidavit, had been deceased, and that at the time and place aforesaid, that is to say, on the 8th day of July, A. D. 1890, at the county of Wapello, state of Iowa, the

said George S. Boone and the said S. E. Adler did then and there present and caused to be presented to the commissioner aforesaid, with the intent then and there, on the part of them, the said George S. Boone and the said S. E. Adler, then and there well knowing that the name Daniel Boone, signed to said false and forged affidavit, was forged and false; and that the name Daniel Boone had been signed thereto by the said George S. Boone, contrary to the form of the statutes," etc.

To this indictment defendant Adler demurs, under assignments which may be summarized as follows: (1) The affidavit is charged to have been presented at Washington, D. C., and without the jurisdiction of this court; (2) the acts charged constitute no crime; (3) the pension claim which the affidavit was filed to support is not charged to have been false; (4) it is not averred that the commissioner of pensions has authority to allow the claim; (5) it is not charged that defendant knew the claim to be false.

The indictment appears to have been drawn under section 4746, Rev. St. This section provides that—

"Every person who knowingly, * * * in any wise, procures the * * * presentation of any false or fraudulent affidavit concerning any claim for pension, * * * shall be punished," etc.

Counsel for defendant appear to have considered the indictment as drawn under section 5438. An examination of the two sections will readily make apparent the distinctions between them. By the terms of section 4746 the offense therein designated consists of a very few essentials, and may be summed up in the words, "knowingly procuring the presentation of a false affidavit concerning a claim for pension." The indictment sets out the affidavit which it charges to be false. It charges this affidavit to have been "in support and in declaration of a pension for one Daniel Boone." It also charges said affidavit to be false, and expressly alleges the same was false because of the false and forged signature thereto; that said Adler did "cause to be presented and present" said affidavit, said defendant Adler "then and there well knowing that the name Daniel Boone, signed to said false and forged affidavit, was forged and false;" and the time and place of the commission of the offense are also stated. Thus the ingredients essential to the offense under section 4746 are charged in the indictment, and the 2d, 4th, and 5th assignments of demurrer are not well taken. This section does not require that the pension claim must be false, concerning which the false affidavit is presented, and the 3d assignment is not well taken.

The remaining assignment contests the jurisdiction of this court, because, as claimed, the indictment charges the affidavit to have been presented to the commissioner of pensions at Washington, D. C., and therefore the court at Washington alone has jurisdiction over the crime charged. The phraseology of the indictment is peculiar on the point under consideration. Its language is, "on the 8th day of July, 1890, at the county of Wapello, in the southern district of Iowa, did then and there cause to be presented and present to the commissioner of pensions at Washington, in the District of Columbia," etc. The claim is that

the words, "at Washington, in the District of Columbia," relate to and fix the presentation as named in the indictment. The district attorney contends that these words are merely *descriptio personæ* with reference to the commissioner, and that the plain meaning and manifest construction of the place of presentation, as stated in the indictment, is, "at the county of Wapello, in the southern district of Iowa, did then and there present," etc. In construing the indictment upon this point, all its different parts relating to place of presentation should be considered. We find that towards its close the indictment contains the statement:

"And that at the time and place aforesaid, that is to say, on the 8th day of July, A. D. 1890, at the county of Wapello, state of Iowa, the said * * * S. E. Adler did then and there present and cause to be presented to the commissioner of pensions aforesaid. * * *"

Section 1025, Rev. St., provides that—

"No indictment shall be deemed insufficient by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of defendant."

In *U. S. v. Waddell*, 112 U. S. 76, 5 Sup. Ct. Rep. 35, Justice MILLER states the rule as to the precision with which the indictment must advise defendant of the crime charged, to be that of "reasonable precision." In *U. S. v. Britton*, 107 U. S. 655, 2 Sup. Ct. Rep. 512, Justice WOODS says it is sufficient if the indictment gives defendant clear notice of the charge he is called on to defend. A more extended statement on this point is found in *U. S. v. Fero*, 18 Fed. Rep. 905, where the court announces that—

"Certainty to a common intent is sufficient. Such certainty is attained when enough is alleged to clearly apprise the accused of the identical crime with which he is charged, so that he may prepare to meet the accusation."

Taking the entire indictment into consideration, we think there can be no doubt in the ordinary mind that the place of presentation of the false affidavit is charged to be at Wapello county, Iowa, and that the contention of the district attorney is in harmony with the indictment, considered in all its parts. Certainly this construction cannot tend to the prejudice of the defendant, at least as to the form in which the indictment advises him of the facts which are charged, as constituting the offense which he is called to meet. The evidence which may be offered on the trial as to the fact of presentation to the commissioner "at Wapello county, Iowa," may bring before the court, in another form, the question of presentation. We are now considering the indictment as admitted, by the demurrer, in all its essential and well-pleaded allegations; and, as we find the assignments of the demurrer to be not well taken, it follows that the demurrer, in its entirety, must be overruled; and it is so ordered.

SHIRAS, District Judge, concurs.

UNITED STATES v. ADLER *et al.*

(District Court, S. D. Iowa, C. D. March 5, 1892.)

1. CONSPIRACY—INDICTMENT.

An indictment under Rev. St. U. S. § 5440, must charge three things: (1) A conspiracy; (2) either to commit some offense against the United States, or to defraud the United States; (3) the doing of some act to effect the object of the conspiracy.

2. SAME.

An indictment under that section is sufficient when it charges that defendants conspired together to fraudulently obtain a pension for one of them in the name of a dead soldier, and that they knowingly caused to be made and presented to the commissioner of pensions a false affidavit in support of a claim for such pension,—an act made criminal by Rev. St. U. S. § 4743.

At Law. Prosecution of S. E. Adler and George S. Boone for a conspiracy to commit an offense against the United States, and to defraud the United States. On demurrer to the indictment. Overruled.

Lewis Miles, Dist. Atty., for the United States.

John F. Lacey and *M. J. Williams*, for defendant Adler.

Before SHIRAS and WOOLSON, District Judges.

WOOLSON, District Judge. The indictment herein appears to be drawn under section 5440, Rev. St., and is voluminous. It charges that defendants, "at the county of Wapello, in the southern district of Iowa, on the 8th day of July, 1890, did willfully, unlawfully, corruptly, and feloniously conspire, confederate, and agree together and with each other to defraud the United States out of sums of money, the exact amount of which is to the grand jurors unknown," and that in pursuance of said conspiracy, and to effectuate and carry out the same, on said 8th day of July, 1890, and at said county of Wapello, said defendants, knowing that one Daniel Boone, at said date deceased, had in his life-time been in the volunteer service of the government, in the late civil war, and had been honorably discharged therefrom, (which said discharge said defendants then had in their possession,) said defendants made and caused to be made application to the commissioner of pensions for a pension for said George S. Boone, in the name of said Daniel Boone, and caused to be procured and presented to said commissioner, and in support of said claim for pension, a false and fraudulent affidavit, (which is exhibited with the indictment;) that the signature to said affidavit is false and forged, and was forged thereto by said George S. Boone; and that, at the time said affidavit was so presented to said commissioner, said defendants well knew said signature to be false and forged. Defendant Adler filed a demurrer containing a large number of assignments, which for convenience may be summarized as follows: (1) The indictment charges no crime. No crime is charged as the object of the conspiracy. (2) No act is charged as having been committed in furtherance of the conspiracy.

Under section 5440, three essentials must be charged: (1) A conspiracy; (2) the design of which is either to commit some offense against the United States or to defraud the United States; and (3) the doing of some

act to effect the object of the conspiracy. And, if the indictment sufficiently charges these three matters, it charges a crime, under this section. The demurrer makes no attack on that portion of the indictment charging a conspiracy. Its assignments are restricted to the second and third essentials named above. Does the indictment charge that the design of the conspiracy was to commit any crime against the United States? Upon the argument, counsel did not disagree that a conspiracy to commit any offense which by the statute is made an offense against the United States, is punishable under section 5440, provided the overt act followed. Section 4746, Rev. St., declares:

"Every person who knowingly or willfully, in any wise, procures the making or presentation of any false or fraudulent affidavit concerning any claim for pension, shall be punished," etc.

Turning to the indictment, we find it charged:

"The said S. E. Adler and the said George S. Boone being then and there at the county of Wapello, state of Iowa, aforesaid, on said 8th day of July, A. D. 1890, did corruptly, unlawfully, and feloniously conspire and agree together to make an application to the commissioner of pensions for a pension for him, the said George S. Boone, in the name of him, the said Daniel Boone, and to falsely, fraudulently, and feloniously obtain a pension for him, the said George S. Boone, in the name of him, the said Daniel Boone; and that to effectuate said corrupt, unlawful, and felonious conspiracy, and in pursuance of said conspiracy, did then and there, at the county of Wapello, in the state of Iowa, on the 8th day of July, A. D. 1890, make and cause to be made a false, forged, and fraudulent affidavit, in writing, and did then and there, at the time and place last aforesaid, cause and procure to be transmitted and presented to the commissioner of pensions, as true, the aforesaid false, forged, and counterfeit affidavit, in support of a claim for a pension for him, the said George S. Boone, under act of congress of June 27, A. D. 1890; * * * and that, at the time and place said defendants presented said false affidavit to the commissioner of pensions, said S. E. Adler and said George S. Boone well knew that the signature to said affidavit was false and forged."

Here are distinctly charged all the elements essential to the offense for whose punishment section 4746 provides, as above stated, viz.: (1) Knowingly (2) procuring the presentation of a false affidavit (3) concerning a claim for pension; and thus the indictment charges the second essential under section 5440.

The remaining essential relates to the "act done to effect the object of the conspiracy." The conspiracy, as charged, was "to defraud the United States out of money" by the acts which the indictment alleges; that is, this conspiracy ("to defraud the United States out of sums of money") was to be accomplished, as the same is charged, as follows: "To make an application to the commissioner of pensions for a pension for him, the said George S. Boone, in the name of him, the said Daniel Boone, and to falsely, fraudulently, corruptly, and feloniously obtain a pension for him, the said George S. Boone, in the name of him, the said Daniel Boone,"—the indictment having previously charged that said Daniel Boone was dead, and that said defendants had obtained possession of his honorable discharge. Thus the particular act done to effect the object of the conspiracy may be said to be that the defendants

knowingly presented a false affidavit in support of the claim for a pension. This affidavit, which is expressly charged to be false and fraudulent, and whose false and fraudulent character was at the time well known to the defendants, was by defendants presented at Wapello county, Iowa, on July 8, 1890, to the commissioner of pensions, in support of the pension claim of George S. Boone; and the money to be paid upon said pension by the government was the money of which the defendants conspired to defraud the United States. Or, stating the indictment in another form, defendants (1) conspired (2) to defraud the United States out of money through a fraudulent claim for pension, by them to be made to the commissioner of pensions for his allowance, and (3) knowingly presented to said commissioner a false affidavit in support of and concerning said pension claim.

Under the statutes and authorities with reference to the clearness and detail with which an indictment must charge the offense, (section 1025, Rev. St.; *U. S. v. Waddell*, 112 U. S. 76, 5 Sup. Ct. Rep. 35; *U. S. v. Britton*, 107 U. S. 655, 2 Sup. Ct. Rep. 512,) we find this indictment sufficient. If any complaint could be justly urged, such complaint would rather be that the indictment is so unnecessarily diffuse and minute as that its clearness of statement is thereby impaired. As the indictment charges a statutory offense, and as it also "clearly apprises defendants of the identical crime with which they are charged, so that they may prepare to meet the accusation," (*U. S. v. Fero*, 18 Fed. Rep. 905,) the demurrer must be overruled; and it is so ordered.

SHIRAS, District Judge, concurs.

STILWELL & BIERCE MANUF'G CO. v. BROWN *et al.*

(Circuit Court, S. D. Ohio, W. D. March 12, 1892.)

1. PATENTS FOR INVENTIONS—NOVELTY AND USEFULNESS—FEED-WATER PURIFIERS.

Letters patent No. 274,048, issued March 18, 1883, to Edwin R. Stilwell, covers a live-steam heater or feed-water purifier, connected with the boiler by steam-pipes, and having a series of pans vertically arranged above the filter, and a space or chamber above the pans, and water inlet, connected to the steam-dome by a pipe, so as to discharge the gases from the top of the purifier directly into the boiler. Held, that the gas-discharge pipe was both a novel and useful feature, and such an advance over letters patent No. 66,998, issued July 28, 1887, to the same inventor, as well as over all other prior inventions, as to sustain the validity of the patent.

2. SAME—INFRINGEMENT.

The patent is infringed by a heater which uses the gas-discharge pipe connected to the top of the heater, notwithstanding that at the other end it is connected with the steam-pipe of the feed-pump, instead of with the dome of the boiler.

In Equity. Suit by the Stilwell & Bierce Manufacturing Company against S. N. Brown & Co. for infringement of a patent. Decree for injunction and an accounting.

STATEMENT BY SAGE, DISTRICT JUDGE.

This suit is brought to restrain the infringement of letters patent No. 274,048, granted March 18, 1883, to Edwin R. Stilwell, for feed-water heater and purifier, and by him assigned to the complainant company. The patent relates to what is called a "live-steam purifier." The object of the invention is to heat and purify the feed-water in a vessel separate from the boiler, and so connected to it by pipes that live steam will enter the purifier from the boiler and heat the feed-water, removing its impurities, and passing it into the boilers in a pure state. The patent contains two claims, as follows:

"(1) A live-steam feed-water purifying or heating apparatus, D, connected to the boiler by means of a water-pipe, K, steam-feed pipes, L, and gas-escape pipe, M, substantially as herein set forth.

"(2) A live-steam heater or feed-water purifier, having a series of pans, vertically arranged above the filter, and a space or chamber above the pans, and water inlet, connected to the steam-dome by a pipe, so as to discharge the gases from the top of the purifier directly into the boiler, substantially as herein set forth."

The bill also charges the infringement of letters patent No. 434,324, granted August 12, 1890, to Ralph B. Day, for live-steam purifier, and assigned by him to the complainant; but this charge has been withdrawn, and the bill as to this patent dismissed.

The patentee of No. 274,048 sets forth in the specification that the principal feature of his invention (which consists in connecting by a pipe the top of the heater with the steam-dome of the boiler and with the steam-space of the boiler) can be employed with a combined heater and purifier, or with either a heater or purifier. This connection is by means of what is termed in the claim "gas-escape pipe, M," passing from near the top of the purifier into the steam-dome of the boiler. The object of this pipe is to allow the direct escape of the gases generated in the heater. The shell of the heater, which is circular, is constructed of boiler-iron, adapted to resist the same pressure as the boiler. It is placed vertically at the side of the boiler, and contains, in its upper part, a series of shelves or pans, over which the cold water, admitted at the top through a pipe, passes, in the operation of heating and purification. The water is first admitted into an overflow pan. This pan is placed opposite the upper steam-pipe, L', which is supplied by live steam direct from the boiler, so that a current of steam will strike against the water as it passes from the overflow pan on to the series of shelves or pans immediately below. At or near the bottom of the series of shelves or pans, a branch steam-pipe, L, from the boiler, admits steam, which passes up over the pans as the water passes down. By employing steam-pipes from two to four inches in diameter, the water in the purifier is kept at or near the same temperature as that in the boiler, and the space above the overflow pan forms, in fact, a part of the steam-dome of the boiler. As a consequence, the inventor states, deleterious gases, escaping from the water as it is being freed from impurities, rise into that space, and

pass through the gas-escape pipe into the steam-dome of the boiler without passing through the boiler itself. The inventor sets forth that another very important result is that by thus highly heating the water in the purifier a much more perfect purification is obtained than in purifiers, which do not in fact form a part of the boiler, by employing live-steam pipe connections to heat and purify the feed-water. In the complainant's purifier, the water, having been heated in passing over a series of shelves or pans, where the mineral impurities are mostly removed, is passed down through a passage on one side of the filter chamber into a mud-well. This chamber and the mud-well, with a filtering chamber, constitute the lower portion of the purifier, where the heavier substance settles, and may be blown off from time to time, through a pipe at the bottom of the purifier. The water passes from the mud-well into the filtering chamber, thence up through any suitable filtering medium, and through pipe, K, into the mud-drum located immediately below the boiler; or pipe, K, may connect with the boiler direct.

The defendants' purifier was manufactured by the Hoppes Manufacturing Company of Springfield, Ohio, which manufactures and sells the Hoppes feed-water heater and purifiers under letters patent 318,112, granted May 19, 1885, to John J. Hoppes, of Springfield, Ohio. The defendants' purifier, as made and sent out by the manufacturers, was provided with but one flange for steam connection, and the usual openings for the other pipe connections. The defendants' purifier was first connected up by a single pipe to the boiler-drum. Afterwards two pipes were put in near one end of the purifier, and, these not accomplishing the desired result, as there was no deposit on the rear end of the purifier, the defendants made a second pipe connection from the rear end of the purifier to the steam-pipe, and in this instance the steam-pipe run the feed-pump. The purifier itself is placed longitudinally, instead of vertically. It is a metallic cylinder, constructed of boiler iron, and provided at each end with suitable covers or heads, which are removable. Extending longitudinally through the cylinder is a series of troughs, arranged one above another, and closed at each end by suitable end-pieces, which extend above the side of the trough, each being provided at either side with a projection adapted to rest on supporting rods or ways, which extend longitudinally along each side of the interior of the cylinder, and are secured to supporting brackets, which are in turn secured to the cylinder. The troughs are adapted to slide on these rods or ways, and, when one or both the heads of the cylinder are removed, may be readily withdrawn from or slipped into the cylinder. Immediately above the upper trough is a perforated supply pipe, provided with a perforated bottom, and extending longitudinally within the cylinder and near its top, almost the entire length of the upper trough. This pipe is connected by a suitable inlet pipe to the pump or other source of water supply. Immediately under the lower trough is a removable horizontal plate, the edges of which are turned up so as to form flanges, which rest on the lower curve of the cylinder; said plate thus forming, with

the bottom of the cylinder, a compartment which closes at each end by vertical perforated plates. The removable horizontal plate is extended at its rear end beyond the troughs, and is provided with a head or flange projecting upward beyond the bottom of the lower trough, the flange being considerably shorter than the trough. Its forward end does not extend out to the end of the troughs, but rests on the perforated vertical plate, thus forming a pocket or chamber in the forward part of the bottom of the cylinder. The vertical perforated plate which closes the rear end of the compartment in which the filtering material is placed extends back some distance, so as to form a chamber to the rear of the filtering chamber, and under the plate. From this chamber leads the water-exit pipe, which extends downward and out from some distance above the bottom of the chamber. When this heater is used as a live-steam heater, a connection from the steam reservoir of the boiler is established by a pipe which leads into the top of the cylinder of the heater, the exit pipe above described being connected to the water inlet of the boiler. There is also a blow-off or discharge pipe, which leads from the chamber above described, which is in front of the filtering compartment. The plates above described are made removable for the purpose of removing or replacing the filtering substance, and that they may be easily cleaned. When used as a live-steam heater, the bottom of the casing or cylinder is so placed as to be above the water-line of the boiler. The operation is as follows: The water is pumped or otherwise forced into the supply pipe, and falls into the top trough. When that trough is filled, the water falls over the sides thereof, and, following the outer surface of the bottom, which is curved, flows in a uniform sheet thereunder until it reaches the center, when it drops into the trough below, and so on through each successive trough, until it falls on the horizontal plate, and flows along the same into chamber, C, below. From that chamber it passes through the filtering chamber into the exit chamber, and thence through the exit pipe into the boiler. As the water passes through the troughs, it is brought into direct contact with the steam, and becomes thoroughly heated. As each trough remains filled with water, the sediment or impurities fall to the bottom, and are retained. The water, flowing in a uniform sheet under the bottom of the troughs, and subjected to the direct action of the steam, parts with the lime or other incrustating substances which it contains, and these are deposited on the under side of the troughs. There are some other details of construction to which it is not necessary to refer. It is obvious from this description that the change from the vertical position of the purifier to the longitudinal is not material, and it is conceded that the purifier as it came from the manufacturers, and as it was first set up for use by the defendants, was not an infringement of the complainant's.

Wood & Boyd, for complainant.

Paul A. Staley, for respondents.

SAGE, District Judge, (*after stating the case.*) It is conceded that the only real difference between the complainant's purifier and that patented

to Edwin R. Stilwell, July 23, 1867, (No. 66,998,) is by the addition of the gas-escape pipe, M, as shown in the complainant's purifier. The purifier patented July 23, 1867, had but one pipe, connecting with the boiler, and supplying steam; and one pipe, connecting the water-well of the purifier to the boiler, for supplying the boiler. That purifier was designed to do its work, so it is stated in the specification, by the action of live steam direct from the boiler. Prior to that is shown patent No. 41,374, January 26, 1864, to A. M. Granger, wherein the steam-supply pipe connects with the main steam-pipe, which supplies the engine, or, it is stated, may be connected to receive steam directly from the boiler. On September 18, 1866, patent No. 58,099 was issued to Hasecoeter and Stephens, for a feed-water heater with an inlet and outlet steam-pipe, corresponding to steam-pipes, L' and L," in complainant's purifier. Steam was introduced into that heater from the exhaust pipe of the engine, through the lower steam-pipe, and the upper pipe was provided for its escape at or near the upper end of the vertical sheet-iron cylinder or shell of the heater, which was intended to be also a purifier. Patent No. 169,362, to Tellier, November 2, 1875, for water filter and purifier, shows at the top of the cover a gas-escape pipe, provided with an automatic valve. A common instance of the use of valves or pipes to permit the escape of air or gas in order that the live steam may enter is in steam radiators for heating purposes. In Hayes, Jeffrey & Schlachs' heater and purifier, — patent No. 226,068, March 30, 1880, — the feed-water enters at the top of the dome of a steam boiler, and passes down through filtering material, and thence directly to the boiler. Two tubes, each two inches or more in diameter, and extending from the boiler into the upper part of the dome, constitute the passage-way for live steam to heat the water and assist in the purification. French's purifier, patented December 6, 1881, (No. 250,519,) upon an application filed August 23, 1880, has an outer drum or jacket surrounding the purifier, and supplied with live steam from the boiler above the water-line, the object being to keep the inner drum—which is the purifier—hot. The bottom of this outer drum is connected by a pipe with the boiler, so that the steam which, by condensation in the space between the two drums becomes water, will run into the water by gravity. French subsequently made an improvement on this purifier, for which he obtained patent No. 250,520, applied for September 5, 1881, and granted December 6, 1881. This improvement shows a pump in the dome of the boiler, which, by pipe connection, forces steam from the boiler through the purifier also, and, as an alternative device, a pump for exhausting the steam through the connecting pipe from the purifier to the boiler. For this last pump, it is stated in the specification, an injector or syphon may be substituted. By changing the connection, the operation of the first pump may be reversed; that is to say, it will exhaust the steam through the apparatus, instead of forcing it into the apparatus, either way causing the desired circulation.

The above are the anticipating devices offered on behalf of the defendant. Without entering upon a detailed examination of them, it will be

sufficient to say that, if the earlier patent to Stilwell (No. 66,998, July 23, 1867) does not anticipate the complainant's patent, none of the others do. The radical difference between that and the complainant's purifier is that the complainant's is provided with the gas-escape pipe, M. The supply pipes being of large capacity, the temperature of the water in the purifier and in the boiler is nearly the same. As a consequence, deleterious gases and air are set free. These rise to the top of the purifier, where, but for the escape pipe, M, they would accumulate and prevent the contact of the steam with the cold water as it is introduced into the heater, and retard the condensation of the steam, and thereby the heating of the water to be purified. The escape pipe, M, connecting the purifier with the dome of the boiler, causes a constant discharge of the gas, and also a free and constant circulation, greatly facilitating the heating of the water in the purifier, and increasing the deposit of impurities. This very desirable result had not been so well accomplished by any one of the previous devices. There is a conflict of views and theories, as disclosed by the testimony, with reference to the method by which the result is accomplished. I shall not stop to consider them. I do not care to go into the discussion of the philosophy of the operation of the complainant's device. It is urged on behalf of the defendants that the escape pipe is not necessary for the production of the desired result of circulation, and that the steam-pipes connecting with the boiler will, if made large enough, accomplish the same result by passing the steam in through the under pipe, and the gases out through the upper part of the pipe. That may be true, and that method was and is free to the defendants. If it would effect the purpose, they were and are at liberty to use it. The difficulty with theories is that they can be used to support either side of a case, and that is peculiarly true of this case. But what we have to deal with is facts; and, whatever may be said in support of this or that or the other theory, the record shows that the complainant's device is the result of a long-continued course of experiments, and that in fact it has proven to be more effective than any which preceded it. Even the defendants' record establishes that the escape pipe which was attached to their purifier, and connected it with the steam-pipe, was applied because without it the operation of their purifier was not satisfactory, and that it remedied the defects. It is contended for the defendants that the defect resulted from the faulty construction of the boiler, and was not in the purifier or its connections; but the fact remains that the only thing that was found that would remedy it was the escape pipe, and that did completely remedy it, and did at the same time conclusively prove the practical utility and value of the complainant's device. The testimony for the complainant proves that its purifier does its work successfully, and keeps the boilers in good condition. The evidence satisfactorily establishes not only its utility, but its superiority. That it is novel is, I think, equally clear; and I am satisfied that it is an invention. Perhaps it might also be termed a "discovery," because it was the result of experiments which finally led to the construction that

was patented. That the defendants infringe is, I think, also clear. It is true that the escape pipe of their purifier is connected to the steam-pipe which supplies the steam to run the feed-pump, and is not connected to the dome of the boiler; but the variation is not material, and does not make the defendants any less infringers. The decree will be for the complainant, for an injunction, with costs.

VULCANIZED FIBER CO. v. TAYLOR.

(Circuit Court, D. Delaware. July 27, 1891.)

PATENTS FOR INVENTIONS — INVENTION — SUBSTITUTION OF MATERIALS — CHAIR BACKS, ETC.

Letters patent No. 185,576, issued December 19, 1876, to Reuben H. Plass, for an improvement in seats and backs for chairs, and claiming simply the substitution of vulcanized fiber for veneers, coated paper, metal, etc., are void for want of invention, as the application of an old material to a new use, as a mere substitute, is in no sense an invention or discovery. *Smith v. Vulcanite Co.*, 98 U. S. 436, distinguished.

In Equity. Suit by the Vulcanized Fiber Company against Edward M. Taylor for infringement of a patent. On motion for preliminary injunction. Denied.

Bradford & Vandegrift, for complainants.

Wm. S. Hilles, for defendant.

WALES, District Judge. Letters patent No. 185,576, dated December 19, 1876, for an improvement in seats and backs for chairs, were issued to Reuben H. Plass, and subsequently, by sundry mesne assignments, became the property of the complainant corporation, which now sues the defendant for an infringement. The defense is want of novelty and the consequent unpatentability of the alleged improvement. The specification states the object of the improvement to be—

"A seat or back for chairs, lounges, etc., of greater strength, durability, and rigidity, and less liable to be affected by the atmosphere than those of the ordinary character. Heretofore veneers, coated paper, metal, and other materials have been employed as substitutes for cane and leather in the manufacture of seats and backs for chairs, etc., but to a greater or less degree have failed to meet the requirements of a practical article."

After detailing the objections to other materials, and in the making of chair seats and backs, the specification continues:

"My improved seat, which is liable to none of these objections, consists of vegetable fiber formed into a sheet which is tough, elastic, light in weight, flexible, yet possessing the requisite stiffness, extremely durable, and of any required color."

The specification next describes the process of making the vegetable fiber, and concludes:

"The material thus prepared is termed 'vulcanized fiber,' and may be used in sheets or strips, solid or perforated, and applied to either the bottoms or backs of chairs, lounges, and other furniture. I do not claim vulcanized fiber, as that is not my invention. My invention relates only to the improvement of chair seats, backs, etc., and consists in the application of the material herein named in the manner set forth. I claim, as a new manufacture, a seat or back for chairs, lounges, etc., consisting, in whole or in part, of vulcanized fiber,—that is, vegetable fiber prepared by treating it with chloride of zinc, or its equivalent, consolidating and drying as set forth."

Does this claim, in connection with the specification, present a patentable invention? The provisions of the constitution, art. 1, § 8, subd. 8, is that congress shall have power to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries. The beneficiary must be an inventor, and must have made a discovery. The patent law has always carried out this idea. In the act of July 8, 1870, (16 St. p. 201, § 24,) the patentee was required to be a person who had "invented or discovered any new and useful art, machine, manufacture, or combination of matter, or any new or useful improvement thereof;" and that language is reproduced in section 4886, Rev. St. So it is not enough that a thing shall be new, in the sense that in the shape or form in which it is produced it shall not have been before known, and that it shall be useful; but it must, under the constitution and the statute, amount to an invention or discovery. *Thompson v. Boisselier*, 114 U. S.

5 Sup. Ct. Rep. 1042.

What did Plass claim to have invented or discovered? Not the process of making vulcanized fiber, for that he expressly disclaims, but simply the substitution of that material in the place of wood, iron, or leather. The substitute purposes no new function, nor does it produce, in combination with old materials, a new result. The application of a material that was never before used in making chairs did not require the exercise of the inventive faculty. He may have been the first person to see the adaptability of vulcanized fiber to this purpose, and to reduce it to practice; but that was nothing more than the judicious selection of a material for two of the component parts of a chair,—a choice that could have been made by any mechanic who was skilled in the art of making chairs, and had the material at hand. Before the date of Plass' application for his patent, vulcanized fiber had been employed as a substitute for wood and for leather in the manufacture of various articles in common use, and is now extensively used in the making of traveling trunks. In the course of time, if its cost shall become cheaper, it may still more generally take the place of other materials. But such substitution, if it amounts to nothing more than the change of one substance for another, the new performing the same function as the old, will not constitute invention or discovery, according to the legal meaning of those words as defined by repeated decisions of the supreme court. The substitution may produce in some respects a new and useful article, yet, if it is not the result of a creative invention, it will not be entitled to a patent.

In *Hicks v. Kilsey*, 18 Wall. 670, the patent related to an improved wagon-reach; that is, a pole connecting the fore and hind axles of a wagon, which was curved upward from the hind axle so as to allow the fore wheels to pass under it when the wagon was turned around. The contrivance was not new, but had formerly been made of wood throughout, having the curved part strengthened by iron straps bolted together. The improvement of the plaintiff consisted in leaving out the wood in the curve, and substituting iron, whereby the reach was made less bulky, but in all other respects having the same shape and performing the same office as before. Mr. Justice BRADLEY, in delivering the opinion of the court, said:

"It is certainly difficult to bring the case within any recognized rule of novelty by which the patent can be sustained. The use of one material instead of another in constructing a known machine is, in most cases, so obviously a matter of mere mechanical judgment, and not of invention, that it cannot be called an invention unless some new and useful result—an increase of efficiency or a decided saving in the operation—is clearly attained. Some evidence was given to show that the wagon-reach of the plaintiff is a better reach, requiring less repair, as having greater solidity than the wooden reach. But it is not sufficient to bring the case out of the category of more or less excellence of construction. Axe helves made of hickory may be more durable and more cheap in the end than those made of beech or pine, but the first application of hickory to the purpose would not be therefore patentable."

In *Hotchkiss v. Greenwood*, 11 How. 248, the court decided that the substitution of porcelain for metal in making door-knobs of a particular construction was not patentable, though the new material was better adapted for the purpose, and made a better and cheaper knob; and so, also, the substitution of wood for bone, as the basis of a bottom covered with tin, was held to be not patentable.

In support of Plass' patent, counsel for complainant relied on the case of *Smith v. Vulcanite Co.*, 93 U. S. 486. There the patent was for an improvement in the manufacture of artificial sets of teeth, and consisted in substituting a plate made of vulcanizable compound for the cement or other material formerly used. But there was something more than a substitution of hard rubber for gold, silver, tin, etc. The article made under the patent was a combination of materials fused together, and producing a new result, which differed in its mode of manufacture from any other article of its class, and was vastly better in several respects to all that had been before known. Plass' claim is for a plain substitution, like the iron in the wagon-reach and the porcelain in the door-knob, being the same in principle, and certainly displaying no higher degree of ingenuity. The motion is denied.

LEE v. PILLSBURY *et al.*

(Circuit Court, D. Minnesota. January Term, 1892.)

1. PATENTS FOR INVENTIONS—PROPERTY RIGHT—DAMAGES FOR INFRINGEMENT.

The exclusive use granted by a patent is a property right, and a plaintiff, in an action at law for infringement, may recover actual damages therefor.

2. SAME—CONSTRUCTION OF CLAIM—INOPERATIVE CLAIM.

The words "substantially as specified," in the claim of a patent, are to be given effect; and where the claim, read literally, would be inoperative, their effect is to include in the claim elements or devices contained in the specification that are wanting in the claim.

3. SAME—DAMAGES—GENERAL EVIDENCE.

Where there is no license fee, and nothing to show that the patentee puts his machine upon the market, he must furnish other evidence to enable the jury to come to a proximate amount of the damage which he has sustained by the infringement, and for this purpose general evidence may be resorted to.

4. SAME.

The actual damages suffered by plaintiff may be arrived at by evidence showing the value of that which defendants have used, the utility and advantage of the invention of the plaintiff over the old modes or devices that have been used for working out similar results, and the saving effected thereby.

5. SAME—NOMINAL DAMAGES.

Plaintiff can recover only nominal damages for the infringement of an impracticable machine, or if he fails to show actual advantage to defendants by the use of his machine.

6. SAME—PROOF OF DAMAGES—MERE OPINION.

Plaintiff must prove the actual damages directly, or show such facts as will enable the jury to ascertain the amount; and mere opinion as to the amount of that damage cannot be considered.

7. SAME—MEASURE OF DAMAGES.

The proper measure of damages for infringement of a patent is an indemnity to the plaintiff for the loss sustained by the infringement.

Action at Law for the infringement of letters patent No. 155,874, issued to the plaintiff October 13, 1874, for a seed separator. It was claimed by plaintiff that certain machines of defendants, used in their mills, infringed the third claim of his patent. Plaintiff's machine consists of a revolving sheet-metal cylinder, into which the grain is spouted. The cylinder is perforated with holes large enough to receive such grains as cockle, but too small to receive the wheat grains completely within them. On the outside, a skin belt, as wide as the length of the cylinder, surrounds it, so as to cause the perforations to retain the cockle. A trough is suspended lengthwise within the cylinder, and as the cylinder revolves the cockle is retained in the perforations, carried above the trough, and is dropped upon it, to be discharged out of the machine. This chute or trough has a brush at one edge, which rubs against the inner surface of the cylinder, to brush down the wheat, and leave the cockle in the holes, to be carried up and discharged in the trough. The third claim reads: "The brush, J, in combination with the perforated cylinder, A, and trough, C, substantially as specified." Defendants contended that the claim was inoperative, because it did not include the skin belt; that they did not infringe it; also that it was anticipated by

the prior art exhibited in American patents, 92,073, June 29, 1869, to Mace; 142,170, August 26, 1873, to Miller; 73,803, January 28, 1868, to Hancock & Leaman; 118,094, August 15, 1871, to Balch; in three French patents, two English patents, and a German publication prior to Lee's patent. It was conceded that the perforated cylinder with a jacket around it, as well as cylinders with indentations for the same purpose, and used in connection with a trough, were old; also that brushes for various purposes were shown in some of the prior foreign patents, in connection with such revolving cylinders. The machines of defendants have an indented cylinder, instead of a perforated one with a jacket. Plaintiff admitted that he had never made nor put into operation but a single specimen of his machine, which occurred a few months prior to his application for his patent; nor had there been any manufacture thereof under licenses. On behalf of defendants it was contended that, under such circumstances, plaintiff could, at most, recover only nominal damages; citing 3 Rob. Pat. §§ 1053, 1054, 1062, and note; also pages 352-366. *Rude v. Westcott*, 130 U. S. 152, 9 Sup. Ct. Rep. 463; *Mayor v. Ransom*, 23 How. 487, 7 Brod. Pat. Cas. 88. Plaintiff cited, *contra*, *Suffolk Co. v. Hayden*, 3 Wall. 315; *Packet Co. v. Sickles*, 19 Wall. 617; *Root v. Railway Co.*, 105 U. S. 198.

Defendants requested the following instructions to be given the jury on the subject of damages:

"That the loss sustained by the plaintiff depends upon the use which he makes of his right. That vindictive damages are not allowable, and that plaintiff is not entitled to more damages than the advantages he would have enjoyed but for the infringement complained of. That where an inventor has not exercised his invention in any way, and neither derives nor purposes to derive any advantage from his rights under the patent, he cannot sustain more than nominal damages from the use of his invention by others. That the plaintiff having proved that he never made more than one machine embodying his invention, which was long since destroyed, and having produced no evidence that he had ever manufactured or intended to manufacture his device, no evidence that he had ever granted any license, and no evidence that he made any use of his invention by using it himself, he is, in case of infringement, entitled to only nominal damages. That, the plaintiff having failed to prove an established license fee, or a depreciation of the value of his exclusive use by the infringement, he can recover only nominal damages in case defendants have infringed."

The court refused these instructions, and instructed on that question as contained below. The same question arose on a former trial of the case, and the instructions of the court were then the same in substance as now given.

Davis, Kellogg & Severance and Keith, Evans, Thompson & Fairchild, for plaintiff.

Winkler, Flanders, Smith, Bottum & Vilas, for defendants.

NELSON, District Judge, (*charging jury*.) This suit is brought to recover damages for an alleged infringement of letters patent granted to

the plaintiff on October 13, 1874, for an improvement in seed separators. The patent has three claims. The third only is alleged to be infringed by the defendants. The patent laws are passed to promote the progress and to encourage inventions of the useful arts. Meritorious inventors are protected, and they are granted the exclusive right to manufacture, sell, and use their inventions. If the subject-matter of the patent possesses novelty and utility, the owner is protected against the use of it by any other person without his consent. The exclusive use granted is a property right, as much so as any other property of the patentee. So in this case, if the third claim in the plaintiff's patent is determined by you from the evidence to be valid, and the evidence also proves infringement by the defendants, the former is entitled to recover actual damages for such infringement. The third claim is as follows: "The brush, J, in combination with the perforated cylinder, A, and trough, C, substantially as specified." The language, "substantially as specified," is to be given effect. Such phrase relates to material features of the combination specified, to be ascertained by considering the purpose of the machine, and what are the elements of the combination which are effective in producing the result intended. It refers to the specification for such elements or devices wanting in the claim; and elements of the combination not specifically mentioned in the claim may be included therein,—that is, in the claim,—in the light of other parts of the specifications, which are applicable. So that, as this third claim, reading it in its literalism, would be inoperative, in my opinion the skin belt may be included as a part of it, jacketed about the perforated cylinder in the manner described in the specification, and I instruct you that my construction of this third claim is that the skin belt must be embraced in it, and, when considering the defenses interposed, you must so construe the claim. Now, gentlemen, you are to determine this question as a jury of business men. Some of you, I know, are familiar with mechanism to a certain extent; others are familiar to some extent with the operations of milling. You will give this case careful consideration, weigh all of the testimony that has been introduced here on both sides, and determine whether the plaintiff has sustained a case which entitles him to damages. If, in your judgment, he has done so, and his rights have been invaded under this patent by the defendants, then he is entitled to actual damages, and the question then presented is, what amount is he entitled to recover? You can readily see, where there is no license fee, no price fixed for royalty, and nothing disclosed which would show that the patentee puts upon the market a machine, for the use of which he charges so much, it is a very difficult matter to determine what the amount of damages may be in a certain case; but, like all questions presented to a jury for their determination, the plaintiff is bound and required to give some *data*, and must furnish the jury with evidence, so that they may be enabled to come to a proximate amount of the damage which the patentee has sustained by the infringement. In other words, general evidence may be resorted to for the pur-

pose of furnishing *data* for the jury to come to a conclusion. They are to take into consideration and look at the value and utility and advantages of the patentee's machine over other makes of seed separators, and ascertain that value from all the evidence as to its character, operation, and effect; and you will take into consideration the value, if any, of that which the defendants have used belonging to the plaintiff to aid you in forming a judgment of the actual damage plaintiff has sustained.

It is conceded that, during the time for which plaintiff seeks to recover, the price of wheat was 60 cents a bushel, the value of the cockle seed which is extracted also has been shown, and evidence has been introduced tending to show the saving effected by the use of the plaintiff's invention. This evidence has been offered here, and it is very appropriate and pertinent, as going to show the utility and advantage of the invention of the plaintiff over the old modes or devices that have been used for working out similar results. Upon those *data* you are furnished with something by which you can arrive at perhaps not an accurate, but a proximate conclusion as to what amount of damage has been suffered by the plaintiff, if you think he is entitled to recover damages. I have been presented with many requests by counsel for defendants, some of which I will give you, some I have qualified, and others I have refused. I will read those I propose to give, and those I have qualified, giving the qualifications, and I state to you that these instructions I give are to be received by you as part of the law in the case. That, in case the jury find an infringement, the plaintiff is only entitled to the damages he has sustained, and, if the jury believe his machine to be impracticable, and useless practically, he would only be entitled to nominal damages for the infringement. That it is the duty of the plaintiff to set forth and prove the actual damage to which he claims to be entitled, and that, if he fails to show actual advantage to the defendants by the use of his machine, he would be entitled to only nominal damages in case the defendants infringe. That it is necessary to the showing of actual damage by the plaintiff that he should prove the same directly, or show such facts as will enable the jury to ascertain the same, and that mere opinion as to the amount of that damage cannot be received or considered. That the proper measure for damages for the infringement of a patent is an indemnity to the plaintiff for the loss sustained by the infringement. You will recollect that there is some claim with regard to this trough or this device with a flexible brush attached to it,—that it was unserviceable, and was not put on for any such purpose, as the wheat never rose up to that point. There is evidence on the part of the plaintiff that the wheat did rise up to that point. That is a question for you to determine. You are to determine what the operation of this brush was for that purpose, and what the operation of the machine was, and say do or do not the defendants infringe the combination in the patent issued to Mr. Lee. The plaintiff might have brought his suit in equity, and had it settled without intervention of a jury, but he presents his case in an action at law, as he has a perfect right to do.

If the jury come to the conclusion that the plaintiff's invention was a valid one, and that there has been infringement on the part of the defendants they can award damages to the plaintiff, but not to exceed the amount claimed, \$1,600.

The jury returned a verdict in favor of the plaintiff in the sum of \$1,600.

THE EMPEROR.

UNITED STATES *v.* THE EMPEROR.

(District Court, E. D. New York. February 22, 1892.)

PENALTIES AND FORFEITURES—ILLEGAL DUMPING—ACT OF JUNE 29, 1888—WHO IS "PERSON OFFENDING"—WHEN TUG NOT "USED OR EMPLOYED" IN VIOLATING ACT.
 The act of June 29, 1888, (25 St. at Large, p. 209,) provides that mud shall not be dumped within certain limits around the port of New York; that every person, firm, or corporation engaged in removing mud shall be responsible for its deposit outside of such limits; that for every violation of the law the person offending shall be deemed guilty of an offense against the act; and that any boat used or employed in violating the provisions of the act shall be liable to a penalty. On suit brought to recover such penalty against a tug which, with scows, was on her way to the dumping ground in the usual course, and well out to sea, but still within the prohibited limits, when the scow-men, who were in no way connected with the tug, with their own volition, and without the knowledge of those on the tug, and contrary to her captain's express orders, dumped the scows, *held*, that neither was the master of the tug a "person offending," within the meaning of the act, nor was the tug "used or employed" in the illegal act of the scow-men.

In Admiralty. Suit to recover a penalty for illegal dumping. Libel dismissed.

Jesse Johnson, U. S. Dist. Atty., for libelant.

Carpenter & Mosher, for claimants.

BROWN, District Judge. The above libel was filed under the act of June 29, 1888, c. 496, (25 St. at Large, p. 209,) to recover against the tug *Emperor* the penalties prescribed by that act for dumping within the prohibited limits certain mud excavated in the North river. The mud had been loaded upon two scows Nos. 19 and 34, belonging to the Morris & Cumming Dredging Company, which after being loaded were made fast to the stake-boat below Liberty island. The steam-tug *Emperor*, not belonging to that company, was employed to tow the two scows out to sea to the prescribed dumping ground. Between 12 and 1 o'clock on the night of July 25th, she took the two scow-men belonging to the scows from Jersey City, landed them aboard the scows, and then proceeded down the bay with the scows in tow on a long hawser, having previously obtained the permit for dumping as required by the act.

The evidence shows that when the tug took the scow-men aboard at Jersey City, one of them said to the captain of the tug that he would give a whistle or show a light when the scows were dumped. The captain re-

plied that he would have no such thing done; that he had been in trouble before; and that the scows should not be dumped until he gave the usual signals of three or four whistles after he arrived at the dumping ground. While the tug was on the way to the dumping ground in the usual course and well out to sea, but before arriving at the dumping ground, and while within the prohibited limits, the men on the scows, of their own volition and without the knowledge of those in charge of the tug, and without any signal from the tug, and contrary to the captain's previous orders, dumped the loads of mud through the bottom of the scows by drawing the fastenings of the bottom and allowing the mud to fall through in the easy way provided for that purpose. The scow-men were in no way connected with the tug. I must therefore treat the case as one in which the unlawful dumping of the scows was in no respect by the act or volition of the owners of the tug, or of any person on board of her. The question submitted is whether the tug is nevertheless made liable for a violation of the act.

The fourth section of the act of 1888 provides as follows:

"All mud," etc., "excavated from any slip," etc., "and placed on any boat, scow or vessel for the purpose of being taken or towed upon the waters of the harbor of New York to a place of deposit, shall be deposited * * * within such limits as shall be defined and specified, * * * and not otherwise.

"Every person, firm or corporation being the owner of any slip, basin or shoal from which such mud," etc., "shall be taken, dredged, or excavated, and every person, firm or corporation in any manner engaged in the work of dredging or excavating any such slip, basin or shoal, or of removing such mud," etc., "therefrom, shall severally be *responsible* for the deposit and discharge of such mud," etc., "within such limits so defined and prescribed; * * * and for every violation of the provisions of this section the *person offending* shall be guilty of an offense against this act, and shall be punished by a fine equal to the sum of \$5 for every cubic yard of mud," etc., "not deposited or discharged as required by this section.

"Any boat or vessel *used or employed in violating any provision* of this act shall be liable to the pecuniary penalties imposed thereby, and may be proceeded against summarily by way of libel in any district court of the United States, having jurisdiction thereof."

The last sentence quoted, though forming a part of section 1, is equally applicable to all sections of the act. The previous parts of section 4 are confined exclusively to violations of section 4. The controverted question is whether the Emperor in this case was "used or employed in violating" the act. It is urged that it should be so regarded, because by the previous language of section 4 it is provided that every person, firm or corporation engaged in removing such mud shall be "*responsible* for its discharge" within the prescribed limits. It is not easy to determine what is the intent of this section as respects the use of the word "*responsible*;" for the succeeding clause of the same sentence is the only clause that enacts any penalty or consequence of violation; and that clause confines the penalty to the "*person offending*," and prescribes no punishment or fine except upon the person offending. I think the last clause is a qualification and limitation upon the "*responsibility*" enacted by the previous clause, in so far at least as to prevent any conviction of

an offense, or any punishment by fine, of any person who is not in some way connected by proof with the performance of the illegal act.

The Emperor in the present case was proceeding in good faith to the prescribed dumping ground. She could not reach it except by first going across the prohibited limits. There was nothing unlawful in her act or intent. Everything that she did was done in the performance of her duty to take the scows to the proper place. She was "used and employed" for that purpose, and for no other purpose. The dumping before reaching the proper place was by no act, omission, or privity of the tug; but by the willful and criminal act of the men on the scows, wholly independent of the tug, and against the express orders of the captain. It seems to me very clear that neither the captain, nor any person on board of the tug, was the "person offending" under the previous sentence of section 4; and that the tug was not "used or employed" in the illegal act of the scow-men. To hold her liable would be to punish the innocent for the guilty; a result never to be reached upon any ambiguous construction of the statute, but only upon its clear and unmistakable meaning. To hold the tug, I must construe the expression used as equivalent to saying that the tug shall be liable for any violation of the act by the scow, or by those on board of the scow, while in tow of the tug; which is certainly a very different and broader expression than that used by the statute. Had this libel been brought against the scows themselves, instead of the tug, it might have been urged with much more force that the scows were "used or employed" in violating the act; because the mud was loaded upon the scows, and because it was directly by means of unfastening the bottom of the scows that the mud was dropped into the sea within the prohibited limits. But that was not the purpose for which the tug was used or employed, nor was it by any act or omission of hers. She was used and employed to take the scows to the proper dumping ground and was faithfully performing that duty and could not go in any other way. The illegal act was done independently of her, and outside of the scope of her "use and employment;" and I must, therefore, dismiss the libel.

v.49f.no.9—48

THE SAMUEL MARSHALL.

PITTMANS *et al.* v. THE SAMUEL MARSHALL.

(District Court, E. D. Michigan. February 5, 1892.)

1. MARITIME LIENS—SUPPLIES—RESIDENT AND NON-RESIDENT OWNERS.

Under the general maritime law, no lien exists for supplies furnished at the port of a state of which the ship-owner is a resident, and *quære*, whether the rule is not the same where part of the owners reside in the state in which is situated such port, and others reside in foreign states, the facts being known to the party furnishing the vessel.

2. SAME—CHARTERED VESSEL—RESIDENT CHARTERER—PRESUMPTION.

If a vessel, at the time supplies are furnished her, is in the use, possession, and control of others than the owner, which fact is or ought to have been known to a party furnishing supplies, and the person so having the possession of the vessel resides at the port where the supplies are furnished, there exists the same presumption that credit was not given to the vessel as in cases where the owner resides at such port.

3. SAME—STATUTORY LIENS—HOW ENFORCED IN ADMIRALTY.

It is because the contract for supplies is maritime that an admiralty court has and exercises its jurisdiction in enforcing the lien given by the law of a state for its security, and admiralty courts construe and enforce such lien in harmony with their general principles, and under the same limitations and qualifications as pertain to maritime liens in general.

4. SAME—STATUTORY LIENS—NECESSARY PROOF.

A material-man, seeking to enforce against a vessel a lien for supplies given by the statute of a state, must establish by proof, as in the case of one furnishing supplies to a foreign vessel, that credit was given to the ship.

5. SAME—CHARTERED VESSEL—ENFORCEMENT OF LIEN—EQUITY.

When the circumstances denote that the owner of a vessel is not the party for whose interests the supplies are furnished, and would not be at fault if they were not paid for, it would be inequitable that a merchant should have the right to give credit to another, and assert a lien therefor, contrary to the stipulations and interests of the owner.

6. SAME—STATEMENT OF CASE.

The owner of a steam-ship having chartered her to a company which was a resident of the same town as libellant, the charter expressly stipulating against the creation of any liens on the vessel, and the circumstances indicating that libellant supplied coal to the vessel knowing that she was under charter, and on the credit of the charterers, who subsequently failed, *held*, that no lien attached to the vessel, either under the general maritime law or the statute law of Michigan.

7. PRACTICE—AMENDING LIBEL.

Held, that the libel in this case, which claimed a lien under the general maritime law, might be amended so as to assert a lien under the law of the state.

In Admiralty. Suit to recover the price of coal furnished the steam-ship Samuel Marshall.

Bowen, Douglass & Whiting, for libelants.

Shaw & Wright, for claimants.

Before SEVERENS, District Judge.

SEVERENS, District Judge. The libel was filed in this case for the purpose of enforcing a lien upon the steamer, the respondent in the case, for coal supplied by Pittmans & Dean for the steamer's use, in September and on the 1st day of October, 1890. The libelants were coal mer-

chants at Detroit, having a dock by the river, at which vessels navigating the stream and the waters it connects called for fuel supplies as occasion required. Their principal office was not located near the dock, but further up, in a more central part of the business portion of the city. They employed a foreman, who had an office at the dock, whose duty it was to attend to the delivery of coal to steam-vessels, when they would call for it, and to receive payment therefor, if the sale was for cash, or otherwise to keep a memorandum of the amount, and of the name of the vessel supplied; to take a certificate from the master of such amount received by him; and to also obtain from him the name and address of the party to whom the bills should be sent for payment,—all of which he reported to the main office. When the coal was furnished on credit, it was the custom of the firm to render by letter addressed to the proper party, as indicated by the foreman's report, monthly statements, showing the amount delivered and charged to the vessel, together with the captain's certificates confirmatory thereof. In a few days thereafter it was customary to send a collector to receive payment of bills from parties having a place of business at Detroit. This method of doing business was habitual with the libelants. No inquiry was made at the time of furnishing coal as to owners' credit or place of residence, or whether the vessel was being run by owners or charterers, or on whose account, except as above stated. The coal was charged upon their books against the vessel, apparently upon the assumption that, if the parties to whom bills were sent did not pay, they could assert a lien on the vessel. At the time when the coal in question was supplied, and during the whole season of navigation that year, the Samuel Marshall was owned by several parties, one of whom resided at Detroit, and the others at Buffalo and other places in the state of New York. The vessel was enrolled at Buffalo, and that was duly indicated as the port to which it belonged, by the imprint on the stern of the vessel, pursuant to the requirements of the statute. But during that whole season the vessel was under charter-party to J. E. Potts, for the use of the J. E. Potts Salt & Lumber Company, a Detroit firm, doing a very extensive business, involving the transportation of lumber, ore, coal, grain, etc., from Chicago and Duluth to Buffalo and return. Among other vessels chartered for this purpose was the Marshall. The charter was of the bare ship, and by it the charterers undertook to pay the entire charges of the vessel, and the running thereof, including the wages of the captain and crew, who were also to be employed by the charterers, except that the owners reserved the right to participate in naming the captain, a stipulation usual in such contracts, and adopted for the better protection of the interests of the owners in the vessel; and there was an express stipulation against the creation of any liens against the vessel. Coal had been furnished to the Marshall throughout the entire season of 1890 by the libelants in accordance with the usual course of their business as above stated, and the monthly supplies were all paid for by the J. E. Potts Salt & Lumber Company, down to the month of September. In the early part of the season the master of the Marshall,

on taking in some coal, informed the foreman of the libelants, at the dock, of the residence of the owners, and of her being under charter to the Potts Salt & Lumber Company, and gave the name and address of that concern as the party to whom bills should be presented for payment. The office of that company was, and had been for some years, within the distance of a block from that of the libelants. The statements were made out and sent to that company monthly, in the way already mentioned, and were paid by them to the collector. On calling for the amount of the July bills the company asked for time, and, after conferring with his principals, the collector took the company's acceptance for 60 days, and receipted the bills as so paid, and the acceptance was duly paid. Bills for the coal included in the present claim, amounting to \$1,466, were sent in the same way to the Salt & Lumber Company, and on the ——— day of November the collector called for payment. The bills included also some coal supplied to another steamer employed by that company. Time being again asked by the company, the collector received their acceptance, due in 90 days, and receipted the bills as before. He did not, on this occasion, refer to his principals about it, but he took the acceptances to their place of business, and they were deposited in their cash-box. One of them was afterwards deposited in bank for collection. The Salt & Lumber Company failed on November 24, 1890. It had doubtless been insolvent for a time further back than the 1st of September, but this was not known to the libelants, who, so far as appears, had no reason to distrust their credit. The libel counts upon the general maritime law as the foundation of the lien asserted, no reference being made to the statute of the state, which gives a lien for supplies to such vessels, whether furnished to them in the foreign or home port.

It is necessary, therefore, to determine whether, in the circumstances stated, the libelants have, by the principles of the general maritime law, a lien upon the vessel for the coal thus furnished, and I am of opinion they have not. It is clearly proven that the vessel was at the time not in the employment of the owners, but was manned, controlled, and navigated by the Salt & Lumber Company, under a charter giving them entire possession of the boat, and imposing upon them the obligation to pay all charges incurred by the steamer while in their service. The charterers resided and were doing business at the port of supply. It cannot be denied that if the owners resided at Buffalo where the vessel was enrolled, or if the libelants had good reason to believe so, after due inquiry, and they delivered the coal upon the credit of the steamer, a lien would inure to them for the price; and it is equally true that if the owners resided at Detroit, and the libelants knew, or ought to have known, that this was so, no lien, under the general maritime law, would have arisen, the rule being that, in the absence of a specific agreement, no lien exists for supplies furnished at the ports of a state whereof the owner is resident,—it being presumed that they were furnished upon the credit of the owner. *The General Smith*, 4 Wheat. 443; *The Lottawanna*, 21 Wall. 579. It has been held in some cases that where part

of the owners reside in the state of the port where the supplies are furnished, and the others in a foreign state, and the facts are known by the party furnishing the vessel, the same rule would apply as last stated. *The Rapid Transit*, 11 Fed. Rep. 322, 328-330; *Stephenson v. The Francis*, 21 Fed. Rep. 715-717; and in *The Indiana*, Crabbe, 479. I do not decide what the rule is in such cases here, choosing to place my decision on other grounds.

For the purpose of applying the general rules just referred to, regard is had, not so much to the question as to who is the owner of the legal title, as to that of possession and use of the vessel at the time when the supplies are furnished. If the vessel is then in the use, possession, and control of others than the owner, a presumption arises that such others are liable to pay the charges incident to the employment; and if the party furnishing supplies knew, or should have known, the facts in regard to the use and control of the vessel, there is the same reason for the presumption against credit being given to the vessel, when the charterer or other person standing in a similar relation to the vessel resides at the port of supply, as in cases when the owner operating the vessel on his own account resides at such port, "and when there is the same reason there should be the same law." And this doctrine is supported by decisions in well-considered cases. *The Golden Gate*, 1 Newb. Adm. 308, 5 Amer. Law Reg. 142; *Beinecke v. The Secret*, 3 Fed. Rep. 665; *The Norman*, 6 Fed. Rep. 406; *The Secret*, 15 Fed. Rep. 480; *Stephenson v. The Francis*, 21 Fed. Rep. 715.

In regard to the question of fact involved as to whether the libelants knew that the Salt & Lumber Company were using and controlling the Marshall under a charter-party or some similar agreement, my impressions from the proof are strong that they must have known it, or from mere carelessness and indifference neglected to inform themselves of facts which were patent to inquiry. It is claimed that the notice of the fact that the vessel was under charter, given by the master to the foreman on the dock, was actual notice. On the other hand, the libelants insist that the foreman was not of such grade of authority as to constitute him their agent for the purpose of receiving such notice. But I do not decide as to this, my opinion being that they knew, or that it should be imputed to them that they knew, the fact which the visible signs plainly indicated. The libelants cannot, therefore, succeed upon the ground of a lien under the general maritime law.

But it is suggested that the libel be amended so as to assert a lien under the law of the state. This is opposed by the claimants for the reason, as alleged, that it makes a wholly different case. In my opinion, the case is one where, within the rules and practice of the court in regard to amendments, it may properly be allowed, if that, indeed, is necessary, as seems to be supposed. *Dupont v. Vance*, 19 How. 162; *The Mary Ann*, 8 Wheat. 380; *Warren v. Moody*, 9 Fed. Rep. 673; *The Morning Star*, 14 Fed. Rep. 866. The change is only with regard to the source of the lien, in point of law, asserted by the libelants. The

proof would not be different, and there can be no surprise. If the proctor for the libelants considers such an amendment necessary, the libel may be amended. This will enable the court to decide the case upon its merits, according to the law deemed applicable thereto.

It was claimed at the hearing that the state statute (2 How. Ann. St. § 8286) was of general application, and gave a lien in all cases when supplies, etc., were furnished, and the course of business of the libelants with its customers seems to have been pursued with such an understanding of the law. They supposed they could finally resort to the vessel, if the parties to whom they looked for payment should fail to pay. But, in my opinion, this position is untenable. The statute must be construed with reference to the general principles relating to the subject. It declares that vessels shall be subject to a lien for all debts contracted by the owner, part owner, master, clerk, agent, or steward on account of supplies furnished for the use of the vessel. By the ordinary rule of construction, the words following "the owner" should be taken to be such persons as stand in relation to the owner, and presumably having his authority to incur the debt contracted, and not the subordinates and agents of others. It has been generally understood that the principal purpose of the local statutes of the states of a like character was to extend to those supplying domestic ships the same privilege which is accorded to those supplying foreign ships. The statute in terms extends to all cases alike, whether the vessel is foreign, in which case the lien exists by the admiralty law, or whether the vessel is domestic. Was it intended by the statute to supplant the admiralty law, and supply a system of its own? That cannot be supposed. Such statutes have never been thought to have any such effect. The jurisdiction of the admiralty courts has been extended over the liens created by those statutes in favor of those furnishing supplies at the home port, because the contracts upon which they were furnished were maritime in their nature, and in exercising such jurisdiction the courts have applied the general principle applicable to maritime cases. They take cognizance of those statutes only to the extent of recognizing the creation of a lien thereby. They ignore altogether the method prescribed for its enforcement. They adopt their own procedure, and enforce the lien, together with other rights brought under judgment in the case, according to the rules and doctrines peculiar to their own jurisdiction. They do not by their decrees administer the lien according to the statute. No reference is made to it in the award or distribution or other disposition by judgment. As was said by Mr. Justice MATTHEWS in a leading case in this circuit, (*The Guiding Star*, 18 Fed. Rep. 263:) "In enforcing the statutory lien in admiralty cases, the admiralty courts do not adopt the statute itself, or the construction placed upon it by the courts of common law or equity, where they apply it." It is because the contract for supplies is maritime that the court has and exercises its jurisdiction in enforcing the lien given for its security. *The Lottawanna*, 21 Wall. 558, 580. The court does

not have jurisdiction of it as an independent thing; that is to say, disassociated from the contract. The lien is an incident to the debt, and is inseparably connected with it, reflecting its qualities.

This being so, will the admiralty courts treat the lien thus recognized as superior and privileged over others? Should it have intrinsic authority, without regard to the facts upon which others are allowed to prevail? Will the lien be given effect contrary to the reason and practice of the court, as exhibited in the rules and doctrines its long experience has evolved? Or does the court adopt the lien, clothing it with the same attributes, and holding it under the same limitations, as are applied to other maritime liens? It would seem that it might lead to incongruous results and serious conflict and difficulty, if the latter be not regarded as the sound rule. It is only in thus dealing with such liens that the priorities given by the maritime law in the admiralty courts can be upheld. It was declared by HOFFMAN, J., in his opinion in *The Columbus*, 5 Sawy. 487, that there was no reason for thinking that such statutes were intended to do more than to give domestic material-men the same protection which the maritime law afforded to foreign material-men, or for thinking that it was intended to withdraw demands of the former from the operation of the general rules and principles by which maritime liens are governed. This view finds support in the opinion of Mr. Justice CURTIS in *The Young Mechanic*, 2 Curt. 404; and this leads to pretty nearly the same result as that which I deduce from the general principle and course of decision in the admiralty courts in enforcing maritime liens, namely, that those courts will for themselves construe the statutory lien, and enforce it in harmony with their general principles, and under like limitations and qualifications as pertain to maritime liens in general. But there are other cases, one or more, in which different views would seem to have been adopted, and a more enlarged effect given to the local statute. I have not overlooked the reasons given for the different result, but my own views remain as stated, after full consideration of the subject.

If the propositions already advanced are correct, it would follow that the libelants must establish by proof that, as in the case of one furnishing such supplies to a foreign vessel, they gave credit to the ship. *The Lottawanna*, 21 Wall. 581. My opinion is that in point of fact they did not, and that the credit was given to the Potts Salt & Lumber Company, with the supposition that, by force of the transaction, the libelants would have a lien upon the vessel. This is quite a different thing from giving credit to the vessel. That the goods were charged on their books to the steamer is of little significance. This was their habitual method of business in their office. A similar feature existed, and was commented upon in *Beinecke v. The Secret*, 3 Fed. Rep. 665, 667, and in *The Mary Morgan*, 28 Fed. Rep. 196, 201. The existence of the lien must therefore be denied.

But I should be brought to the same result if I were to adopt a broader construction of the statute, and interpret and give effect to it upon the

principles of courts of law and equity. It is a condition to the acquisition of a valid lien upon the property of another that it should be acquired in good faith and with due respect to his rights. It has already been pointed out that by a familiar rule of construction, of general application, the subordinates mentioned in the statute as the persons upon whose contracts a lien will attach upon the ship are those standing in the relation of agents to the owner. Under ordinary circumstances, the subordinates, being employed about and upon the ship, might fairly be presumed to have the owner's authority, and the party supplying would have his lien, because he has trusted to appearances for which the owner was responsible. But the merchant is presumed to know that it is a common thing for a vessel to be hired, and to be managed and used, in the employment of others, under charter-party with the owner or otherwise, under circumstances where the obligation for supplies does not rest upon the owner. And if the facts presented to him are sufficient to induce a reasonably prudent man, having a just regard to the rights and interests of others, to suppose it probable that the owner is not employing the vessel, but that it is in the service of another, under charter or other agreement involving the payment of charges and expenses by the charterer or lessee, he is bound in good faith to inquire. When the circumstances denote that the owner of the vessel is not the party for whose interest the supplies are furnished, and would not be at fault if they were not paid for, it would be inequitable that a merchant should have the right to give credit to another, and assert a lien therefor, contrary to the stipulations and interests of the owner. And, in my opinion, the same rule requiring the exercise of good faith is applicable in giving due construction and effect to the clause found at the end of section 4286, Rev. St. U. S.,—a section forming part of the provisions of the law limiting the liability of shipowners, if, indeed, that clause has a wider scope than the immediate subject-matter with which the context deals. The merchant is under no obligation to furnish the supplies. He may do so or not, and he may sell for cash or on credit, as he thinks advantageous to himself. If he does furnish and on credit, in the face of an agreement between others of which he has notice, devolving the obligation of payment upon another than the owner, and denying to the charterer the right to hypothecate the ship, he ought not to be allowed to assert a lien upon the owner's property. And, in my opinion, the facts were here sufficient to apprise the libelants that the vessel was not in the service of the owner, or at least to have put them upon inquiry as to how the fact was. They had notice of its place of enrollment by the name thereof painted upon the stern. *The Martha Washington*, 1 Cliff. 463; *The Superior*, 1 Newb. Adm. 181. They knew that the supplies were furnished in the expectation of payment from the Salt & Lumber Company of Detroit. They knew that credit had been given by themselves to that company, and extended, for supplies previously furnished. All the circumstances indicated that the Salt & Lumber Company were acting in their own interest, and not as agents. Their giving their own paper on extended time was strong evidence of this. There is a moral probability arising from the fact that they knew

the Salt & Lumber Company had, for a considerable time, been engaged in an extensive business involving the employment of vessels. Express notice of want of authority to make such a contract as will hypothecate the vessel is not necessary to defeat an attempt to accomplish that end. The language of Mr. Justice CLIFFORD, in delivering the opinion of the court in *The Lulu*, 10 Wall. 192, 201, is applicable here, where he says, in discussing the obligation of good faith which the merchant or lenders must observe:

"It is well-settled law that a party to a transaction, where his rights are liable to be injuriously affected by notice, cannot willfully shut his eyes to the means of knowledge which he knows are at hand, and thereby escape the consequences which would flow from the notice if it had actually been received; or, in other words, the general rule is that knowledge of such facts and circumstances as are sufficient to put a party upon inquiry, and to show that, if he had exercised due diligence, he would have ascertained the truth of the case, is equivalent to actual notice of the matter in respect to which the inquiry ought to have been made."

As may be observed, in reaching the conclusion at which I have arrived, I have waived (as I have several other questions which have presented themselves along the way) all consideration of the grounds of defense of payment, or suspension of the right of action, by the giving and receiving of time acceptances of the Potts Salt & Lumber Company for the supplies in question, which had not matured when the libel was filed. For the reasons given I am of opinion that the libelants must fail upon the principal issues in the case, and that the libel should be dismissed.

THE CLYDE.

THE NASHOTAH.

THE W. J. ROEBUCK.

ILLINOIS STONE CO. v. THE CLYDE, THE NASHOTAH, and THE W. J. ROEBUCK.¹

(District Court, N. D. Illinois. October 19, 1891.)

COLLISION—BETWEEN TOWS.

A steamer, which had just taken on a cargo at a dock in the Chicago river, swung out into the stream for the purpose of starting on her voyage, whereupon two tugs, each towing a canal-boat, approached from opposite directions. As soon as she perceived the tugs, the steamer stopped, and swung her bow as far as she could towards the shore, there being another vessel between her and the shore. The two tugs passed each other between the steamer and the opposite shore, and their two bows collided. *Held*, that the steamer was not in fault, but that both tugs were to blame for attempting to cross at that point, and that each tug should bear half the loss.

In Admiralty. Libel by the Illinois Stone Company against the propeller Clyde, the canal propeller Nashotah, and the canal-boat W. J. Roebuck, for damages caused by a collision.

Charles E. Kremer, for libellant.

John C. Richberg, for respondents.

BLODGETT, District Judge. The libellant in this case seeks to recover damages sustained by him, as owner of the canal-boat Hogan, by reason of a collision which occurred between the Hogan and the canal-boat Roebuck, on the waters of the Chicago river, on the evening of the 31st of July, 1889, whereby the Hogan was sunk. The proof in the case shows that just before the collision the steam-propeller Clyde, having taken on a cargo of over 60,000 bushels of wheat at what is known as "Keith's Elevator," a short distance above the Halsted-Street bridge, and on the east side of the south branch of the Chicago river, cast off her forward lines, and started her wheel for the purpose of swinging out into the river in order to start on her voyage; that the schooner Helen Williams lay directly below the berth at the dock occupied by the Clyde. The Clyde's bow swung out into the stream past the Williams, and probably some distance into the river, when the whistle of the canal-tug Nashotah was sounded for the draw of the Halsted-Street bridge, the Nashotah coming up the river with the Roebuck in tow, both lumber laden. The master of the Clyde at once took measures to swing the bow of his boat back towards the dock, but was unable to swing her entirely back against the dock, by reason of her having lapped partly against the

¹Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

Williams. At this time, the canal-tug Loomis was coming down the river with two canal-boats in tow, one of which was the Hogan, and had sounded a single blast of her whistle for the Nashotah, to indicate that she (the Loomis) wished to take her tow through the west draw of Halsted-Street bridge, instead of the east draw, which was the starboard draw, and the one she would naturally take, and the Nashotah had responded in assent to this proposition, so that the arrangement had been made between the Nashotah and the Loomis that the Nashotah, coming up stream, should pass through the east draw, and the Loomis, going down, should pass with her tow through the west draw of the bridge. The Clyde being swung out into the stream somewhat, made it necessary that both the Nashotah and the Roebuck, her tow, should swing out into the stream a little for the purpose of passing the Clyde's bow, and in doing so, the Nashotah passed safely around the bow of the Clyde, and resumed her course nearly parallel with the Clyde up the river; the Roebuck, following upon a line of about 150 feet in length, also swung out into the river around the Clyde's bow, and, just as she had passed the Clyde's bow, collided with the Hogan, which was coming down the river in tow of the Loomis, breaking in her tow, and causing her to sink.

I do not see how any blame can be attached to the Clyde for this accident. She had only done what she had a right to do,—swung out into the stream for the purpose of starting on her voyage. As soon as she was apprised of the approach of the Nashotah and her tow, she not only stopped, but swung her bow back as far as she could towards the shore, against the Williams, and remained there, giving room for the Nashotah and her tow to pass up the river. I do not think that the Clyde was bound to retreat, so to speak, back into her berth, from which she had started. She had the same right to occupy the water of the river that the Nashotah and her tow and the Loomis and her tow had. Each of them must exercise their respective rights so as, if possible, not to interfere with the other. I think the fault in this case, by which the Hogan was sunk, is attributable solely to the attempt on the part of the Loomis and the Nashotah to simultaneously take their tows past the bow of the Clyde, under the circumstances. The Nashotah could have more easily stopped, perhaps, as she was coming up the river, and had whatever current there was against her, and the proof shows there was some current; but I think it was negligence in both tugs to attempt to pass each other through so narrow a space as was left by the Clyde at that point. One should have waited for the other. Possibly, under the circumstances, it was the duty of the Nashotah to have waited, but certainly one should have waited for the other; and it is clear that skillful men, watching the movements of the two boats, must have seen that there was danger of a collision between these two tows at this point, and hence there should have been more care used than was. I am therefore of opinion that both the Loomis and the Nashotah were at fault, and the damages sustained should be divided. As there is no proof that the

Roeback sustained any injury, and as no cross-libel has been filed by her owners, a decree will be entered awarding to libelant one-half the damages sustained by the Hogan.

THE EXPRESS.

HEALEY v. THE EXPRESS.

(Circuit Court of Appeals, Second Circuit. January 18, 1892.)

COLLISION IN SLIP—STEAM-BOAT AND CANAL-BOAT—INTRUDING BOAT.

A steam-boat moved out of her regular slip in a careful and proper manner, after due notice to two canal-boats, intruders in the slip, of her intention, and after providing a steam-tug as a helper. Her side, however, came in contact with one of the intruding boats, which in turn was pressed against libelant's boat, and damaged it. *Held*, that the steamer was not liable for the collision.

In Admiralty.

Appeal from a decree of the circuit court of the United States for the southern district of New York. The district court for said district dismissed the libel, and libelant appealed to the circuit court, which affirmed *pro forma* the decree of the district court, and libelant appealed to this court. By the regulations of the New York city dock department, only seven canal-boats may dock in the slip at the foot of Rutgers street, East river. The slip is the regular berth of the steam-boat Express. Libelant's canal-boat was one of seven lawfully in the slip, when two more canal-boats came in and moored outside of her. The space left for the Express to navigate in was very narrow. She seasonably notified the outside boats of her intention to leave the slip, and ordered them to move away, which they did not do. She also had a tug to assist her in moving. She moved out nearly in a straight line, but her starboard side came in contact with the outside canal-boat, and libelant's boat was squeezed between the outside boats and a shorter boat lying inside of her, and received injuries for which this suit was brought.

Hyland & Zabriskie, for appellant.

Wing, Shoudy & Putnam, for appellee.

PER CURIAM. We are unable to find the Express in fault for this collision. She notified the boats, whose presence in the slip caused all the trouble, to move before she left her berth, and was under no obligation to furnish them with the means to obey the orders of the dock-master, to like effect, given them earlier in the day. She was properly berthed at her pier, had the right to leave it, and was entitled to

the use of water sufficient for such maneuver. The space in which she was compelled to navigate was greatly reduced by the presence in the slip of more boats than the regulations of the dock-master permitted, but the space was still sufficient to warrant a reasonable expectation that she could draw out without doing any greater damage than would result from the ordinary contact of boats when moving in crowded slips. She exercised due care in leaving, did not move rashly, notified the intruding boats to withdraw, and provided a steam-tug, by whose assistance she might counteract the danger to be apprehended from the tide pressing her against the pier, and thus swinging her stern out against them. So far as the evidence shows, she moved out carefully, and nearly in a straight line, although, as her greatest breadth of beam drew towards the outer end of the pier, she did come in contact with the outermost boat, pressing it with considerable force against its neighbor. Even then it is not likely that the libelant's boat would have been damaged had it not been that she was berthed against a boat so much shorter than herself that the pressure she received from the other boats was not evenly distributed. Were this a controversy between the Express and the intruding boats, the latter would be held solely in fault; their wrongful act, which unnecessarily and unlawfully embarrassed the Express when leaving her slip, being the immediate and proximate cause of the collision. The mere fact that the libelant's boat was not herself in fault does not change the situation; her remedy for the injuries from collision with the other canal-boats is against them, not against the Express.

Decree appealed from is affirmed, with disbursements of the circuit court and the costs of this court.

THE CLARA.

THE RELIANCE.

McCaffrey *et al.* v. THE CLARA AND THE RELIANCE.

(District Court, S. D. New York. February 14, 1892.)

1. COLLISION—EAST RIVER—CORLEAR'S HOOK—STATUTE AS TO MID-RIVER—HUGGING SHORE—SIGNALS OMITTED.

The tug C., with a tow, was going up the East river with the strong flood-tide, within 400 feet of the New York shore, and was nearing Corlear's Hook. The steam-barge R., coming down stream nearer the New York shore, on passing from the slack-water into the strong flood-tide off the Hook, setting a little across the river, swung her head to port, and collided with the tow of the C., though both vessels reversed. *Held*, that the C. was in fault (1) for disobeying the statute which required her to take the middle of the river; also (2) for not signaling; and (3) for not giving more room for the swing of the R. in the cross-tide. The R.,

coming down on her own side of the river in slack-water, and not expecting to meet any vessel coming up in the C.'s situation, was held in fault for not keeping a proper lookout, and consequently not doing all she might have done to counteract the tide.

3. SAME—STATUTES—WHEN MATERIAL—CUMULATIVE—PRECAUTIONS AGAINST COLLISIONS.

The non-observance of the statute requiring vessels to navigate in the middle of the East river is material when it causes embarrassment to the other vessel. To prevent collisions, the rules impose cumulative duties, designed in part to avert the consequences of mistake or negligence. Hence the non-observance of a rule, such as to give signals, does not become immaterial, merely because observance of the rule would not have been necessary if the other vessel had done her duty, or had not been negligent.

In Admiralty. Libel by owner of canal-boat George Adams to recover damages for collision.

Carpenter & Mosher, for libelants.

Goodrich, Deady & Goodrich, for the Clara.

Wing, Shoudy & Putnam, for the Reliance.

BROWN, District Judge. At about 8:30 A.M. on October 20, 1891, as the steam-tug Clara, with the canal-boat George Adams lashed to her port side, was proceeding up the East river in the strength of the flood-tide, the canal-boat, when off Corlear's Hook, came in collision with the steam-barge Reliance, loaded with coal, which was coming down the river and rounding Corlear's Hook near the shore. The Reliance was loaded deeply by the head, and on passing from the slack-water near the shore into the strong flood-tide, which sets from Jackson-Street pier towards Williamsburgh, she was swung round to port; and though both reversed full speed, they could not avoid collision.

This collision, like so many others that occur at Corlear's Hook, is directly traceable to the persistent refusal of those navigating round the Hook to observe the statutory requirement to go as "near mid-river as may be." For the purpose of taking advantage of the slacker water at one place or another above or below the Hook, tugs continually take the additional risks that a violation of the statute involves. In the present case, so far as I can see, the Clara was without excuse. Although the evidence is contradictory as to her precise position in the river, I am satisfied that she was not over 400 feet from the New York shore, if so much, or one-quarter of the width of the river there. A number of witnesses testify she was only half that distance out. Of the disinterested witnesses, those who were in the best position to observe make the distance from the New York shore the smallest. The only excuse offered by the Clara for not keeping the middle or right-hand side of the river is the set of the tide towards the Williamsburgh shore. But that suggestion is without force; there was nothing in the tide that presented the slightest difficulty in going in mid-river, or on the right-hand side of the river, had the Clara been so inclined. The river was clear of other vessels. The Clara was further in fault for not signaling as required by the rules of the supervising inspectors. No signals were given

by either tug. The excuse given by the Clara for not signaling is that she was so much further out in the river than the Reliance that there was no need of signals; but the result proves the contrary. It is further urged that both her place in the river and the absence of a signal were immaterial, because there was time enough and space enough for the vessels to avoid each other as they were going, and without the giving of signals. If this argument were sound, no signal would ever be material, since there is always time enough and space enough if each boat does her duty otherwise, except in cases of inevitable accident. The same reasoning would make the want of a proper lookout on the Reliance immaterial, since the absence of a lookout would have done no harm had the Clara been near mid-river, where the statute required her to be. The argument wholly overlooks the object of the various rules for the avoidance of collisions, which is to provide cumulative guaranties for the preservation of life and property, rather than to allow the safety of all to be imperiled upon the chance of a single neglect. To prevent lamentable accidents, often involving the loss of life, these cumulative duties are imposed by the rules and regulations upon both vessels. Timely signals are required, because such signals tend to avert the natural consequences of carelessness, and the lack of previous timely observation on one side or the other, as well as to enable the boats to come to a common understanding as to the mode of passing. Navigation in mid-river is required in order to give larger opportunities for maneuvering, and to avoid the special dangers arising near the shore, and any interference with other vessels there.

Next to Hell Gate, Corlear's Hook and the Battery present the greatest dangers in East river navigation, and the observance of all the rules to avoid collision is in those places most imperative. I think it probable, as is urged by the counsel for the Clara, that if a good lookout had been kept on the Reliance, and if her wheel had been put hard a-port at the moment when it was put slightly to starboard, and thus no delay in porting had happened, the collision might possibly have been avoided, although this is not positively certain. But the Reliance did not keep a proper lookout. She was pursuing the usual course, coming down on the right-hand side of the river in slack-water, and apparently did not expect to meet a vessel coming up in the Clara's position. She was inattentive and negligent, and is, therefore, chargeable with her own fault, and is liable therefor. But that does not remove the fault of the Clara in coming up the river in the strength of the flood-tide near the New York shore without good reason, and where her course was a serious threat and embarrassment to the Reliance, coming down on her own side of the river near the New York shore in the customary manner; because it would require, I think, the utmost care and effort by the Reliance, from the time the Clara's position and course became first visible, to avoid on the one hand the long Jackson-Street wharf, and to avoid on the other hand being set across against the Clara by the strong cross-current the moment the Reliance struck it.

The rule constantly applied is that, if the navigation of the one vessel contrary to the statute produces difficulty and embarrassment to the other vessel, the violation of the statute shall be held to be a contributing fault, since one of the objects of the statute is to prevent such embarrassments, (*The Columbia*, 29 Fed. Rep. 716, 719; *The Rockaway*, 38 Fed. Rep. 856, affirmed 43 Fed. Rep. 544; *The Garden City*, 38 Fed. Rep. 860, and cases there cited;) but if it causes no embarrassment, it is not deemed a proximate cause of the collision, and will be disregarded, (*The Columbia*, *supra*; *The Titan*, 44 Fed. Rep. 510, affirmed 1 U. S. App. 123, 49 Fed. Rep. 479; *The Emperor*, 46 Fed. Rep. 143.)

So also, had a signal been given by the Clara as required by the inspector's rules, there is no reason to suppose the attention of the Reliance would not have been attracted by it. The Clara has not shown, and cannot show, that such a signal would have been of no use. *The Pennsylvania*, 19 Wall. 125, 136; *The Dentz*, 29 Fed. Rep. 528. If the presence of the Clara had been thus made known, earlier efforts would naturally have been made by the Reliance to withstand the strong set of the tide which swung her against the Clara's tow. The lack of a signal thus presumptively contributed directly to the collision.

When the Reliance was seen by the Clara at some distance, it was, moreover, the Clara's duty to go to the right a sufficient distance to allow for any swing of the Reliance that the tide might cause without her fault. *The Fred Jansen*, 49 Fed. Rep. 254, 1 U. S. App. 92. There was nothing to prevent the Clara from doing so.

The evidence does not warrant the finding that the Reliance was in fault for being loaded by the head, nor because the tide got the best of her for a few moments. Nor was such a swing to be wholly unexpected; it happens occasionally, and the Clara took the risk of it in going so near the shore. I have no doubt the Reliance took the ordinary precautions, and, after the Clara was seen, did as well as she could. Her fault was in not seeing the Clara sooner; but for this the Clara was also partly responsible, because she did not give the signal which the law required of her. The fault of the Reliance being obvious from want of a proper lookout, the damages must be divided, and a reference ordered to compute the amount, if not agreed upon.

NORTON *et al.* v. WALSH.

(Circuit Court, E. D. Wisconsin. April 8, 1892.)

REHEARING—NEWLY-DISCOVERED EVIDENCE—LACHES.

Where parties, having in their possession evidence deemed material, appeal without moving for a rehearing, and after six months dismiss the appeal and ask for a rehearing on the ground of newly-discovered evidence, their laches is inexcusable, and the motion should be denied.

In Equity. Suit by Edwin Norton and others against Francis A. Walsh for infringement of patent. Motion for rehearing upon newly-discovered evidence. Overruled.

N. C. Gridley, for the motion.

Munday, Everts & Adcock, opposed.

Before GRESHAM, Circuit Judge, and JENKINS, District Judge.

JENKINS, District Judge. The bill was filed for an alleged infringement of certain letters patent of the United States. Upon final hearing before the district judge, an interlocutory decree passed for the complainant on the 5th day of January, 1891. A motion for rehearing was presented to the circuit and district judges on the 25th day of June, and overruled on the 13th day of July, 1891. Thereupon an appeal was prayed and allowed to the circuit court of appeals, which on the 12th day of January, 1892, was dismissed upon motion of the appellant. The mandate of the appellate court was filed here on the 16th day of January, and the present motion filed on the 18th day of January, 1892. The motion proceeds upon the ground that the inventions claimed under the complainants' patents were anticipated by certain newly-discovered patents disclosed in the moving papers. So far as respects all the patents now sought to be introduced as newly-discovered evidence, except No. 79,890, mentioned below, no excuse is stated for failure to plead them or to make timely proof of them in evidence. The answer asserts, in anticipation of the inventions claimed by the complainants, 20 American, 5 English, and 3 French patents. The search in the patent-office, preliminary to pleading, is stated to have been thorough and exhaustive. These patents now offered as newly-discovered were, so far as disclosed, accessible to the searcher, the then counsel of the defendant. No failure to discover them is asserted. It must be presumed, therefore, that they were known to him, but deemed immaterial to the controversy.

The failure to find letters patent No. 79,890, issued to Becker, Ross, and Sturnagal, is excused upon the facts stated in the moving papers. But regarding this evidence as newly-discovered, not cumulative, and that due diligence has been used prior to its discovery, we are yet of opinion that this motion must be overruled for failure to make timely presentation of the matter to the court. The patent was discovered by counsel prior to the argument of the original motion for rehearing in June, 1891. As stated in the moving papers, it was referred to upon that argument, and the court declined to consider it because it was not

within the record. It was the duty of the defendant, if he desired consideration of that patent, to have made this motion at that time. Instead of so doing, he appealed from the decision of the court. After a delay of six months, he concluded to dismiss his appeal, and to resort to this motion. That is not diligence. Nor is it excusable laches. It cannot be permitted to thus experiment with the administration of justice. It may not be allowed to parties to withhold evidence in their possession, deemed material, pending an attempt to reverse a decree, and therein failing; or becoming satisfied of the correctness of the decree, to seek a rehearing upon evidence in their possession, and which should have been submitted to the court before the appeal, and within a reasonable time after its discovery. The validity of the complainants' patents is here for the first time adjudicated. It is unfortunate, therefore, that all evidence material to their validity should not have been presented to and considered by the court. We cannot, however, allow this application without establishing a bad practice. The motion is overruled.

RUSSELL & Co. v. LAMB.

(Circuit Court, S. D. Iowa, C. D. March 21, 1893.)

RES ADJUDICATA—FEDERAL AND STATE COURTS—EQUITY PLEADING.

A bill to quiet title was brought in an Iowa court, and, after answering the same, defendant filed a cross-bill, showing title in himself, and asking that the same be quieted against plaintiff. Complainant then dismissed the bill, but afterwards filed answer to the cross-bill, and also filed a petition, as defendant to the cross-bill, to remove the cause to a federal court, which was denied by both the state and the federal courts. After a hearing on the cross-bill, and answer thereto, the state court rendered a decree for defendant, which was affirmed by the state supreme court, after fully deciding that the cross-bill and answer were sufficient to sustain the decree under the state statutes and practice. *Held*, that the decree constituted a complete bar to a subsequent suit in a federal court upon the same allegations contained in the original bill, even though the cross-bill and answer would be insufficient under the rules pertaining to equity pleadings in the federal courts.

In Equity. Suit by Russell & Co. against Newton Lamb to quiet title to lands. Decree dismissing the bill, and quieting title to defendant on his cross-bill.

Cole, McVey & Cheshire, for complainant.

W. G. Harvison, for defendant.

Woolson, District Judge. The complainant, Russell & Co., an Ohio corporation, brings this action for the cancellation of a sheriff's deed for certain real estate in Polk county, Iowa, held by defendant, Lamb. The bill alleges various specific grounds for the relief prayed, including sale illegally made of non-contiguous parcels, in violation of the statutes of Iowa, and that the sale was made by the sheriff after the judgment, under whose execution he proceeded, had been fully satisfied. And complainant avers title in itself to said real estate through sheriff's deed, un-

der certain judgments set out. Defendant, Lamb, fully answers the various specific grounds of attack made by complainant's bill on his title, and pleads in bar, as *res judicata*, the judgment and decree of the district court of Polk county, Iowa, in three several actions. Defendant also files his cross-bill herein, averring ownership, through sheriff's deed, of the real estate in controversy herein, and praying decree establishing, confirming, and quieting this title in himself. By agreement of counsel and consent of court, this cause was heard, and is now submitted on the plea alone. It is agreed by both parties that, if the plea is sustained, decree must be entered for defendant; but, if the plea is not sustained, the case will proceed to hearing upon the other issues involved. The pleadings herein, with the exhibits, are voluminous. I have deemed it proper to examine fully the several pleas in bar presented by defendant. But, finding the one last pleaded in the answer and cross-bill to be decisive of the case, it becomes unnecessary to consider, in this decision, the two first pleaded. This plea of defendant avers that complainant, Russell & Co., instituted in the district court of Polk county, Iowa, an action in equity against defendant, Lamb, wherein are set out as the cause of action the identical grounds set out in the bill herein, and the same relief is prayed which is herein prayed; that defendant, Lamb, in said action filed his answer and cross-bill, claiming title in himself, and asking same be quieted; and that on the issues joined on said cross-bill the cause was tried on its merits, and decree entered against complainant, Russell & Co., and establishing and quieting in defendant the title to said real estate.

The law of *res judicata* appears to be well settled. In *Hahn v. Miller*, 68 Iowa, 745, 28 N. W. Rep. 51, the supreme court of Iowa declare:

"The general rule is that the judgment of a competent court is conclusive between the parties upon all questions directly involved in the issues, and necessarily determined by it."

This is substantially the rule announced in various decisions of the supreme court of the United States. *Stockton v. Ford*, 18 How. 418; *Packet Co. v. Sickles*, 5 Wall. 580; *Cromwell v. Sac Co.*, 94 U. S. 351; *Bryan v. Kennett*, 113 U. S. 179, 5 Sup. Ct. Rep. 407.

In *Doe v. Carpenter*, 18 How. 297, the language of the supreme court is as follows:

"The general rule is that the judgments of courts of concurrent jurisdiction are inadmissible in a subsequent suit, unless they are upon the same matter, and directly in point. When the same matter is directly in question, and the judgment in the foregoing suit is upon the point, it will then be, as a plea, a bar, or as evidence, conclusive between the parties. So a judgment is conclusive upon a matter legitimately within the issue, and necessarily involved in the decision."

I find from the evidence submitted that complainant, Russell & Co., instituted against defendant, Lamb, in the district court of Polk county, Iowa, in April, 1887, an action in equity; that the petition and amendments filed thereto contain averments, as grounds for relief, identical with the bill herein; that the same relief is therein prayed, and that the

prayer expressly asks the cancellation of same deed from the sheriff to defendant, Lamb, and with reference to the same real estate, as in bill herein prayed; that defendant, Lamb, filed therein his answer, fully traversing said petition as to the facts averred other than those appearing of record; that said defendant therein set out the facts claimed by him to constitute his title to said real estate, averred his ownership thereof in fee-simple, and by cross-bill prayed affirmative judgment establishing and quieting his title to the real estate in controversy therein, which is the real estate in controversy in the action now pending in this court; that complainant, Russell & Co., filed its answer to said cross-bill; that Russell & Co. dismissed its said action in said Polk district court, and thereupon said court proceeded to try the issues joined on said cross-bill and answer, and rendered decree therein, which decree contains the following:

"The court, after the introduction of the proofs and listening to the arguments of the respective counsel, being now fully advised in the premises, finds that the allegations in said cross-petition contained are true, and that the equities of this cause are with the defendant, Lamb. It is therefore hereby ordered, considered, adjudged, and decreed that, as against the said Russell & Co., the said Newton Lamb is the absolute owner in fee of the premises in controversy, [describing them.] and that his title thereto is paramount and superior to any interest the said Russell & Co. may have in the said premises; and that the title to said premises be, and the same hereby is, established, quieted, and confirmed in the said Newton Lamb, as against the said Russell & Co.," etc.

But counsel for complainant in argument contend that since in said action, in Polk district court, Russell & Co. dismissed its action, there remained nothing upon which said court could act and said decree be based. This argument proceeds on the theory that defendant's (Lamb's) answer in said action fell with plaintiff's dismissal of its action, and that thereafter no basis remained for affirmative action and decree in the state court. But in that action Russell & Co. filed an answer. An answer to what? To what did Russell & Co. intend its allegations should respond? The answer was never withdrawn, but remained, and still remains, as a part of the pleadings in that action. After Russell & Co. had dismissed the action, so far as able to effect such dismissal, and filed answer therein, Russell & Co. formally filed therein a petition for removal of the action to the federal court. In the opinion of Russell & Co., there remained at that time sufficient action for a removal thereof to this court. The opening sentences of this petition for removal are instructive as to the then considered *status* of the pleadings in that action:

"The petition of Russell & Co., of the state of Ohio, respectfully shows that your petitioner is the sole defendant interested in this suit as it now stands; they having dismissed his cause of action, and filed an answer to the cross-bill of Newton Lamb. And your petitioner further respectfully shows that the said Newton Lamb in his cross-bill asks to quiet the title to certain lands in Polk county, Iowa, which lands are of the value of more than \$5,000. And your petitioner further respectfully shows that they claim to be the owners of said lands situated in Polk county, Iowa, and they have a deed therefor; that this cause has not yet been tried, but that the same is pending

for trial; and that your petitioner desires to remove this suit before the trial thereof," etc.

The petition for removal was denied by the state court. (It may be proper to here state that this court concurred in that denial, by remanding to the state court the same case which was attempted to be brought here by the filing by Russell & Co. of certified transcript of the files and record from the state court.) And thus, after dismissal of action by Russell & Co., there remained in said action only the cross-bill of Lamb, and answer of Russell & Co. The petition for removal, formally presented to that court by Russell & Co., recognizes this as the state of the pleadings. Upon those pleadings trial was had, and decree passed against Russell & Co., who may not now be heard to say in this court that there was no cross-bill as a basis for such decree. It may also be instructive to examine a motion for continuance which appears in the files in the pending action, and in which, under date of May 16, 1890, Russell & Co. ask a continuance of this action until the decision of the appeal then pending in the supreme court of Iowa which said Russell & Co. had taken from decree of the Polk district court. After stating that the action in said Polk district court "was tried by the district court on defendant's answer and cross-bill," the application proceeds:

"The complainant says that the defendant herein has pleaded adjudication in the state court, and that the questions involved in this case have been passed upon by the state court, who it is alleged have jurisdiction of the same, and that the question of the rights of the parties are now in the supreme court of Iowa on appeal, and that one of the questions involved in said appeal is whether or not the answer or cross-bill, so called, of the defendant, in the district court, was such a cross-bill as could entitle him to proceed thereon, and that this case should not be tried until the case (appeal) in the supreme court has been disposed of, and that this cause should stand over and wait the decision of the supreme court."

Turning to 48 N. W. Rep. 939, (*Russell v. Lamb*), I find that the Iowa supreme court have formally and fully passed upon the question whether said answer and cross-bill, under the statutes of Iowa, and under the practice of the courts of the state, was a sufficient cross-bill to sustain said decree, and sustained the same as sufficient, and affirmed the decree of the district court; and that this decision is abundantly supported by the general line of decisions of said supreme court. This must end the controversy as to whether, in the Iowa courts, said answer and cross-bill was a good and sufficient cross-bill.

But complainants now urge that this answer and cross-bill, so filed in said Polk district court, would have been held insufficient if filed in this court in an action here pending; and that because of its insufficiency, when tested by the rules pertaining to equity pleadings in the federal courts, such answer and cross-bill, although it may have been good in the state court, will not be regarded by this court as sufficient to sustain the plea of *res judicata* as to the judgment and decree in said state court rendered thereon. But the action was not pending here. The pleading was filed in the state court, and under the state statutes. Whether the pleading was such a cross-bill as, under the circumstances of the case, to authorize the Iowa

court to proceed to trial thereon, and to grant relief, must be determined under the Iowa statutes. Of the subject-matter of the action the Polk district court unquestionably had jurisdiction. And all the parties to the action were present in court, with pleadings filed in the action and counsel taking part in the trial. The court had jurisdiction of the parties. The construction of the Iowa statutes, as to the force and effect of pleadings in said action, is peculiarly the province of the Iowa courts. "The construction given to the statute by the highest court of the state should be followed by this court." *Moores v. Bank*, 104 U. S. 625. "The construction given to a statute of a state by the highest tribunal of such state is regarded as a part of the statute, and is binding upon the courts of the United States." *Leffingwell v. Warren*, 2 Black, 599. And when, as in this case, the decision is supported by the unbroken line of decisions of the state supreme court, the federal courts would accept the state construction, even though that might conflict with the decisions which the federal courts had made in cases before it, wherein a like point of construction was involved. *Bucher v. Railroad Co.*, 125 U. S. 555, 8 Sup. Ct. Rep. 974. And even upon matters of general law, such as the construction of commercial law and like matters, not directly the result of state legislation, the federal courts hesitate to adopt a construction with reference to actions brought before them from any state, when such construction would have, within that state, a different effect from that flowing from the construction adopted by the state court. "Even in such cases, for the sake of harmony and to avoid confusion, the federal courts will lean towards an agreement of views with the state court, if the question seems to them balanced with doubt." *Burgess v. Seligman*, 107 U. S. 20, 2 Sup. Ct. Rep. 10. I find that the plea in bar is in point. It is well taken and fully sustained by the evidence. Let decree be entered herein dismissing complainant's bill, and, on defendant's cross-bill, establishing defendant's title to the real estate in controversy, and quieting the title in him.

NASHUA & L. R. CORP. v. BOSTON & L. R. CORP. *et al.*

(Circuit Court, D. Massachusetts. March 16, 1892.)

1. MASTERS IN CHANCERY—TAKING AN ACCOUNT—LAW OF THE CASE.

When a question as to the date from which interest shall run has been decided by the court after full hearing, on a motion for final decree, such decision is binding on a special master to whom the cause is subsequently referred to take an account, and cannot be again raised by exceptions to his report.

2. SAME—REPORT—EFFECT OF PRIOR SUPREME COURT DECISION.

When the supreme court has decided that plaintiff is entitled to a full accounting in respect to a given series of transactions, upon definite principles of liability, the master's report in respect thereto is not subject to exception because it awards a sum exceeding the amount named in the bill, and it is immaterial whether the bill is amended.

In Equity. Suit by the Nashua & Lowell Railroad Corporation against the Boston & Lowell Railroad Corporation and others for an ac-

counting. For prior reports, see 8 Fed. Rep. 458; 19 Fed. Rep. 804; 27 Fed. Rep. 821; and 10 Sup. Ct. Rep. 1004. The hearing is now upon exceptions to the report of the special master. Overruled.

Francis A. Brooks, for complainant.

Josiah H. Benton, Jr., for defendants.

Court, Circuit Judge. On July 21, 1891, this case was referred to a master to take an account under the mandate of the supreme court, directing the circuit court to take further proceedings in accordance with the opinion of that court. 136 U. S. 356, 10 Sup. Ct. Rep. 1004. The master upon this accounting finds that the complainant is entitled to recover from the defendant the sum of \$29,676.41, with interest from May 19, 1890, the date of the mandate, to the date of the final decree herein. To this report both parties filed exceptions. The complainant's exceptions relate to the question of the time from which interest should be computed upon the sum found due. Under the first exception, it is claimed that interest should have been reckoned from the date of the commencement of suit, April 17, 1880. In the second exception, it is claimed that interest should be allowed from the times the several sums of money belonging to the complainant were appropriated by the defendant.

Some months before the case was referred to the master, upon complainant's motion for a final decree, this question of interest was fully heard by the court upon the record and the evidence in the case, and upon due consideration thereof, and of the arguments and briefs of counsel, the court held that the complainant was only entitled to interest from the date of the mandate. The master properly based his finding upon this decision of the court. After a full hearing by both parties and a decision by the court, this question was not open before the master, but the master was bound to follow the ruling of the court. The complainant's exceptions, therefore, are overruled.

The first exception of the defendant relates to the amount of \$29,676.41 found due by the master. The defendant contends that the amount should have been \$26,124, which is the specific sum mentioned in the bill of complaint. Although at first inclined to the opinion that no greater amount than the last sum mentioned could be recovered without amending the bill, upon further consideration I am satisfied that upon the bill as it stands, in view of the opinion of the supreme court, the complainant is entitled to a full accounting with respect to those matters wherein the defendant was held liable by the supreme court, even if the sum should prove to be in excess of the amount named in the bill. In this view, it became immaterial whether or not the bill was amended. I therefore hold the master's finding to be correct, and overrule this exception.

The remaining exceptions of the defendant, in view of the opinion I have already expressed, become, it seems to me, unimportant. The motion to recommit is denied, exceptions are overruled, and the master's report confirmed.

UNITED STATES *v.* INSLEY *et al.*

(Circuit Court, D. Kansas. February 29, 1892.)

1. BAIL-BONDS—FORFEITURE—HOW COLLECTED.

Proceedings in the federal courts in Kansas, to enforce a forfeited bail-bond given in the federal court against the sureties, must be by action after the end of the term, as provided by Gen. St. Kan. c. 82, § 153, and a judgment entered during the term, upon motion merely, after an entry of forfeiture and the issuance of a *scire facias*, is void.

2. REVIVOR OF ACTIONS—MARSHAL'S DEED.

When a judgment debtor dies after a levy on lands, the action must be revived before a valid deed can be made.

In Equity. Bill by the United States against Martha Insley and others for an accounting and to redeem lands. Decree quieting title in defendant Insley.

J. W. Ady, U. S. Atty., for plaintiff.

J. D. McClevery, for defendants.

RINER, District Judge. This is a bill for an accounting, and to redeem lot 1, block 104, in the city of Ft. Scott. In July or August, 1869, Joseph H. Roe and C. A. Ruther were arrested upon a complaint charging them with violating the internal revenue laws of the United States. On the 3d of August, 1869, they were placed under bond for their appearance before the United States district court for the district of Kansas, with one M. McElroy and one Charles Bull as sureties. The bond or recognizance is in the following language:

"Know all men by these presents, that we, Joseph H. Roe, C. A. Ruther, and M. McElroy and Charles Bull, are jointly and severally held and firmly bound unto the United States of America in the penal sum of two thousand dollars, lawful money, for the payment of which well and truly to be made we bind ourselves, our heirs, executors, administrators, and assigns, firmly by these presents. Witness our hands and seals this third day of August, A. D. 1869. The conditions of the above obligation are that if the above bounden Joseph H. Roe and C. A. Ruther shall each of them be and appear, in his own proper person, before the United States district court, in and for the district of Kansas, at the next term thereof, and on the first day of said term, there to answer to a charge of willfully and knowingly violating the internal revenue laws of the United States, and shall not depart said court without leave, and shall abide the judgment of said court therein, then the above obligation to be void; otherwise to be and remain in full force and effect.

C. A. RUTHER. [Seal.]

"J. H. ROE. [Seal.]

"M. McELROY. [Seal.]

"CHAS. BULL. [Seal.]

"Subscribed in my presence and approved this Aug. 3, 1869, at Fort Scott, Kansas.

W. A. SHANNON, U. S. Com'r."

On the 12th day of October, 1869, that being the second day of the term, a forfeiture of this recognizance in due form was taken, and an order for a writ of *scire facias* was issued, returnable October 30th. On the 6th of November, 1869, and at the same term, a motion was made

to make the forfeiture final, and for judgment, which was entered for the sum of \$2,000, the penalty of the bond. No suit was brought upon this bail-bond nor other proceedings had except as above stated. Before the rendition of the judgment, McElroy, one of the sureties, had bought from one Bryant (the purchase being made August 5, 1869) lots 1 and 3, in block 104, in Ft. Scott, the purchase price being \$6,000. At the time of this purchase, and to pay for this property, McElroy borrowed from one Palmer \$3,500, and gave a mortgage dated August 7, 1869, upon these lots in Ft. Scott to secure the loan. April 27, 1871, a *pluries* execution was ordered out on the judgment of November 6, 1869, in favor of the United States, and on May 2, 1871, the execution was levied upon these lots 1 and 3, in block 104, in Ft. Scott. May 30, 1871, Palmer brought suit to foreclose his mortgage, but did not make the United States a party defendant. Service of summons was made on McElroy and wife, May 31, 1871. June 6, 1871, at a sale under said *pluries* execution, the United States bought said lot in satisfaction of its debt. October 4, 1871, Palmer obtained judgment of foreclosure in the sum of \$3,764.16 and costs. October 16, 1871, the sale to the United States was confirmed and deed ordered made. The deed was subsequently made. October 25, 1871, Palmer ordered out execution against McElroy. December 4, 1871, the property was sold under the Palmer execution, and bid in for the debt by Palmer. The sale was confirmed; and on January 4, 1872, a sheriff's deed was made to Palmer. Here occurs an interregnum of over 12 years. This suit was brought November 28, 1884. The United States has never been in possession of said property. The attitude of the title on January 4, 1872, was—*First*, the property had been sold to the United States by sale confirmed October 16, 1871, on a second lien; *second*, the property had been sold to Palmer by sale confirmed December 26, 1871, on a first lien, the United States not being a party defendant. Between January 4, 1872, and the filing of this bill, on November 28, 1884, McElroy and wife remained in possession of said lot, with the consent of Palmer, under an agreement to purchase, until the death of Palmer, November 13, 1872, after which the agreement lapsed. Afterwards the Palmer heirs desired to sell, and they made another agreement with McElroy, who acted as agent for his wife, that they would sell the lots to Mrs. McElroy, defendant herein. Payments on the property began and slowly progressed through a series of years. The property had an earning capacity, and the rents and profits went to Moses McElroy. He died August 24, 1881, leaving the property partly unpaid for. In the agreed statement of facts it is admitted that the said agreement with the Palmer heirs vested the title and ownership of said lot "in the said defendant, Elizabeth McElroy, except as affected by the claim or interest of the complainant in this action, if it shall be determined any such claim or interest exists. The payments to Polly Palmer and her estate of the purchase price were made by Moses McElroy from his own funds while living, and from the same sources the taxes were paid until the bringing of this action. After the agreement of purchase had been made by Elizabeth McElroy,

she improved the lots by erecting certain buildings thereon at an expenditure of several thousand dollars, and has ever since paid all taxes and assessments levied upon said property, and has also collected the rents and enjoyed the use and benefit of the property; and the rents and profits so received and enjoyed by the said Elizabeth McElroy since her purchase of said lots exceed by a small amount the principal and interest that would now be due under the said mortgage of August 7, 1869, by way of redemption, and also exceed in addition thereto the total amount expended by the said Elizabeth McElroy since her said purchase for improvements made and taxes paid upon said property, with interest to date." The property was finally deeded by the Palmer heirs to Mrs. McElroy about five years after her husband's death, and after the filing of this bill. All of the defendants, except Elizabeth McElroy, have disclaimed any interest in the property in dispute. Upon these facts two questions are submitted to the court for determination: *First*, was the judgment of May 2, 1871, a valid judgment? *Second*, was it necessary to revive the original action before the marshal could make a valid deed; McElroy, the original defendant, having died between the date of the levy and sale and the date of the deed?

Section 1014 of the United States Revised Statutes provides that for any crime or offense against the United States the offender may, by any justice or judge, commissioner, etc., in any state where he may be found, and agreeably to the usual mode of process against offenders in such states, be arrested, imprisoned, or bailed, as the case may be, etc. While the instrument upon which the judgment in favor of the United States was rendered is called a "recognizance," yet technically it is not, but is a bail-bond or contract. A recognizance is an obligation of record. This security, call it what we may, was a recognizance or bail-bond taken agreeably to the mode of process against offenders in the state of Kansas at that time, and was a valid obligation under the laws of the state. The parties failed to appear in the proper court at the time specified in the bond, and the bond was properly forfeited. The security having been taken agreeably to the usual mode of process in the state of Kansas, the rights of the parties became fixed thereby, and the liability of these sureties upon this bond must be determined under the statutes of the state of Kansas in force at that time. Section 153, c. 82, Gen. St. Kan., which it is conceded was in force at the time this bond was taken, provides a remedy by action after the adjournment of the court against the bail and upon the recognizance, and that the action shall be governed by the rules of civil pleading so far as applicable. Section 149 of the same chapter provides that the bail, (that is the surety,) at any time before judgment against him, may surrender his principal either to the court or the sheriff, (or marshal in this case,) and, upon payment of the costs, may thereupon be discharged from further liability upon the recognizance. Thus it will be seen that, by the laws of Kansas in force at the time this bond was taken, the only remedy upon a forfeited recognizance was by action in the nature of a civil action, and that this action could be commenced only after the adjourn-

ment of the court at which the forfeiture was taken, for the surety had the entire term at which the forfeiture was taken to surrender his principal, pay the costs, and be discharged. This right the sureties were deprived of by the proceedings had in the district court upon the forfeiture of this recognizance. The proceedings there had were not authorized by the statutes of Kansas, nor by any law of the United States to which my attention has been called, and the judgment there entered, for the reasons above stated, had no validity.

McElroy, the original defendant, having died between the date of the levy and the date of the deed, it was necessary to revive the action before a valid deed could be executed. A decree will go for the defendant, quieting the title to the property in dispute in her, but not at the cost of the complainant.

HARMON *et al.* v. STEED *et al.*

(Circuit Court, D. West Virginia. February 16, 1892.)

1. TAXATION—DELINQUENT LISTS—RECORDING.

The mere failure of the county clerk to record the delinquent list filed in his office, as required by Code W. Va. c. 30, § 21, does not affect the validity of a subsequent sale for taxes, since a compliance with the prior requirements of the statute fully answers the purpose of giving notice to the state and the land-owner, and the record is only intended for the purpose of preserving the list.

2. SAME—REDEMPTION.

In order to redeem land sold for taxes, it is necessary, under the Code of West Virginia, to pay (1) the taxes of the year for which the land was sold, and (2) for the year in which it was sold; and a payment of the former without the latter effects no redemption.

3. SAME—AUDITOR'S CERTIFICATE.

The certificate of the auditor that the lands have been redeemed does not bind the state, when it fails to show that the taxes for both years have been paid.

4. SAME—DUTY OF REDEMPTION.

It is the duty of a person seeking to redeem land from taxes to investigate the matter fully, and tender the full amount demanded by the law, if in fact it is not demanded by the officer.

In Equity. Bill by Charles A. Harmon and William W. Flanagan, partners trading as C. H. Harmon & Co., against Thomas Steed, Alexander F. Matthews, William M. Tyree, and Homer A. Holt, to cancel a tax-deed and also a deed executed by the grantee therein. Bill dismissed.

The case was submitted on an agreed statement of facts, in substance as follows:

It is hereby stipulated and agreed between the plaintiffs and defendants in the above-entitled cause, by their respective counsel, that the following facts shall be considered and treated upon the hearing of this cause as proven therein in proper form, that is to say, that on the 1st day of April, 1884, and for more than one year prior thereto, James T. and T. B. Marshall were and had been the owners in fee of the tract of 1,264 acres of land in the bill mentioned; that for said year said land was duly assessed for taxes amounting to \$——; that, said tax not being paid within the time required by law, it was

duly returned delinquent for such non-payment to the auditor of the state, and by him certified to the sheriff of Nicholas county to be sold for such delinquent tax, and was by him, said sheriff, on the _____ day of _____, 1885, duly sold, and at said sale purchased by the state of West Virginia; that afterwards, on the 7th day of May, 1886, said Marshalls paid into the treasury of the state of West Virginia the sum of \$14.69, the amount of taxes so assessed for 1884, and interest thereon, and received from the auditor a paper purporting to be a certificate of redemption, which is filed as certificate No. 1 with the answer of the defendants, and is to be read as part of this agreement; that the taxes for said year 1884 and interest aforesaid are all the taxes then or afterwards paid by said Marshalls, or any one for them, for the purpose of redeeming said land from the sale aforesaid; that on the 7th day of January, 1887, P. F. Duffy, the auditor of West Virginia, certified to the clerk of the county court of Nicholas county that the land aforesaid had been redeemed from the sale made to the state on December 22, 1885, and said certificate did not contain any statement of the amount paid, or what taxes were paid to effect such redemption, and such certificate was filed in the clerk's office of said county, as appears by Exhibit C, filed with the bill, which exhibit is to be read as part of this statement of facts; that said lands were assessed with taxes for the year 1885 in the name of the said Marshalls, and in no other name, and said taxes for 1885 not being paid by the said Marshalls, or any one for them, said land was returned delinquent for the non-payment thereof, and, said taxes for 1885 not being afterwards paid, said lands were on the _____ day of _____, 1887, certified by the auditor to the sheriff of Nicholas county for sale for said taxes, and on the _____ day of _____, 1887, the time fixed by law for such sale, said sheriff sold said land to the defendant Thomas Steed, who then and there paid said sheriff the amount of taxes, damages, interest, and costs for which said lands were so certified to be sold, including all commissions, costs of publication, and fee for receipt, and took the proper receipt therefor from said sheriff; that the delinquent list for 1885 of Nicholas county was not returned to the auditor's office till after May 7, 1886; that the sheriff, within the time required by law, filed in the clerk's office of the county court of Nicholas county his list of sales made in the year 1887, pursuant to law, including also the sale of said lands to the said Steed, but the clerk of said court failed to indorse or note thereon the date of such filing; that said lands not being redeemed from said last-mentioned sale within one year next thereafter, or prior to the 18th day of January, 1889, on the day last named the said Steed, having had a report made by the surveyor of said county, as shown by Exhibit K, with the bill to be read herewith, procured from the clerk of said court a deed in due form for said lands, and caused the same to be duly recorded in said office on the same day, which deed is filed as Exhibit H with the bill, and to be read herewith; that the delinquent list of Nicholas county for the year 1885 was duly filed in the clerk's office of said county court, but never recorded in any well-bound book or any other book in said office, and no book for that purpose had ever been kept in said office, but said list has been on file and preserved in said office since the day the same was filed therein, open to the inspection of all parties desiring to examine the same, and said list showed that said tract of land had been returned delinquent in the name of the said Marshalls for the non-payment of the taxes for the year 1885, and a copy of said delinquent list was duly filed in the office of the auditor of state on the _____ day of _____, 1886; that the plaintiff Harmon paid the Marshalls \$1,300 cash for the land in controversy on June 9, 1887, and on that day obtained from said Marshalls the deed filed as Exhibit E with the bill, and to be read herewith; that for the year 1886 said lands were omitted from the land-books, and for the year 1887 said lands were assessed with taxes for that year in the name of the

said Marshalls, and also charged with the back taxes for the year 1886, which taxes for 1886 and 1887 were paid by the plaintiffs; that said lands were duly assessed for taxes in the name of the plaintiffs for the year 1888, who failed to pay the same, whereon said lands were returned delinquent for such non-payment, and sold by the sheriff in November, 1889, at which sale the defendant William M. Tyree became the purchaser for the price of \$17.77; that on the _____ day of _____ the plaintiffs paid to the clerk of the county court of said county the amount of said purchase money paid by said Tyree, with interest thereon at the rate of 12 per cent., for the purpose of redemption, the said Tyree being a non-resident of said county, (the original receipt of said clerk, marked "X," to be read as part of this statement of facts;) that for the year 1889 said land was transferred to the said Steed on the land-books, and assessed with taxes in his name, and paid by him October _____, 1889, amounting to \$12.79, but said lands also remained on the land-books in the name of the plaintiffs, and were assessed in their name; that on the 4th day of November, 1889, the defendants Holt, Matthews, and Tyree purchased the said lands from the said Steed, for which they agreed to pay the price of \$1,264, and at the time the deed was executed paid in cash one-third or one-fourth of the purchase money, and obtained a deed therefor from said Steed on said last-named day, and had the same duly recorded on November 13, 1889, which purchase was *bona fide*, and without any notice or knowledge of any adverse claim except such, if any, as they would be affected with by reason of the records aforesaid; said lands have largely increased in value since the purchase aforesaid of the said Holt, Matthews, and Tyree, by reason of the recent projection of railroads in that vicinity; that after said purchase by Holt, Matthews, and Tyree, and before the bringing of this suit, the plaintiffs caused written notices to be posted on the said lands, warning off trespassers; that, at the date of bringing this suit, neither the plaintiffs nor the defendants had actual possession of said land, but shortly after the bringing of this suit the tenants of the defendants took actual possession thereof, and have held the same since, to the exclusion of the plaintiffs. It is further agreed that all exhibits filed with the bill or answers may be read upon the hearing, subject to all exceptions as to competency or relevancy of the same; that the statements in the bill are true as to the facts of the tender made to and refused by the defendants Holt, Matthews, and Tyree in July, 1890. It is further agreed that the value of the land in controversy exceeds the sum of \$5,000. This agreed statement of facts is to apply to this case only as presented in the present suit, and is not to be used against the parties for any other purpose, or in any other litigation concerning the same matter.

Watts, Ashby & Dabney, for complainants.

Brown & Jackson, for defendants.

Before JACKSON, District Judge.

JACKSON, District Judge. Two questions for the consideration of the court are presented in this case. The first is that the sale was irregular, and under the ruling of this court in the case of *De Forest v. Thompson*, 40 Fed. Rep. 375, as well as under numerous decisions in the supreme court of West Virginia, it must be set aside. The irregularity complained of to sustain the position arises from the failure of the clerk "to record in a well-bound book to be kept by him" the delinquent list required by section 21 of chapter 30 of the Code of West Virginia. It is admitted that the sheriff returned the list as required by that section, and that it was in the office at the time of the sale of the land in controversy, but

that it was not recorded as required by the section; and for this reason it is claimed that the sale made by the sheriff should be set aside. So far as the pleadings disclose, this was the only irregularity, if in fact this was one. It will be observed that chapter 30 relates entirely to the collection of taxes, prescribing the mode and manner of the collection; and, upon the failure of the officer to collect the taxes on any realty, it directs him what to do. Among other things, a delinquent list is required to be filed in the clerk's office of the county, which is to be recorded by the clerk. Section 21 of the same chapter provides that the taxes may be paid into the treasury of the state before sale, but nowhere is there to be found in chapter 30 any provision of law for the sale of delinquent lands. Chapter 31 alone provides for the sale of such lands, how and what must be done before a sale is had, as well as what is to be done after sale. The provisions of chapter 30 furnish a guide to the officer in the collection of taxes, while chapter 31 provides the remedies for enforcing the collection of taxes against the property of those who are delinquents. Chapter 30 is more or less directory, while chapter 31 is mandatory in all its provisions, some of which are semi-judicial in their character. When we examine closely what is required by section 21 of chapter 30, and which is relied on to show the irregularities of the tax-sale in this case, we find that the scope of its purpose is to furnish certain information for both the state and owners of lands who are in default for the payment of taxes: *First*, the sheriff, who is charged under the laws of West Virginia with the collection of taxes, is required, when he fails to collect any portion of them charged against the realty, to make a list of the real estate which is delinquent for the non-payment of taxes thereon, stating the year for which the delinquency occurred, a copy of which list is to be posted two weeks at the front door of the court-house of the county before the session of the county court at which it is to be presented; *second*, the sheriff is required "to present three lists of the delinquent lands at or before the session of the county court at which the county levy is next laid." It is not denied that such lists were presented to the court, and that one of them was filed in the clerk's office and a copy sent to the auditor, as required by statute. If the statute had made no other provision, could it be claimed that this list was insufficient to furnish notice of delinquency to any owner of land who exercises ordinary care and diligence in looking after his interest? I think not. All that could be required under the statute was to do just what was necessary to give notice of the condition to the claimant of any lands reported delinquent. The requirement of the statute that the list so furnished was to be recorded, was merely to preserve the list. It was no part of the duty of the officer charged with the collection of the taxes to see that the list was recorded. The failure of the clerk to record it in no wise determined the *status* or condition of the land reported delinquent. The recordation of the list neither aided nor prevented the vigilant claimant in the redemption of his lands after the return of the delinquent list. It is true, before the land could be sold, it must be found delinquent. This the court did when it passed

upon the lists filed by the officer, as required by section 20, c. 20, and entered of record that it was "satisfied of the correctness of the said lists," and directed the original to be filed in the clerk's office and a copy of it sent to the auditor. This provision of the statute may be regarded as essential, and therefore mandatory, while the other provision, requiring the clerk to record the list in a book kept for the purpose, is not essential to determine the delinquency of land for taxes, and a failure to comply with it does not vitiate the sale. In this connection, we must look to the provisions of chapter 31 of the Code of West Virginia to determine what is required to effect a sale of delinquent lands. Sections 4 to 9, inclusive, point out what is to be done to make the sale, which are conditions to be complied with by the officers making it prior to sale. None of the conditions required by the provisions of these sections of this act are shown by the pleadings in this case not to exist, and therefore we must conclude that the statute was complied with up to the time of sale. And such, also, is the case as to the requirements of the statute subsequent to the sale. I conclude, therefore, that all the provisions of the statute necessary to effect a sale had been complied with. This disposes of the first question raised by the pleadings.

The next position taken by the plaintiffs is that, if the sale should be found to be regular, then there was a redemption of the land under the statute, which reinvested the grantor of the plaintiffs with the title, and that the sale in 1887 for the taxes of 1885 was illegal and void. The evidence in this case discloses the fact that the land in controversy was sold for the taxes of 1884 on the 22d day of December, 1885, and, there being no purchaser for it, the sheriff, as required by law, bid it in for the state, where the title would remain unless redeemed in one year or sold again at the next tax-sale of delinquent lands. Upon the 7th day of May, 1886, the Marshalls paid into the treasury of the state the taxes of 1884, amounting to \$14.06, and \$2.13 interest and office fees. It nowhere appears in the pleadings and evidence that any other amount was paid, or that the taxes for the year 1885, in which it was sold, was paid, as the statute requires. The statute requires two things to be done to secure the redemption: (1) The taxes are required to be paid for the year in which the land was sold; (2) the taxes for the year or years for which it was sold. It is conceded that the taxes for the year in which it was sold were not paid, and that afterwards, in the year 1887, they were sold for the delinquent taxes of 1885, and purchased by Steed. It is also shown that the auditor, on the 7th day of January, 1887, certified the land for re-entry upon the land-book, and that it had been redeemed in the name of the Marshalls, the former owners, and that, in pursuance of said certificate, it was re-entered on the land-books for 1887, and charged with the back taxes for the year 1886. It will, however, be observed that this redemption does not embrace the taxes of 1885, which do not appear to have ever been paid. To meet this difficulty, raised by the defendants, the plaintiffs insist that the act of the auditor is the act of the state, and therefore the state must be bound, and, inasmuch as the auditor has certified the redemption, it was ille-

gally and improperly sold for the taxes of 1885. I will hereafter allude to this position. In the view I take of this case, it is unnecessary to determine as to how far the action of the auditor might or could bind the state. I confess to some surprise in not finding in the briefs of counsel a discussion of that part of section 16, c. 31, of the statute, that I think disposes of this question. To my mind it is clear that no redemption, as required by the statute, was made in this case, and the certificate of the auditor shows it. There never was any redemption of the land for the taxes of 1885, for which it was sold in 1887. The last clause of the sixteenth section of chapter 31 provides that "land may be sold for any unpaid taxes for any year previous to that in which it was sold as aforesaid, and subsequent to the year or years for the taxes of which it was sold, or for that year, as if such former sale and redemption had not been made." The certificate of the auditor is relied on to show that the land was redeemed, and the title reinvested in the "previous owner." But does it show the payment into the treasury of the taxes of 1885, as plainly required by section 33 of chapter 31 of the Code? The answer to that question must settle the fact of redemption, and, as there was no such payment, the last clause of section 16, c. 31, which expressly provides for the sale of land when the taxes have not been paid for the year in which land was sold, was not complied with, and I must hold that the land was not redeemed after the sale of 1887, and that the purchaser, Steed, under that sale, became invested with the legal title, which is a valid title against the previous owner, or those claiming under him.

I have not thus far referred to the obvious duty of the claimant, when he attempted to make a redemption of his lands under the statute, to satisfy himself whether he had done all the law required him to do to effect the redemption. There was a plain and manifest duty on his part to pay, not only the past-due taxes, for which the delinquency occurred, but to pay also the taxes for the year in which the sale occurred. He should have fully investigated the matter as to the amount required, and tendered the full amount demanded by the law, if in fact it was not demanded by the officer. And here I will briefly notice the position of the counsel for the plaintiff, that the act of the officer was the act of the state. Ordinarily the state speaks through its officers, and their legitimate acts bind the state. Their acts, however, must be under the law, and in accordance with it. Certainly the state cannot be bound by an officer who neglects to perform a duty required by the express terms of the statute. He cannot execute the law in part, and in part disregard it, especially when rights of other parties intervene. I do not think that either the law of agency or the doctrine of estoppel properly arises in this case. The only question is, did the party who undertook to redeem his lands comply with the statute? I think he did not.

It is unnecessary to notice in this controversy the sale of the land for taxes in the name of the Marshalls in 1889, as they had sold the land and conveyed the same to Harmon by a deed which had been admitted to record in the proper county January 31, 1888, and which in law oper-

ated to transfer the title to Harmon, in whose name the lands should have been assessed to protect his title. It follows from what I have said that the bill must be dismissed.

MERRITT *et al.* v. WASSENICH.

(Circuit Court, D. Colorado. February 27, 1892.)

1. SPECIFIC PERFORMANCE—DISCRETION OF COURT.

Specific performance of a contract rests in the discretion of the court, which will not decree it when, in view of all the circumstances, the ends of justice will not be subserved thereby.

2. REAL-ESTATE BROKERS—FALSE REPRESENTATIONS.

A real-estate agent, in order to induce his non-resident principal to make a sale, wrote that the property might be sold for \$27,000, and that this was from \$2,000 to \$3,000 more than it was worth. A few days later it was sold for \$35,000. *Held*, that the statement must be considered a representation of fact, and not of opinion merely.

3. SAME.

The fact that the owner's son was in the city about a month before, and had written her that the property was worth \$35,000, was not sufficient to show that she did not rely upon the agent's representation.

4. SAME—AUTHORITY—DUTY OF THIRD PERSONS.

One who purchases real estate from a non-resident owner, through a real-estate broker, is bound to ascertain, not only the terms of his authority, but also the correspondence by which such authority was obtained.

In Equity. Suit by Elmer D. Merritt and Philo D. Grommon, co-partners, against Theresa Wassenich, for specific performance of a sale of real estate. Bill dismissed.

Benedict & Phelps and J. P. Heisler, for plaintiffs.

Charles J. Hughes, Jr., for defendant.

RINER, District Judge. This is a suit in equity for the specific performance of a contract for the sale of certain real property situated on Fifteenth street, in the city of Denver, which property is described in the bill of complaint as follows: "Part of lots fifteen and sixteen in block one hundred seven."

The facts, briefly stated, are as follows: January 16, 1888, L. Anfinger & Co., real-estate men at Denver, addressed to the defendant, at Cincinnati, Ohio, the following letter:

"DEAR MADAM: We have some eastern parties here, who are buying Denver real estate, and have been trying to get them to buy your property; but, not knowing what you would sell for, we were unable to give them a price knowing that the property now pays about six per cent. on a little over \$30,000, with all the risk of a large depreciation in the next few years, for Fifteenth street has seen its best days. In fact, the property was worth more two years ago than it is to-day, and is falling in value every day. The electric road has proved a failure, and the company has stopped running, and all of their operations that have been going on for the past year, trying to make it successful, and have shut down. The tenants of the stores are all kicking, and want a reduction in rent; and we earnestly advise you to sell at the present time, if possible. The people whom we now have on the string will pay

between \$27,000 and \$30,000, which is from \$2,000 to \$5,000 more than the property is actually worth, and that much more than you can ever get any one to pay. They say they will only pay \$27,000 cash, but we think we can induce them to pay something more. You know Mr. Tesch, the tenant of the saloon, claims that the property is worth more to him than to any one else; still he only offers \$25,000. We again advise you that if you can get these people to buy, you ought to let it go. We can loan the money out at 8 and 9 per cent. per annum, secured by first-class Denver real estate, which will give you an income of \$200 per month clear, without the trouble, worry, or risk. As it is now, you do not get as much as that, and with the chances of the property depreciating in value. It will never increase, and, as time goes by, it is sure to fall in value. Fifteenth street has had its best days is acknowledged by every one. The town is going the other way. 16th, 17th, and 18th are now the main streets, especially 17th and 18th. If you decide to sell, wire us your very lowest price, (we will get as much more as possible,) for the party will not remain in Denver long enough for you to inform us by mail, and we think we could get more out of them if they are here when your reply comes than by correspondence.

"Yours, very truly,

L. ANFINGER & Co."

To this letter the defendant replied by telegram on the 20th of January, which telegram is in the following language:

"CINCINNATI, OHIO, 20th.

"To L. Anfinger & Co., 1541 Champa Street: Thirty-two thousand is my lowest figure.
MRS. T. WASSENICH."

Following this telegram, the defendant wrote to L. Anfinger & Co., her letter being dated on the 20th of January, as follows:

"DEAR SIRS: Your letter of the 16th received, and hardly know what to do. You and Albert and differ so widely in estimate of the property. Albert thinks it worth \$35,000, and is positive it will increase in value. As I have the utmost confidence in both, I don't know whose advice to take, so compromised. Still I should not like to miss this chance, and hope you will bring about a settlement. Some years ago was offered \$34,000, before even the house was built. They were also eastern people. Should you effect this sale, trust you will make everything solid for us, so they cannot hold us for taxes or anything else. You will remember, perhaps, I made Mr. Tesch a promise through you to let him have the refusal of it, and he might consider himself unjustly treated should we sell without considering that. It might also benefit us to play them against each other, and no doubt he will appreciate it all the more, seeing some one else desires it. However, leave all that to your better judgment. You might let me know what per cent. you charge, also what other expenses will arise, so that I know exactly what to figure on.

"MRS. T. WASSENICH."

Following this correspondence, L. Anfinger & Co. entered into negotiations with one Russell, a resident of Denver and a real-estate broker, for the sale of this property, giving him a certain time within which to close the transaction. He sold it to the complainants herein for the sum of \$35,000, and was to receive for his services the sum of \$2,000, and on the 28th of January, L. Anfinger & Co. wrote to the defendant, at Cincinnati, Ohio, that they had sold the property for \$32,000, less commission and taxes of 1887, stating in their letter that they had used every effort to get the parties up to \$32,500, but missed, and stated the terms of sale to be \$500 cash, to bind the bargain, \$9,500 in 30

days, and \$22,000 on or before three years, with interest at 8 per cent., secured by trust-deed on the property; stating, also, to her in that letter that their commission would amount to \$715. On the same day they telegraphed her that they had sold the property for \$32,000, less commission and taxes. To this last letter and telegram the defendant did not reply, and the only communications from her in relation to this transaction were the letter and telegram of January 20th. On the 28th of January, the date of the last communication to Mrs. Wassenich, L. Anfinger & Co. signed a receipt, as follows:

"DENVER, COLO., Jan. 28, 1888.

"Received from Merritt & Grommon, as part payment for the following described real estate, [here follows description,] the entire price to be paid for said real estate \$32,000, and is to be paid as follows: \$1,000 as above recited; \$9,000 on or before thirty days from date; and four notes, of \$5,500 each, aggregating \$22,000, secured by trust-deed on said property. The four notes payable on or before three years from said date, with interest at eight per cent. per annum, interest payable quarterly. The title to be perfect, a good and sufficient warranty deed, and to be executed and delivered by said Theresa Wassenich to Merritt & Grommon, their heirs or assigns, on or before the 28th of February, 1888, together with an abstract showing clear title: provided, however, that the payment of \$31,000 is tendered or paid at said date. If the said payment of \$31,000 in cash and notes is not paid or tendered on or before the said 28th of February, 1888, then this contract to be void and of no effect, and both parties released from their obligations herein; and in that event the said one thousand dollars paid on this date is to be held by Theresa Wassenich and L. Anfinger & Co. and P. B. Russell, brokers, one-half each, as liquidated damages.

[Signed]

"THERESA WASSENICH.

"By L. ANFINGER & Co., her Agents.

"Witnesses:

"P. B. RUSSELL.

"W. B. WHITE."

Subsequently, and on the 8th of February, L. Anfinger & Co. gave to the complainants herein the following receipt:

"DENVER, COLO., Feb. 8, 1888.

"Received of Merritt & Grommon the sum of five hundred dollars, as part payment of lots fifteen and sixteen, in block one hundred seven, in East Denver, Arapahoe county, Colorado, described as follows, [here follows description,] which I have this day assigned to said Merritt & Grommon at the full price of \$32,000, the balance of \$1,500 to be paid upon examination of title and at the time or times, and in the manner, as I may then see fit to request.

[Signed]

"MRS. THERESA WASSENICH,

"By L. ANFINGER & COMPANY, her Agents."

—This last receipt or contract being the one set out in the bill of complaint, and which the court is asked to specifically enforce.

The above constitutes substantially all of the correspondence in the transaction between these parties and Mrs. Wassenich in relation to the sale.

It is contended by the complainant that if any misstatements were contained in the communication of L. Anfinger & Co. of January 16th

which led up to the alleged sale by them, as the agents of Mrs. Wasenich, of this property, they related merely to matters of opinion, and were not misstatements or misrepresentations of fact, and that the plaintiffs are only charged with knowledge of this correspondence so far as it relates to the question of authority.

It is contended, also, that she had other means of information, and that she knew the situation when she sent the telegram and letter of January 20th. The relief here asked is not a matter of absolute right to either party. It is a matter resting in the discretion of the court, to be exercised upon a consideration of all of the circumstances of the particular case. The discretion which may be exercised is not an arbitrary or capricious one, but is controlled by the established doctrines and settled principles of equity. In general, relief will be granted when it is apparent from a view of all the circumstances of the case the ends of justice will be subserved, and it will be withheld when from a like view it appears that it will produce hardship and injustice to either of the parties. It is not sufficient to show that the legal obligation under the contract to do the specific thing desired may be perfect, but it must also appear that the specific enforcement will work no hardship or injustice. That L. Anfinger & Co.'s letter of January 16th contained misstatements, and misstatements of fact, and not of mere opinion, is I think undoubted. Their statement was not, in my judgment, a statement of opinion merely. They were real-estate men, and assumed to state the facts. Their statement to the defendant was that the property could probably be sold for \$27,000, which was \$2,000 or \$3,000 more than it was worth. That this statement was not the fact, and that it must, or at least should, have been known to them to be unwarranted, is I think fully established by the fact that within a very few days the property found ready sale at \$35,000.

Neither do I think that there is anything in the suggestion that she had other sources of information; that her son had been there, and that for that reason she did not rely upon the statement of L. Anfinger & Co. The evidence shows that her son had left Denver, and gone to California, a month or two before this transaction. I think it apparent on the face of this record that the letter of January 20th was written to induce her to close the transaction at what is clearly shown to be an inadequate price. Taking the entire correspondence, and the circumstances surrounding the transaction, into consideration, I think it entirely clear that the effect was to commit a fraud upon her, and induce her to part with her property for less than it was worth; and I do not think it can be said, in view of the fact that L. Anfinger & Co. were in the real-estate business, and had opportunity to know the values of property, that their statement contained in the communication which was the basis of this transaction was a mere expression of opinion. But, conceding this to be the fact, still I say they were bound to know. So far as the transaction affects the rights of the defendant in this case, the misrepresentations were misrepresentations of fact, upon which she relied, and which induced her replies which are now relied on as the

basis of recovery here. Whether Merritt & Grommon knew the contents of the letter of L. Anfinger & Co. of January 20th is perhaps not clearly shown by the record; but, if they did not take steps to inform themselves as to that matter, they cannot take advantage of it here, for they were bound to know, not only the authority from her to L. Anfinger & Co., but the correspondence which induced that authority to be given. But, even taking the most favorable view for the complainant in the case, and admitting, for the sake of argument, that the misstatement in the letter of the 20th was only an expression of opinion as to values, and that Merritt & Grommon were not required to examine into the transaction further than to see the authority, still this contract is one which I think, within all the cases, cannot be specifically enforced. Construing the authority in the most favorable light, and giving to it the broadest construction contended for by complainant, its terms were not complied with. The authority was, if authority at all, to sell the property for \$32,000; the purchaser to be responsible for the taxes. The sale as made was for \$32,000,—five hundred dollars cash, \$9,500 in 30 days, and \$22,000 in three years; the defendant to pay the taxes on the property and a commission of \$715. This was the statement of sale contained in the letter of L. Anfinger & Co. of January 28th; also the statement of the sale contained in the receipt given by them on that date. That authority to make the sale upon such terms was not authorized, the parties themselves it seems became aware; for on the 8th of February another and different receipt, stating different terms of sale as to payment, was given by L. Anfinger & Co. to the complainants. That this last transaction was unauthorized, and cannot affect the rights of this defendant, I think entirely clear. The terms of sale as originally made she declined to accept, and they could not after that date, without new authority, proceed to make other and different terms of sale.

In addition to all that I have suggested above, my own view is that the authority on which L. Anfinger & Co. assumed to act was not an authority to sell the property for \$32,000. The very language of the letter shows clearly upon its face that it was not intended as an authority to dispose of the property at that price, absolutely and unconditionally, but that it contemplated further correspondence and negotiations. The closing words of her letter are: "You might let me know what per cent. you charge, also what other expenses will arise, so I will know exactly what to figure on." This statement meant, if it meant anything, that the matter must be again submitted to her before any definite action was taken.

Under all of the circumstances of this case, to grant the relief asked by the complainants would undoubtedly work a great hardship and injustice upon this defendant; it would be to say to her that she must take for her property several thousand dollars less than it was worth at the time of the transaction; and this upon a letter and telegram which she was induced to write by a statement of values, which, so far as she is concerned, under the circumstances of this case, amounted to a fraud.

The complainants' bill will be dismissed, at their cost.

CITY OF SOMERVILLE v. BEAL, Receiver.

(Circuit Court, D. Massachusetts. March 14, 1892.)

1. BANKS AND BANKING—CHECKS FOR COLLECTION—INSOLVENCY.

Whether the title to a check deposited with a bank passes to the bank before collection, so as to immediately create the relation of debtor and creditor between it and the depositor, is a question of fact, depending upon the circumstances and course of dealing in each particular case.

2. SAME—RIGHTS OF DEPOSITOR.

Certain checks marked "For deposit" were deposited in a bank at a quarter to 3 on Saturday, and credit was immediately given for the amount thereof on the pass-book. The bank closed at 3, and the next day was declared insolvent, with the checks still in its hands. It was the bank's custom, at the close of each day's business, to balance its books, crediting depositors with the amount of their checks, and, if a check was subsequently returned unpaid from the clearing-house, it was charged off to the depositors. The depositor in this instance did not know of this custom. He had made deposits with the bank for several years without any special arrangement, and had never drawn against uncollected checks, except by particular understanding. *Held* that, on these facts, title had passed to the bank so as to create the relation of debtor and creditor.

3. SAME—PLEADING—FRAUD.

But where the foregoing facts were alleged in the bill, and connected with the further allegations that, at the time the checks were received, the bank was, "irretrievably insolvent, and made so by the operations of the president and two others of the directors," and that the depositor then believed it to be solvent, and had no means of knowing of its insolvency, this was sufficient to show fraud, and to render the bank liable to return the checks or their proceeds.

4. SAME.

It was not necessary for the bill to specifically allege that the officers of the bank had knowledge of its insolvency, since such knowledge would be implied from the allegation that the insolvency was caused by the president and two directors.

In Equity. Suit by the city of Somerville against Thomas P. Beal, receiver of the Maverick National Bank, to recover the proceeds of certain checks. Heard on demurrer to the bill. Overruled.

Selwyn Z. Bowman, for complainant.

Hutchins & Wheeler and *Frank D. Allen*, U. S. Atty., for defendant.

COURT, Circuit Judge. This is a bill in equity brought by the city of Somerville against Thomas P. Beal, receiver of the Maverick National Bank, claiming title to certain checks (or their proceeds) deposited in said bank on the afternoon of October 31, 1891, the day the bank closed its doors for business. The case was heard upon demurrer to the bill, the receiver contending that the title in the checks passed to the bank, and that the city of Somerville must come in with the general creditors. The main allegations of the bill are, in substance, as follows: On Saturday, October 31, 1891, at about a quarter before 3 o'clock in the afternoon, the treasurer of the city of Somerville deposited in the Maverick National Bank checks on different banks, amounting to \$21,171.40, and \$8,450 in cash. The bank closed its doors at 3 o'clock on that day. The treasurer handed the checks (with the other deposit) to the receiving teller, with a deposit ticket, and at the same time his pass-book, and the teller at once credited the total amount of the deposit therein. The treasurer stamped the following indorsement on the back of each check: "For deposit. JOHN F. COLE, Treas. & Coll. City of Somerville." After

the bank closed its doors on that day, the books of the bank, according to the usual custom, were posted and balanced, and the amount of said checks was placed to the credit of said city of Somerville, and the checks put in the clearing-house drawer, with other checks intended for presentation at the clearing-house on the following Monday. On the following day, Sunday, the bank was declared insolvent, and the bank examiner took possession of the same. All the assets and property of the bank were held by the examiner until the time the receiver was appointed. On Monday the bank examiner caused the checks to be sent to the clearing-house, where they were paid, and the proceeds thereof were received by the examiner. Subsequently these proceeds were transferred to and are now held by the receiver. They have been kept in the accounts of the receiver separate and distinct from the other funds of the bank. The city treasurer had for several years made deposits with said bank without any special agreement in regard thereto. There was no agreement that checks, when deposited, should be considered as cash, or that the treasurer could draw against them before collection; and the treasurer never drew a check for which his deposit was not sufficient, without counting the proceeds of uncollected checks, except in a few instances, where a special arrangement was made with the bank by which the bank agreed to advance him certain specified amounts of money on his checks in excess of deposits. There was no express understanding that the checks should or should not be credited to the city immediately on deposit, but they were always so credited on the pass-book at the time of the deposit. The treasurer did not know whether the books of the bank were balanced after the close of business on each day, and credit given on the books of the bank for checks deposited on that day, but he did know that the amount of such checks was at once credited to him on his pass-book. It was the custom of the bank, on balancing the books at the close of each day's business, to credit deposits on that day at their face value, and without discount; and it was also the custom of the bank, in case a check was returned from the clearing-house uncollected, forthwith to charge off to such depositor any such check, and thus cancel the credit. It was the practice of the Maverick Bank, and is the practice of the other banks in Boston, in some cases, to allow depositors to draw against checks deposited before such checks are collected, and in some cases not, depending upon the bank's opinion of the reliability of the depositor and the makers of the checks. The treasurer, at the time of making the deposit, believed the bank was solvent, and he had no knowledge, or means of knowing, of its insolvency. The bill further alleges that, at the time the checks were received by the bank, it was irretrievably insolvent, and made so by the operation of the president and two others of the directors.

Two questions are raised by this demurrer: *First*. Did the title to these checks pass to the Maverick Bank when it credited the amount of such checks on the complainant's pass-book? *Second*. If the title to the checks would have passed under ordinary circumstances, do not the allegations of the bill as to the condition of the bank at the time constitute

such a fraud upon the complainant as to entitle it to recover the checks or their proceeds?

As to the first question, whether the title in the checks passed to the Maverick Bank, I am inclined to the opinion that it did. There are numerous decisions upon this general subject of the ownership of deposits in a bank which subsequently becomes insolvent, and each case seems to turn upon the particular facts underlying it. The question is one of fact, rather than of law. *Railway Co. v. Johnston*, 133 U. S. 566, 10 Sup. Ct. Rep. 390. If we take the simple case of a customer depositing a check with a bank, which immediately credits him with the amount, allowing him to draw against it if he wishes, this being the usual course of dealing between the parties, it would seem that the property in the check passes from the customer, and vests in the bank, though there is no express agreement respecting the transfer of checks so deposited to the bank. *Bank v. Loyd*, 90 N. Y. 530, affirming 25 Hun, 101. The supreme court in *Railway Co. v. Johnston*, *supra*, cite the following language from the above case, as reported in 25 Hun:

"That the intention that the check should be received as cash is to be inferred from the fact that the check was due immediately, and was drawn on a bank, and for all purposes of the parties was equivalent to so much money; * * * and such intention is confirmed by preceding transactions, admitted by the depositor, in which checks were deposited as cash in his bank-book, and that the custom of his bank in its dealings with him was to credit him with all checks as money."

Railway Co. v. Johnston was the case of a sight-draft, and Mr. Chief Justice FULLER, in the opinion of the court, after referring to this fact and other circumstances, such as the right to charge exchange and interest on large drafts taken for collection, says:

"This was not consistent with the theory of an understanding between the bank and the company that the title to this and similar drafts should pass absolutely to the bank."

The decision is finally made to rest mainly on the ground of fraud.

Taking all the allegations of the present bill upon this particular point to be true, I am inclined to the opinion that this case comes within the principle laid down in *Bank v. Loyd*, and that, if the bill contained no other allegations, the demurrer should be sustained.

But the bill further alleges that, when the checks were received by the Maverick Bank, "it was irretrievably insolvent, and made so by the operations of the president and two others of the directors." It also avers that the bank closed its doors within 15 minutes after this deposit was received. For the purposes of this demurrer, these allegations must be taken to be true. To receive a deposit under these circumstances (assuming these facts to be proved) would constitute such a fraud as would entitle the depositor to a return of his checks or their proceeds. *Railway Co. v. Johnston*, 133 U. S. 566, 10 Sup. Ct. Rep. 390; *Cragie v. Hadley*, 99 N. Y. 131, 1 N. E. Rep. 537; *Anonymous Case*, 67 N. Y. 598; *Martin v. Webb*, 110 U. S. 7, 15, 3 Sup. Ct. Rep. 428.

It is contended by the defendant that the bill should have alleged

knowledge on the part of the officers of the bank as to its insolvent condition at the time the deposit was received, in order to bring this case within the rule respecting fraud. But the bill alleges that the bank was irretrievably insolvent at the time the checks were received, through the acts of the president and two other officers. It must be presumed, therefore, that the officers knew the condition of affairs and the consequences of their own acts. Under these circumstances, it was not necessary to aver specifically that the officers had knowledge of such insolvency. Upon this ground the demurrer is overruled.

POTTER v. BEAL *et al.*

(Circuit Court, D. Massachusetts. February 25, 1892.)

CONSTITUTIONAL LAW—UNREASONABLE SEARCH—PRIVATE PAPERS—NATIONAL BANKS.

The president of a national bank which had failed brought a bill against the receiver, alleging that a certain trunk which was then in the vaults, and of which complainant held the key, contained his private papers; that the receiver, who refused to surrender the same, was about to be summoned before the United States grand jury with the papers, to investigate a criminal charge against complainant. The prayer was for an order for the delivery of the papers, an injunction against taking them before the grand jury, and for general relief. Complainant proved by the cashier that the trunk was kept in the bank as the property of the president, but the witness had no knowledge of its contents. *Held*, that under the fourth and fifth amendments to the federal constitution, the receiver could not give evidence as to the contents of the trunk, nor could a public investigation be had; but, as the plaintiff had voluntarily submitted his rights, and asked for affirmative relief, the court would appoint a master to examine it entirely alone, and turn over to complainant any papers belonging to him, and to the receiver, such as were the property of the bank, and were not material to the government's case against complainant; and that such as related to bank transactions, and were material to the prosecution, should be held by the clerk for further consideration. *Boyd v. U. S.*, 6 Sup. Ct. Rep. 524, 116 U. S. 616, distinguished.

In Equity. Bill by Asa P. Potter against Thomas P. Beal, receiver of the Maverick National Bank, and Frank D. Allen, United States district attorney, to obtain possession of a trunk alleged to contain private papers.

Henry D. Hyde, M. F. Dickinson, and Elmer P. Howe, for complainant.
Hutchins & Wheeler, for receiver.

Frank D. Allen, U. S. Atty., *pro se*.

ALDRICH, District Judge. This is a proceeding in equity, and the bill was filed on the 15th of February, 1892. At that time the only parties were Potter, plaintiff, and Beal, receiver, defendant. At a preliminary hearing, February 16th, the plaintiff and defendant were represented by counsel, and the United States attorney appeared, and claimed the right to be heard on behalf of the government. The bill, in effect, alleges that the plaintiff, who was the president and a director of the Maverick National Bank, deposited in the vaults thereof certain private and personal books, papers, and other documents, which were never the

property of the bank, and that some of the papers were then in a trunk, to which he held the key; that the trunk was in the vault when the bank was closed by order of the comptroller on the 1st day of November, and that the receiver has since held it, and refused to pass it to the plaintiff; that the papers are personal in their nature, and necessary to a settlement of his business affairs; that he is charged with violations of the law, and that the government attorney was about to issue a summons calling the defendant Beal before the grand jury with the papers in question; that he is without adequate remedy at law, and therefore seeks the interposition of a court of equity.

The relief sought is (1) an order that the books, papers, and other documents be delivered to the plaintiff; (2) that the defendant Beal be enjoined from using the same before the grand jury; and (3) such other relief as may be just. At this hearing no evidence was offered other than the evidence contained in the bill, which was sworn to. After hearing the parties, through their counsel, and the suggestions of the government's attorney, the prayer for preliminary injunction was denied, except so far as relief was involved in an order which was entered in said cause, and was as follows:

"To the end that the rights of the public and all interested parties may be protected, it is ordered that the defendant forthwith lodge with the clerk of the United States circuit court for the district of Massachusetts the trunk named in said bill, together with its contents; and the clerk is directed to carefully keep the same in its present condition until otherwise ordered."

In obedience to this order, the defendant lodged the trunk and contents with the clerk, where it now remains under seal. Subsequently the defendant Beal filed his answer, alleging, in effect, that the trunk came into his possession as a part of the assets of the bank; that he is advised and believes that it is his duty to examine the contents thereof, and ascertain whether it contains property of the bank, or memoranda, books, papers, or accounts concerning its affairs; and the government attorney, appearing, was, upon petition, made a party, and filed a motion, asking, in effect, such an order as would lay the papers before the grand jury. Whereupon the plaintiff asked for further hearing, to the end that evidence might be introduced as to the nature of his possession, and a hearing was had on the 23d day of February, 1892. At this hearing the plaintiff called one Work, a cashier, whose evidence tended to show that the trunk in question was kept in the bank, and not elsewhere, as the private trunk of Mr. Potter; but the witness had no knowledge of the contents. It further appeared from this witness that Mr. Potter and one Kellogg, the clerk of the bank, and a secretary to Mr. Potter, and no other persons, had access to the trunk. Neither Mr. Potter nor Kellogg was called as a witness. It also appeared that the trunk was at one time opened by agreement, and that certain insurance policies were taken therefrom, and that certain deeds of Florida lands, which one Hanson held in trust as security to certain notes held by the bank, were taken therefrom by Mr. Ewer, by agreement.

The defendants offered evidence as to the character of the contents,

which was excluded upon the plaintiff's objection, on the ground that, as the investigation was for the purpose of ascertaining whether the papers were private, and therefore entitled to protection, the question should be determined upon a proceeding not in conflict with the spirit of articles 4 and 5 of the amendments to the federal constitution. Upon the preliminary hearing, and at this stage of the proceedings, the parties all ask for affirmative relief, neither denying the jurisdiction of the court nor questioning its power to ascertain the character of the contents of the trunk in question in a reasonable manner, reserving the right to object to all unreasonable and improper proceedings.

Now, what is the situation? The plaintiff neither alleges nor proves by satisfactory evidence that the trunk contains private papers only. He holds the key, and refuses to deliver it, to the end that the trunk may be opened at a public hearing. I only infer from this refusal, in view of the fact that he asks for affirmative relief, that he thinks a public exhibition of private papers unreasonable, and that he is willing to submit to such a private and reasonable examination as is necessary to enable the court to make an intelligent order, and one which shall not violate the rights of either party. The plaintiff, who is supposed to know the contents, does not give information at a public hearing; the defendants, who have partial information, are not permitted to disclose at such hearing.

In the case of *Boyd v. U. S.*, 116 U. S. 616, 6 Sup. Ct. Rep. 524, it was held that an order of court upon compulsory proceedings, compelling a party to produce a paper, the character of which was known, in order that it might be used against him, was an unconstitutional and erroneous order. The case at bar, in my judgment, is distinguishable from the case referred to. Here the plaintiff voluntarily submits his rights to the determination of the court, and asks for relief and an order that papers be delivered, the character of which is not known to the court. From the character of the possession, I think the court should know, in a general way, what the trunk contains, before an order is made as to the disposition of its contents. It is very clear that Mr. Potter is entitled to speedy possession of his private and confidential papers. It is equally clear that the bank is entitled to know what is taken from its vaults. Whether the government is entitled to have possession of any part of the papers, I do not undertake to say. A court of equity will not make an order changing the actual custody of property without clear and satisfactory evidence of title; in other words, the court will not make an order that this trunk be delivered to either party until it has some evidence of what it contains.

With the view, therefore, of ascertaining the rights of the parties in a manner not unreasonable, and not in conflict with the provisions of the constitution referred to, Hon. JOHN LOWELL, of Boston, is appointed master, to examine the contents of the trunk in question. Mr. Howe, of counsel, will pass the key to the clerk, who will open the trunk in the presence of the master, and no other person; and, after examination by the master, in the presence of no one, such papers, documents, and other things, if any, as are the property of the Maverick Bank, and are not

material to the issue suggested in the motion of the district attorney, after being first shown to the plaintiff, will be delivered to the defendant Beal by the clerk. *Second.* Such, if any, as are private, and are not the property of the Maverick Bank, together with such as do relate to Maverick Bank transactions, and are necessary and material to be introduced by Mr. Potter in his own behalf, will be forthwith delivered to his counsel, Mr. Howe. *Third.* Such, if any, not included in the two classes above, as relate to Maverick Bank transactions, and, in the judgment of the master, are or may be material to the issue suggested in the motion of the district attorney, and the proper presentment of the government's case, shall be sealed, returned to the trunk and the safe custody of the clerk, who will relock the trunk in the presence of the master, return the key to Mr. Howe, and hold the trunk and such contents until further directed. The master, without further characterization, will report whether or not he finds papers and documents within the classes named, and what disposition has been made thereof. The examination contemplated by this order is to be considered a part of the preliminary hearing, or, in other words, in aid thereof, and is designed to enable the parties to lay evidence before the court in a private and reasonable manner; the nature of the case being such that it would be unreasonable to direct or permit it to be done in a public manner. Upon report, the parties will be further heard as to the proper use and disposition of such, if any, papers and other things as are material to the government's case.

It is understood that the examination is to be private, and no publicity whatever, except such as is conveyed through a report of the character indicated. Before the examination contemplated by this order, the parties and their counsel may, in the presence of each other, or separately, if they so agree, make such explanation to the master as they desire as to the character of the papers, and, until such examination and report, or until the foregoing order is vacated or modified, all parties are strictly enjoined from interfering in any way with the trunk or its contents. It may also be understood that there is to be a speedy examination and report, unless some party aggrieved desires to raise the question of the propriety of this order; and in such event, upon proper motion, in view of the novelty of the proceedings, and the delicacy of the question involved, the examination will be fixed at such a day as will enable the court of appeals to pass upon the question, if such right of appeal exists.

ISAACS v. SOUTHERN PAC. CO.

(Circuit Court, D. Oregon. March 14, 1892.)

INJURY TO EMPLOYEE—EVIDENCE.

In the trial of an action for damages for personal injury occasioned by an accident to a bridge on a railway, it is error to admit evidence on the part of the plaintiff going to show that in the reconstruction of the bridge longitudinal braces were used where none had been used before.

(Syllabus by the Court.)

At Law.

Tilman Ford and *Richard Williams*, for plaintiff.

E. C. Bronaugh and *W. D. Fenton*, for defendant.

DEADY, District Judge. This action was brought by Grace G. Isaacs against the Southern Pacific Company to recover damages for personal injuries alleged to have been sustained in a railway accident, commonly known as the "Lake La Biche disaster." On the trial of the case the jury found a verdict for the plaintiff in the sum of \$11,000.

The defendant now moves to set aside the verdict, and for a new trial, because the court erred in admitting evidence on the part of the plaintiff as follows: It being shown and admitted that the bridge in question was originally constructed without longitudinal braces, the plaintiff called Henry Rogers as a witness, and asked him if the defendant, in the reconstruction of the bridge, put in such braces; to which question the defendant objected, which objection was overruled by the court; and thereupon the defendant excepted, and the witness answered, "Yes."

This ruling now appears, in the light of the authorities, to have been erroneous, and materially so. The effect of the evidence was to practically show an admission on the part of the defendant that the bridge was not properly or sufficiently constructed, without longitudinal braces, in the first place; whereas, the use of them in the reconstruction might have been only out of abundance of caution in the light of the experience of the wreck.

No authority has been shown in support of the ruling, and it is believed that none can be found, unless it be in the state of Pennsylvania.

In the case of *Nalley v. Carpet Co.*, 51 Conn. 524, the court said:

"The fact that an accident has happened, and some person has been injured, immediately puts a party on a higher plane of diligence and duty, from which he acts with a view of preventing the possibility of a similar accident, which should operate to commend, rather than condemn, the person so acting. If the subsequent act is made to reflect back on the prior one, although it is done upon the theory that it is a mere admission, yet it virtually introduces into the transaction a new element and test of negligence which has no business there, not being in existence at the time."

In *Morse v. Railroad Co.*, 30 Minn. 465, 16 N. W. Rep. 358, the court overruled its former decisions on this subject, and said:

"A person may have exercised all the care which the law required, and yet, in the light of his new experience, after an unexpected accident has occurred, and as a measure of extreme caution, he may adopt additional safeguards. The more careful a person is, the more regard he has for the lives of others, the more likely he would be to do so, and it would seem unjust that he could not do so without being liable to have such acts construed as an admission of prior negligence. We think such a rule puts an unfair interpretation upon human conduct, and virtually holds out an inducement for continued negligence."

In *Railroad Co. v. Clem*, (Ind. Sup.) 23 N. E. Rep. 965, it was held, in the language of the syllabus:

"In an action against a railway company for injury caused by alleged negligence in the construction of its road, evidence that after the accident the company changed and repaired its road is inadmissible to show negligence."

In *Lang v. Sanger*, (Wis.) 44 N. W. Rep. 1095, it was held that in an action for injuries alleged to have been received through the dangerous condition of a gangway in the defendant's saw-mill, evidence that after the accident defendant made repairs is inadmissible.

The admission of the evidence over the objection of the defendant appears to have been erroneous, both on principle and authority. The jury were led to believe by it that the bridge ought to have been constructed with such braces originally, and that the omission to do so was negligence, which contributed to the result. The motion is allowed, and the verdict set aside. In the light of the former trial, this case ought to be settled by the parties, and doubtless will, and thereby save the expense and labor of a new trial.

EDDY *et al.* v. LAFAYETTE *et al.*

(Circuit Court of Appeals, Eighth Circuit. February 15, 1892.)

1. RAILROAD COMPANIES—KILLING STOCK—PRESUMPTION OF NEGLIGENCE.

In the absence of a statutory rule to that effect, the law does not presume negligence from the fact alone that stock was injured or killed by a railroad company.

2. SAME—LAWS IN INDIAN TERRITORY.

The statute of Arkansas, which changed the common-law rule by providing that the mere fact of injury or killing of stock by a railroad company shall be *prima facie* evidence of negligence, was not put in force in the Indian Territory by Act Cong. May 2, 1890, § 81, (26 St. p. 81.)

In Error to the United States Court in the Indian Territory.

Action by Ben F. Lafayette and Moses Lafayette against George A. Eddy and H. C. Cross, as receivers of the Missouri, Kansas & Texas Railway Company, to recover for stock killed on defendants' railroad. Verdict and judgment for plaintiffs. Defendants brought this writ of error. Reversed.

Clifford L. Jackson, for plaintiffs in error.

W. T. Hutchings, for defendants in error.

Before CALDWELL, Circuit Judge, and SHIRAS and THAYER, District Judges.

CALDWELL, Circuit Judge. This action was commenced in the United States court for the Indian Territory by the defendants in error, who were the plaintiffs below, against the plaintiffs in error, to recover damages for a mule alleged to have been killed through the negligent operation of the locomotive and cars of the Missouri, Kansas & Texas Railway Company by the plaintiffs in error, as receivers of the road. There was a trial in that court before a jury, and a verdict and judgment for the plaintiffs for \$160, and the defendant sued out this writ of error. Upon the trial the court below gave the following among other instructions to the jury:

"Heretofore the ruling of this court has been that the only duty which a railroad company owed to the owner of stock killed upon its track was that the engineer in charge of the train at the time should use ordinary or reasonable care, after the stock should have been discovered by him, to prevent injury to such stock, and, this being shown, relieved the company from all liability. To this I still hold. But I have also held that the *onus* of proving the want of ordinary care on the part of the railroad company was on the plaintiff; that is, that the burden of establishing negligence was on the plaintiff, and that the fact of the killing was not *prima facie* evidence of negligence. On the further consideration of the act of congress establishing this court, and duly considering the decisions of the supreme courts of both the United States and of the state of Arkansas, also the modern writers of acknowledged authority, I have determined to change my ruling on the question involved. I shall now hold the law to be that the fact of injury, when proved, shall be *prima facie* evidence of negligence, but that this presumption may be rebutted by proof of care."

After citing authorities in support of this view of the law, and offering the defendants an opportunity to rebut the *prima facie* case of negligence arising, as the court held, from the fact of killing, an offer of which the defendants declined to avail themselves, the court instructed the jury:

"That if the jury shall believe from the evidence that the plaintiff was the owner of the stock mentioned and described in the complaint, and that the same, or any part thereof, was killed by the railroad trains of the defendants, then they should find for the plaintiff, and assess his damages at the fair cash market value of the stock so killed."

The giving of this instruction is assigned for error. In the absence of a statutory rule to that effect, the law does not presume negligence from the fact alone that the animal was injured or killed by the railroad company. The general, but not quite uniform, doctrine of the authorities, in the absence of a statute, is that the plaintiff must show that the railroad company was negligent, and that the law will not presume, and the jury is not authorized to infer, negligence from the fact of killing alone. *Volkman v. Railway Co.*, (Dak.) 37 N. W. Rep. 781; *Eaton v. Navigation Co.*, (Or.) 24 Pac. Rep. 415; 1 Redf. R. R. § 126; *Pierce*, R. R. 428; 3 Wood, Ry. Law, § 417; 11 Ror. R. R. 1389; 1 Thomp. Neg. p. 512, § 15; 2 Shear. & R. Neg. § 419; *Deer Neg.* § 298; *Whart. Neg.* § 899; *Railway Co. v. Wendt*, 12 Neb. 76, 10 N. W. Rep.

456; *Milburn v. Railway Co.*, 86 Mo. 104; *Railway Co. v. Geiger*, 21 Fla. 669; *Railway Co. v. Bolson*, (Kan.) 14 Pac. Rep. 5; *Walsh v. Railroad Co.*, 8 Nev. 111; *Railway Co. v. Betts*, (Colo. Sup.) 15 Pac. Rep. 821; *Railway Co. v. Heiskell*, 13 Amer. & Eng. R. Cas. 555; *Railroad Co. v. McMillan*, 37 Ohio St. 554; *Railway Co. v. Henderson*, (Colo. Sup.) 13 Pac. Rep. 910.

In reference to stock injured or killed by railroad companies upon their tracks, several of the states have passed statutes imposing more extensive duties and liabilities on the companies than was imposed by the common law. Some of the states have enacted statutes making proof that an animal was injured or killed by a railroad company *prima facie* evidence of negligence on the part of the company. A statute in Arkansas is construed by the supreme court of that state to have this effect. The court said:

"The true construction of the act in question is that, the killing being shown or confessed, the presumption is that it was done by the train, and that it resulted from want of care. At common law, the *onus* of proving these facts was on the plaintiff." *Railroad Co. v. Payne*, 33 Ark. 816, 824.

But the statute of Arkansas, here referred to, was not among those put in force in the Indian Territory by the act of congress. It will be observed that the rule in that state, that, the killing being shown, the law presumes that it resulted from negligence on the part of the railroad company, is grounded on a statute, and that the court declares that at common law the *onus* of proving the negligence was on the plaintiff. The plaintiff must prove the negligence as well as the killing; but, as we pointed out in the case of *Railway Co. v. Washington*, 49 Fed. Rep. 347, (at the present term,) these facts may be proved by circumstantial evidence, and, as is there shown, it is not such a difficult task as counsel seem to suppose to prove facts and circumstances from which a jury might rightfully infer both the killing and the negligence. But in that territory the inference in such cases is not one of law, but of fact, to be drawn by the jury from all the evidence in the case. The judgment of the court below is reversed, and the cause remanded, with instructions to grant a new trial.

EDDY *et al.* v. DULANEY.

(Circuit Court of Appeals, Eighth Circuit. February 15, 1892.)

In Error to the United States Court in the Indian Territory.

Clifford L. Jackson, for plaintiffs in error.

G. B. Dentson and *N. B. Muxey*, for defendant in error.

Before CALDWELL, Circuit Judge, and SHIRAS and THAYER, District Judges.

CALDWELL, Circuit Judge. This action was commenced by the plaintiff below to recover damages for the alleged negligent killing of his cattle by the defendants below while operating the Missouri, Kansas & Texas Railway, as

receivers. The plaintiff recovered judgment, and the defendants sued out this writ of error. Upon the trial the court gave the same instruction to the jury that was given in the case of these same plaintiffs in error against Lafayette, 49 Fed. Rep. 798, (decided at this term.) This was error. The judgment of the court below is reversed, and the case remanded, with instructions to grant a new trial.

EDDY *et al.* v. WALLACE.

(Circuit Court of Appeals, Eighth Circuit. February 15, 1892.)

1. CARRIERS—INJURY TO PASSENGERS—MOVING TRAIN.

Plaintiff took passage on defendants' freight train, which, when it reached his station, halted in such a position that the caboose in which he was riding was quite a distance from the station. He had alighted, or was in the act of alighting, when the brakeman told him not to get off, for, after the freight was unloaded, the train would be moved so as to bring the caboose near the platform. The train, instead of slowing up as the caboose neared the platform, increased its speed, and plaintiff, acting under the advice of the brakeman, jumped off, and was injured. *Held*, that defendants were estopped by the act of their servant from claiming that plaintiff was in fault in not leaving the train when it first stopped, or that its contract of carriage was fully performed at such time; that defendants could not avail themselves of their general custom as to the stoppage of freight trains, nor of the rule that passengers on freight trains assume increased risks; and that plaintiff was entitled to recover if, in jumping off the train, he acted as a prudent man would have acted in the circumstances.

2. SAME—CONTRIBUTORY NEGLIGENCE.

Contributory negligence is a defense which will not avail defendants, unless sustained by a preponderance of the evidence.

3. SAME—DAMAGES.

In an action for personal injuries caused by defendants' negligence, where it appears that plaintiff has not fully gained the use of the injured member, damages may be given for future loss.

Error to the United States Court in the Indian Territory.

Action by William J. Wallace against George A. Eddy and H. C. Cross, as receivers of Missouri, Kansas & Texas Railway, for personal injuries. Verdict and judgment for plaintiff. Defendants bring error. Affirmed.

Clifford L. Jackson, for plaintiffs in error.

W. L. Hutchings and *Sandels & Hill*, for defendant in error.

Before CALDWELL, Circuit Judge, and SHIRAS and THAYER, District Judges.

SHIRAS, District Judge. The plaintiffs in error are the receivers having charge of the Missouri, Kansas & Texas Railway, and operating the trains thereon, under the orders of the United States circuit court for the district of Kansas. The defendant in error, on the 7th day of May, 1890, became a passenger on a freight train operated by the receivers, for the purpose of going from Kiowa to Stringtown station, in the Indian Territory. The train contained many cars, and, when it reached the station last named, it was halted in such a position that the caboose in which the defendant in error was seated was quite a distance from the

station platform. When the train halted, the defendant in error went to the end of the car, with three grip-sacks, for the purpose of leaving the train. When he had stepped, or was about stepping, on the ground, one of the brakemen belonging to the train told him not to get off; that there was some local freight to be unloaded; and that the train would be moved lower down,—meaning by this that the caboose would be brought near to the station platform. Thereupon the defendant in error resumed his position on the steps of the caboose, with his luggage, awaiting the movement of the train. After some minutes' delay, the train was put in motion, and, as the caboose came to the platform, instead of slowing up, the speed was increased; noticing which, the defendant in error asked a brakeman whether the train had gone, and was answered: "Yes, we are gone, but we are not running very fast. You can get off. I will throw off your grips." Thereupon the defendant in error jumped from the bottom step of the caboose, was thrown down and injured, his arm being broken and wrist sprained. To recover damages for the injuries thus caused him, the defendant in error brought this action in the United States court for the Indian Territory, and, upon a trial before a jury, he recovered a verdict for \$1,250; and, judgment being entered therefor, the receivers bring the case to this court, the assignment of errors embracing 32 specifications.

We shall not attempt to consider each specification separately, but shall confine the opinion to the few general propositions which are decisive of the rights of the parties. The errors assigned, based upon the form of the summons and the sufficiency of the service thereof, call only for the remark that these points have already been ruled upon by this court adversely to the contention of plaintiffs in error. *Railroad Co. v. James*, 48 Fed. Rep. 148; *Eddy v. Lafayette*, 49 Fed. Rep. 798, (opinion filed at present term.)

The fourth and fifth assignments of error are based upon the refusal of the trial court to permit the introduction of evidence tending to show that it was the general custom, and in accordance with the rules of the company, to stop local freight trains at such parts of the station grounds as would be most convenient for loading or unloading freight, and passengers thereon were expected to leave such trains at such places as they might be stopped with reference to the convenient dispatch of the business of the company. Under some aspects which the case might have assumed, this evidence would have been admissible; but upon the issues that were in fact presented by the testimony, and upon which the case went to the jury, the same was immaterial. If the claim had been made that the passenger had been compelled to get off the cars at an unfit place, or at a point other than the platform, and had suffered injury thereby, then it might have been pertinent to prove the general rule and custom of the company in the particular named. It is true that the petition does charge, among other matters, that the train was improperly and negligently handled, in that it was not halted at or near the station platform; but in submitting the case to the jury the liability of the defendants was not made to depend in any degree upon the question of

the place where the train was halted, and, as the evidence introduced did not present this as an issue in the cause, the court did not err in the ruling complained of.

It is also assigned as error that the court refused to give several instructions requested upon behalf of the receivers, the purport of which may be fairly understood from the two requests now cited, to-wit:

"The court instructs the jury that if you find that plaintiff entered defendants' local freight train on the day in question at the station of Kiowa, for the purpose of taking passage to the station of Stringtown, as a passenger upon said train, and that said train was stopped by defendants' agents and servants at the station of Stringtown sufficient length of time to enable plaintiff to safely alight therefrom, and that such stoppage of said train was made at a place and in a manner customary in the management and operation of similar freight trains upon defendants' said line of railway, and that plaintiff availed himself of said opportunity to so alight from said train, and did alight therefrom, then you will further find that defendants fully performed their duty to plaintiff in affording him an opportunity to leave said train, and that plaintiff, on so alighting from said train, ceased to be a passenger upon said train."

"The court instructs the jury that if you find that plaintiff entered upon defendants' local freight train on the day in question at the station of Kiowa, for the purpose of taking passage to the station of Stringtown, as a passenger upon said train, and that said train was stopped by defendants' agents and servants at the station of Stringtown sufficient length of time to enable plaintiff to safely alight therefrom, and that such stoppage of said train was made at a place and in a manner customary to the management and operation of similar freight trains upon defendants' said line of railway, and that plaintiff availed himself of said opportunity to so alight from said train, and did alight therefrom, then you will further find that defendants fully performed their duty to plaintiff in affording him an opportunity to leave said train, and that plaintiff, upon so alighting from said train, ceased to be a passenger on said train; and if you further find that plaintiff, believing that he could save himself the trouble of walking from where the car in which he had been riding had been stopped to the defendants' depot or said station of Stringtown, and for that purpose got back upon said car with a view of getting off as the same passed by said depot, that then plaintiff was not a passenger upon said train, and was not entitled to be treated as a passenger by defendants' servants in charge of said train."

As already stated, the undisputed evidence showed that, when the train halted at Stringtown, the defendant in error was in the act of leaving the caboose, although he would have been required to walk a long distance with the baggage he had with him before reaching the station platform, when the brakeman told him that they had local freight to unload, and that the train would be moved so as to bring the caboose near to the platform. The passenger had a right to rely upon the information thus given him, and if, disregarding the same, he had gotten off the caboose at the place it then stood, and had sued the company for breach of contract, in that the company had not conveyed him to the station proper, but had required him to alight at an inconvenient and possibly dangerous place, he would have been defeated in the action upon proof of the fact that the brakeman told him not to get off at that place, and that the train would be moved up to the station proper. The evidence

proves beyond question that the passenger would have left the caboose at the spot where it halted, regardless of the inconvenience thereby caused him, had it not been that the company, through its agent, notified him that the train would be moved to a more convenient point, and that he should await such movement before alighting from the car. Under such circumstances, the company is estopped from claiming that the passenger was in fault in not leaving the train when it halted with the caboose a long distance from the platform, and it is also estopped from asserting that its contract of safe carriage had been fully performed when the train had stopped long enough to allow the passenger to leave the car. The court, therefore, was clearly right in refusing to give the instructions above quoted and others of the same import; for they wholly ignore the fact that the action of the passenger in continuing on the caboose was due to the directions given him by the agent of the company.

It is further claimed that the court erred in charging "that a common carrier admitting passengers to a freight train incurs the same liability to transfer them safely as if on a passenger train." And in refusing, at the request of the company, to instruct "that a passenger taking a freight train takes it with the increased risks and diminution of comfort incident thereto, and, if it is managed with the care requisite for such a train, it is all those who embark upon it have a right to demand. The passenger can only expect such security as the mode of conveyance affords." It is possible to imagine or suggest cases in which the facts would be such as to make the request above quoted entirely proper, and also to require a more full statement of the abstract rule of law given by the court in its charge; but there was nothing developed in the evidence in this case that called upon the court to instruct the jury in regard to any increased risks or discomforts attending a passage in the caboose of a freight train, as compared with a passage in a drawing-room car forming part of a passenger train. The injury to the defendant in error did not grow out of a risk peculiar to a freight train. It might just as easily have occurred if the train had been composed of passenger coaches, for the injury resulted from the passenger leaving the car when in motion, which may occur as readily with passenger as with freight trains.

The case was sent to the jury upon two propositions: *First*. Was the carrier guilty of negligence causing the accident, in that the passenger was induced to get off the train when the same was in motion? *Second*. Was the passenger chargeable with negligence in jumping from the steps of the caboose under the circumstances developed in the evidence?

Upon the first question the court charged, in substance, that if the passenger, when the train stopped at the station, was directed to remain on the car until it was moved to a more convenient place, which, however, was not done, but, the train being put in motion, the passenger was advised to get off the moving train, and was aided in so doing by the employes of the defendants, and in consequence thereof was injured, such facts would constitute negligence on part of the carrier, and entitle the passenger to a verdict, unless the latter had, by negligence on his part, defeated his right of recovery. Counsel for the receivers does

not, in argument, press the exceptions taken to this part of the charge, evidently recognizing the fact that it could not be successfully claimed that it was a proper performance of the contract of safe transportation, requiring of the carrier the exercise of the highest degree of care and skill, to induce a passenger to forbear leaving the train by the representation that the car upon which he was riding would be stopped at the platform, and then, neglecting to stop the train, to induce the passenger to jump from the moving car, and thereby subject himself to the risks incident to such a mode of leaving the train. It cannot be successfully affirmed that a carrier of passengers exercises the high degree of care exacted of him, if he requires or induces passengers to leave the car upon which they are riding when the same is moving at a constantly increasing rate of speed; and therefore it was not error for the court to charge the jury that, if they found the facts to be as stated, then the charge of negligence against the defendants was made out, and the plaintiff was entitled to a verdict, unless it appeared that he had, by negligence on his part, contributed to the accident.

It is, however, urged as ground of error that the court did not properly instruct the jury upon the question of contributory negligence; the position of counsel, as stated in the brief, being as follows:

"The plaintiff should have acted as a prudent man would have acted, and cannot, after acting recklessly and in a foolhardy manner, recover for injuries sustained by him while so acting. If the plaintiff saw, or by ordinary care could have seen, that the defendants had in fact negligently exposed him to the risk of injury, he can no longer rely on the instructions or advice of defendants' agent, but must use all the additional precautions on his part which a person of ordinary prudence would use in view of the circumstances as they are, and not as they ought to be."

Whether the court did not, in substance, instruct the jury in accord with the views of counsel will be best determined by quoting the language of the charge upon this point, the same being as follows:

"The court instructs the jury that though they may find from the evidence that the plaintiff jumped from the train of the defendants while the same was in motion, and defendants' servant or employe upon said train had advised or instructed the plaintiff to so jump from said train, and that the plaintiff was thereby injured and had his arm broken, yet if the jury should further find that said train was moving at such a rapid speed that the danger to plaintiff in so jumping from such train at such time was so great that a man of ordinary prudence would not have so jumped, then the plaintiff should be considered as guilty of contributory negligence, and the jury should find for the defendants. The court instructs the jury that if they should find from the evidence in this case that the plaintiff, being a passenger on defendants' train, was instructed by defendants' trainmen to leave the train in question when such train was moving at such a high rate of speed as would have prevented a man of ordinary prudence from acting upon such instruction, then your verdict will be for the defendants. The court instructs the jury that a passenger on a railway train is not justified in yielding to the advice or instruction of those in charge of the train to alight or jump from the train while the same is moving at a high rate of speed; that in such case the passenger must think before he acts, and is bound to think and act as a person of ordinary prudence would do under the same circumstances; and if the jury be-

lieve from the evidence that the plaintiff, in jumping from a moving train at the station of Stringtown, at the time he received the injuries complained of in this cause, was doing that which was obviously dangerous to a person of ordinary prudence, then the plaintiff cannot recover, though he was invited or instructed to so jump from said train by defendants' servants or agents."

Extended comment is not needed to demonstrate, not only that the instructions given were in harmony with the views of counsel as now stated in the brief, but that they clearly and fully stated the law, so that the jury could not possibly have misunderstood their duty in the particular to which the instructions are applicable. The completeness of the charge in this regard is also a sufficient refutation of the errors based upon the refusal of the court to give several requests of the receivers upon this subject. The instructions given met all the different phases of the evidence, and no additional light would have been given the jury by a repetition of the same thought in the forms used in the requests preferred, but not given.

Exception is also taken to the ruling that contributory negligence is a defense which will not avail a defendant unless sustained by a preponderance of the evidence. That it is a matter of defense is the settled rule in the courts of the United States, and why there must not be a preponderance of evidence to sustain it we are at a loss to perceive. If the argument of counsel was well founded, the rule would be that, if there was evidence tending to show contributory negligence, a party injured could not recover, which is certainly not the law in any forum. Unless, upon the entire evidence, the jury can fairly say that a plaintiff has, by negligence on his part, contributed to the injury complained of, his right of recovery cannot be defeated on that ground; and this is the equivalent of the proposition that the fact of contributory negligence must be established by a preponderance of the evidence.

It is also said that it was error to refuse a request to the effect that the jury could not award damages to plaintiff "for future loss that plaintiff may sustain in consequence of his injury received by himself at the time he alighted from the train in question." In argument, it is said that there was no evidence to sustain a finding that there would be damage in the future, and hence plaintiff was not entitled to an award therefor. If this was the point sought to be covered by the request submitted, the language used therein is but illy fitted to express the idea. If the request had been given, the jury would probably have understood it to mean that they could not award damages for future loss caused to plaintiff by the injury received, but must confine the award to the damages received in the past, which would clearly have been an erroneous statement of the law. The record shows that the defendant in error, when upon the stand as a witness, testified that at that time he had not regained the full use of his arm; that he could not use it without causing pain; and that the rotatory motion of the arm was impaired. There was evidence, therefore, tending to prove a continuing injury, and the damage caused thereby in the future was a proper element to be considered in the assessment of the damages, and the court, therefore, did not err in

refusing to give the instruction in question. We have thus considered all the material points covered by the errors assigned, and do not find therein any sufficient ground for reversing the action of the trial court.

The judgment is therefore affirmed, at cost of plaintiffs in error.

EDDY et al. v. LAFAYETTE et al.

(Circuit Court of Appeals, Eighth Circuit. February 15, 1892.)

1. RECEIVERS OF RAILROAD COMPANIES—SUITS WITHOUT LEAVE OF COURT.

Act Cong. March 3, 1887, § 3, (24 St. p. 554,) authorizing suits against receivers of railroads without special leave of court, was intended to place such receivers upon the same plane with the railroad companies, both as respects their liability to be sued for acts done while operating railroads, and as respects the mode of service of process. *Central Trust Co. v. St. Louis, A. & T. Ry. Co.*, 40 Fed. Rep. 426, followed.

2. SAME—SERVICE OF PROCESS IN INDIAN TERRITORY.

For injuries committed in the Indian Territory, receivers sued therein are properly served by delivering a copy of the summons to one of their station agents in charge of a railway station therein under the Arkansas laws, made applicable to the Indian Territory, providing that such service is sufficient to confer jurisdiction when defendant is a railway company or a foreign corporation.

3. SAME—OBJECTIONS TO JURISDICTION—WAIVER.

Receivers of a railway, in an action against them in the Indian Territory for an injury committed therein, served with summons by delivering a copy to one of their station agents therein, by answering on the merits and going to trial after motion to quash the service is overruled, will not thereafter be permitted to question the jurisdiction of the court. *Harkness v. Hyde*, 98 U. S. 476, distinguished.

4. FIRES SET BY LOCOMOTIVES—PRESUMPTIONS.

In an action in the Indian Territory against the receivers of a railroad to recover for hay destroyed by a fire set by defendants' locomotive, where it appears that one of plaintiffs is a member of the Creek Nation, and that the hay was cut and gathered by her on Creek lands, it will be presumed, in the absence of a contrary showing, to have been lawfully harvested.

5. SAME—PARTIES.

Hay destroyed by a fire negligently set by defendants' locomotive was harvested by the occupant of the land under contract with another, whereby he agreed to advance the requisite funds, the former to receive one-third the proceeds. *Held*, that such persons could maintain a joint action for the loss.

6. SAME.

It is no ground of defense that the contract under which the hay was harvested was invalid because made with a married woman, for, both being parties to the suit, all the necessary parties are before the court.

7. SAME—NEGLIGENCE OF DEFENDANTS.

In an action to recover for hay destroyed by fire set by defendants' locomotive, a charge that in the matter of keeping their right of way free and clear of combustible materials, and in providing their locomotives with suitable spark-arresters, defendants were only called upon to exercise "reasonable care, skill, and diligence," states the proper rule.

8. SAME.

Negligence may be imputed to a railroad company if it allows combustible material to accumulate along its right of way in such quantity, at such places, and at such seasons as renders it liable to become ignited and cause damage to adjacent property.

9. SAME.

The fact that fire is communicated by a passing locomotive is *prima facie* evidence of negligence.

10. SAME—NEGLIGENCE OF PLAINTIFFS.

It appeared that the hay was burned in ricks while plaintiffs were making hay in the vicinity, and that the men so employed were keeping a constant lookout for

fires, and had two water-wagons on the field. *Held*, that the court properly refused a charge based upon the assumption that they did not use "any effort to protect the hay."

11. SAME—MEASURE OF DAMAGES.

In an action to recover for hay destroyed by fire set by defendants' locomotive, an instruction that the measure of damages is the market value of the hay when burned, with interest from such time, is erroneous in not leaving to the jury any discretion as to withholding or allowing interest, but is no ground of reversal, where it appears that the jury did not, in fact, allow interest.

12. SAME.

In case there is no local market value, the value is properly fixed by the value at the nearest market, deducting the cost of transportation.

In Error to the United States Court in the Indian Territory.

Action by Ben F. Lafayette and Sallie M. Hailey against George A. Eddy and H. C. Cross, as receivers of the Missouri, Kansas & Texas Railway Company, to recover for hay destroyed by a fire set out by defendants' locomotive. Verdict and judgment for plaintiffs. Defendants brought error. Affirmed.

Clifford L. Jackson, for plaintiffs in error.

W. T. Hutchings and Sandels & Hill, for defendants in error.

Before CALDWELL, Circuit Judge, and SHIRAS and THAYER, District Judges.

THAYER, District Judge. This is an action to recover the value of 666 tons of hay which was destroyed by fire near Wagoner, in the Indian Territory, on August 20, 1889. The hay was stacked in 15 ricks, at distances varying from 400 yards to 1½ miles from the track of the Missouri, Kansas & Texas Railway Company. Messrs. Eddy and Cross were operating said railroad as receivers when the fire occurred. The complaint filed in the lower court alleged that they had negligently permitted large quantities of dry grass and weeds to accumulate on the railroad right of way; that they had in service a locomotive engine which was not supplied with the best appliances for arresting sparks, and that while using such engine it was carelessly permitted to emit sparks, or drop coals of fire, which ignited the combustible material on the right of way, and started a fire that eventually spread to the hay-ricks, and destroyed them. On the trial in the lower court the evidence showed very conclusively that the fire began on the right of way, and was most likely occasioned by a locomotive drawing a train of freight-cars which had passed only a few moments before the fire was discovered, and was seen to emit sparks at or very near the place where the fire originated. There was also considerable testimony tending to show that the right of way at that place, and for some distance in either direction, was covered with combustible material, such as dry grass and weeds, which grew very close to the track, and was liable to become ignited. It was further shown that the section boss in the employ of the receivers had been requested to burn the combustible material along the right of way, at that particular point, only a short time before the hay-ricks were destroyed, but that he had neglected to comply with such request. The trial resulted in a verdict against the receivers in the sum of \$2,664.

The record before us shows that an unusual number of exceptions

were taken to the action of the trial court. Seventy-four errors are noted in the assignment of errors, forty of which seem to be relied upon by counsel to secure a reversal of the cause. It would extend this opinion to an unnecessary length, and would subserve no useful purpose, if we attempted to notice all of the errors that have been assigned. We have considered the various assignments in detail, and find many of them to be without merit. We shall confine our attention, therefore, to those specifications which seem to us to be most material and important.

The first exception that will be noticed relates to the jurisdiction of the trial court. Process was served on the receivers by delivering a copy of the summons to one of their station agents in charge of the railway station at Muscogee, in the Indian Territory. A motion was made to quash the service, which was overruled, and an exception was duly saved. Subsequently the receivers pleaded to the merits, and went to trial, but in so doing reserved to themselves the benefit of their previous exception, so far as it was within their power to do. On this state of facts it is contended that the lower court did not acquire jurisdiction to enter a judgment against the receivers, although it is conceded that under the laws of the state of Arkansas, which have been made applicable to the Indian Territory, such service as was had in the present case is sufficient to confer jurisdiction when the defendant is a railway company or a foreign corporation. Mansf. Dig. §§ 4979-4982, and section 31, Act Cong. May 2, 1890, (26 U. S. St. p. 94.)

We regard this contention of counsel as untenable for two reasons. The third section of the judiciary act of March 3, 1887, (24 U. S. St. p. 554,) authorizing suits to be brought against receivers of railroads, without special leave of the court by which they are appointed, was intended, as we think, to place receivers upon the same plane with railway companies, both as respects their liability to be sued for acts done while operating a railroad and as respects the mode of obtaining service. Such was the view entertained by the circuit judge of this circuit in the case of *Central Trust Co. v. St. Louis, A. & T. Ry. Co.*, 40 Fed. Rep. 426, and we concur in what is there said on this subject. We are also of the opinion that the jurisdiction of the lower court may be maintained on the further ground that, by answering to the merits and going to trial after the motion to quash the service of summons had been overruled, the receivers submitted to the jurisdiction of the court, and should not be permitted to question its jurisdiction in this court. In so holding, we have not overlooked the decision in *Harkness v. Hyde*, 98 U. S. 476, but we believe that case may be fairly distinguished from the one at bar. In *Harkness v. Hyde* the process involved had not only been served outside of the territorial jurisdiction of the court, and within the limits of an Indian reservation, but the officer who served the process was guilty of a violation of law in entering the reservation for that purpose. In the case at bar the service was had at a place within the jurisdiction of the court from which the process emanated. It also had jurisdiction of the subject-matter of the suit, by virtue of the fact that the negligent acts complained of had been committed within the Indian Territory.

Under these circumstances, we are unable to concede that the receivers may raise the question of jurisdiction in this court after pleading to the merits, and entering upon a long trial in the lower court. It is a general rule that mere defects in the service of process may be waived by an appearance, where the court has jurisdiction of the subject-matter of the controversy, and the defect in the service only impairs the jurisdiction over the person of the defendant. Such is the rule in the state of Arkansas, whose laws have been extended over the Indian Territory, and such is also the rule in other states. *Railway Co. v. Barnes*, 35 Ark. 95; *Martin v. Goodwin*, 34 Ark. 682; *Kronaki v. Railway Co.*, 77 Mo. 368; *Rippstein v. Insurance Co.*, 57 Mo. 86; *Estill v. Railroad Co.*, 41 Fed. Rep. 858; *Railway Co. v. McBride*, 141 U. S. 127, 11 Sup. Ct. Rep. 982.

The cases are very exceptional where a litigant is at liberty to deny the jurisdiction of a court, after defending on the merits, and taking the chances of making a successful defense precisely as if it had jurisdiction. If the receivers desired to raise the question of jurisdiction in this court, we are of the opinion that they should have refused to appear in the lower court, or, having appeared for the purpose of moving to quash the service of process, that they should have abandoned the case when their motion to quash the service was overruled.

The next question to be considered is whether the plaintiffs below showed such a title to the hay that was destroyed as entitled them to recover its value. It is strenuously insisted by counsel for the receivers (and this is said to be their main contention) that the plaintiffs below showed no such title as warranted a recovery, for the reason that the hay was cut on lands belonging to the Creek Nation, and that both of the plaintiffs were trespassers in so doing; and, *secondly*, because one of the plaintiffs was a licensed trader, and, as such, was expressly prohibited by a local statute from cutting hay on the common pasturage grounds of the Creek Nation. It is sufficient to say, with reference to this contention, that the record before us fails to show whether the hay was cut on the common pasturage of the nation, or on lands at the time occupied and held by Mrs. Hailey individually, according to the customs and usages of the nation. We will certainly not presume that either of the defendants in error was guilty of a trespass, much less that in cutting the hay either of them violated a criminal statute. In so far as we are permitted to indulge in presumptions, we must presume that the hay was lawfully harvested. The burden is on the receivers to overcome that presumption, and we find nothing in the present record that would authorize us to say that the hay was gathered on the public domain without license, and that, for that reason, the defendants in error showed no title.

The record does disclose, and there is no evidence to the contrary, that one of the plaintiffs in the lower court (Mrs. Hailey) was a member of the Creek Nation. As such, she certainly held the land where the hay was harvested as a tenant in common with other members of the Creek Nation, even if it was not gathered on lands of which she was the sole

occupant, according to the usages and customs of her tribe. We know of no law of the nation, nor has any such law been called to our attention, that would preclude her from cutting hay on land which she occupied in common with other members of the Creek Nation. The record further shows that the hay in question was harvested under a contract between the defendants in error, whereby Mrs. Hailey agreed to cut and bale, and also to deliver, 2,000 tons of hay at Wagoner, in the Indian Territory. The requisite means to enable her to fulfill the contract were to be advanced by Ben F. Lafayette, the other defendant in error, and, in consideration of the performance of the contract by Mrs. Hailey, she was to receive one-third of the net proceeds of the hay when harvested and sold. The hay appears to have been put up in ricks, pursuant to the provisions of this contract, by persons in Mrs. Hailey's employ, and it was in her possession when the fire occurred. Under these circumstances, we are of the opinion that the defendants in error showed a sufficient title to enable them to maintain a joint action against a wrongdoer for the loss of the hay. In this connection we will also add that the receivers are not in a position to urge, as a ground of reversal, that the contract between the defendants in error was invalid, because Mrs. Hailey was a married woman. Even if such be the fact, it does not impair her title to the hay or prevent her from recovering its full value. If the position is tenable, it merely shows that one of the plaintiffs below was an unnecessary party. Mrs. Hailey has not thought proper to lay claim to the entire proceeds of the hay, on the ground that the contract between herself and the other defendant in error is not enforceable as against her by reason of her coverture, and the receivers will not be permitted to make such a plea in her behalf. It is sufficient for their protection that all parties who have an interest in the hay have been made parties to the suit, and will be concluded by the judgment. *Allen v. Buffalo*, 38 N. Y. 280; *Simar v. Canaday*, 53 N. Y. 298, 301; *Mississippi Planing Mill v. Presbyterian Church*, 54 Mo. 520; *Lass v. Eisleben*, 50 Mo. 122; *Yonley v. Thompson*, 30 Ark. 399.

A number of the exceptions taken have reference to the charge, and to the action of the trial court in refusing requests to charge, which were tendered in behalf of the receivers. As some of these exceptions relate to the giving and refusal of instructions touching the degree of care that the parties to the suit were bound to exercise, we can best indicate our views on this branch of the case by stating the substance of the charge of the trial court on these points. In the matter of keeping their right of way free and clear of combustible materials, and in the matter of providing their locomotives with suitable appliances so that they would not emit sparks, the trial court charged that the receivers were only called upon to exercise "reasonable care, skill, and diligence;" in other words, that the law only exacted of them that degree of diligence that a prudent and skillful man would exercise under like circumstances to prevent injury to his own property. It further instructed the jury, however, that while the receivers were not liable unless the fire was occasioned by their negligence, yet, if they had allowed combustible

material to accumulate along the track which was liable to be ignited by sparks from passing engines, the jury would be authorized to impute negligence. It further directed the jury that it was the duty of a railway company to keep its right of way clear of combustible materials, and that its failure to do so was a circumstance showing negligence. It also instructed them, in substance, that the fact that a fire had been occasioned by sparks from a passing engine was *prima facie* evidence of negligence, and that such proof would compel the receivers to show that it was not due to their fault, and that they had not been guilty of negligence. On the other hand, the jury were advised that the plaintiffs in the lower court could not recover if, by their own fault or negligence, they had contributed to the burning of the hay. They were further told that if the evidence showed the existence, in the locality where the hay was stacked, of "a general and uniform custom of long standing, to plow around hay-ricks or make fire-guards," they might consider that fact in determining if the plaintiffs had been guilty of contributory negligence. Such, in substance, were the directions given by the trial court concerning the respective duties of the parties to the controversy. In so far as the charge of the lower court defines the degree of care that should have been exercised in keeping their locomotives and right of way in a proper and safe condition to prevent fires, the plaintiffs in error have no cause to complain. The charge in this respect embodies the substance of several requests that were asked by the plaintiffs in error. That portion of the charge also appears to us to have been substantially correct which related to the accumulation of combustible material along the right of way, and to the burden of proof after the origin of the fire had been shown. Negligence may properly be imputed to a railway company if it suffers combustible material to accumulate on its right of way in such quantity, at such places, and at such seasons as renders it liable to become ignited, and cause damage to adjacent property. It is also incumbent on a railway company to show that it has used all of those reasonable precautions which the law exacts, when it is proven that adjacent property has been damaged by a fire, which was occasioned by sparks or cinders from a passing locomotive. The decisions to this effect are both numerous and uniform. Shear. & R. Neg. §§ 676, 678, and citations.

It is contended, however, that, in defining the duty of the defendants in error, the trial court should have gone further than it did, and should have declared, as it was requested to do, "that if * * * the plaintiffs did not use any effort to protect their hay, which they allege was burned by sparks cast out by defendants' engine, either by plowing around the ricks of hay in question, or by making fire-guards around the same, or using other means, such as a careful, prudent person should have done, and that because of such failure to so protect said hay that the same was burned, the jury should find for the defendants." We think this request ought not to have been given, for the following reasons: It assumes that the evidence in the case tended to show that the defendants in error had made no effort and had taken no precautions to protect their hay from fire, which was not the fact. The testimony

showed (and there was no proof to the contrary) that the defendants in error were making hay in the immediate vicinity of the ricks when they were destroyed; that the men so employed were keeping a constant lookout for fires; and had two water-wagons on the field for the express purpose of extinguishing such fires as might occur. The request was accordingly misleading, and was properly refused, in that it ignored testimony tending to show that certain reasonable precautions had been taken by the defendants in error to protect their property. It is not claimed, nor does it appear from the record, that there was any evidence of contributory negligence, except the testimony of three or four witnesses, tending to show that it was the practice of some persons, in the locality where the fire occurred, to plow around hay-ricks, for the purpose of preventing fires. The existence of any practice tantamount to a general custom was controverted by the defendants in error. The receivers, however, requested the trial court to charge, in substance, that, if the proof showed "a custom to plow around hay-ricks," the jury might consider that fact in determining whether the defendants in error had been guilty of such negligence as would preclude a recovery. From the tenor of the charge as above stated, it appears that the trial court granted the prayer, and charged the jury on this point substantially as the plaintiffs in error had requested it to do. We conclude, therefore, that the receivers are not entitled to complain of the manner in which the issue as to contributory negligence was submitted to the jury. In so far as the trial court dealt with that question, its charge was certainly correct. It might have directed the jury to consider whether the failure to plow around the hay-ricks was not culpable negligence, irrespective of the existence of such a custom; but it was not asked to give that direction, and its failure to do so, under the circumstances stated, will not warrant a reversal.

There are two other assignments of error to be considered, which relate to the measure of damage. The court below instructed the jury that the measure of damage was "the market value of the hay when burned, with six per cent. interest from the time it was destroyed." This instruction is fairly subject to criticism, for the reason that it did not leave the jury any discretion to withhold or allow interest on the value of the hay. We entertain no doubt that interest may be allowed as damages, in cases where property has been destroyed through the culpable negligence of another, as well as when it has been wrongfully converted; but the usual, and perhaps the better, practice is to leave such allowance to the discretion of the jury. *Beals v. Guernsey*, 8 Johns. 446; *Thomas v. Weed*, 14 Johns. 255; *Devereux v. Burgwin*, 11 Ired. 490; *Gilpins v. Consequa*, Pet. C. C. 85; Sedg. Dam. (7th Ed.) 189-191. In the present case, however, we find no occasion to disturb the verdict on account of the error complained of, as it is quite evident from the record that the jury estimated the value of the hay at four dollars per ton, and did not in fact award interest.

The plaintiffs in error also requested the trial court to charge the jury "that, if they found that there was a market for hay in the rick * * *

in the vicinity where it was burned, then they should disregard all evidence as to the market for hay at other places." This request the court denied in form, but charged in substance as follows:

"That the measure of damages was the market value of the hay and six per cent. interest, and, if there was no local market value, that the value might be fixed with reference to the market value at the nearest place where hay was sold, due allowance being made for cost of transportation," etc.

We are unable to discover any material error in this direction or in the refusal of the receivers' request. It is evident, we think, that the jury must have understood the charge as a direction to allow the market value of the hay at Wagoner, if there was a local market value, irrespective of its value elsewhere. There is also abundant evidence in the case to support the finding of the jury as to the value of the hay. We have, as before stated, considered all of the exceptions taken to the action of the trial court, but have only mentioned those which appear to us to have most weight. The case seems to have been tried in the lower court with a view of saving as many exceptions as possible, and, in view of that fact, we cannot refrain from condemning a practice which subserves no useful purpose, and imposes so much unnecessary labor on an appellate court. The judgment of the lower court is hereby affirmed.

EDDY *et al.* v. POWELL.

(Circuit Court of Appeals, Eighth Circuit. February 15, 1892.)

1. PLEADING—AMENDMENT.

Plaintiff's complaint, in an action for personal injuries, was entitled as against "E. and C. R. ceivers," etc.; and in the opening paragraph plaintiff complained of "the defendants E. and C. receivers of" a certain railroad, alleged to be a corporation doing business, etc. *Held*, that an amendment was properly allowed so as to state a case against defendants in their official capacity "as" receivers.

2. RAILROAD COMPANIES—ACCIDENTS AT CROSSING.

Plaintiff, while driving over defendants' crossing between two sections of a train which had been cut so as to make a passage, was caught between them by the sudden movement, without warning, of one of the sections. He testified that he waited to cross, but was signaled by the train brakeman to proceed, but in this he was contradicted. *Held*, that a charge, in substance, that if plaintiff was directed by the brakeman to cross, contrary to his previous intention, and in so doing he sustained injury, he was entitled to recover, unless in attempting to cross he had assumed a risk of getting caught between the two sections which was known to him at the time, and was such as a prudent man obviously would not have taken, was proper, and not erroneous, from the use of the word "reckless," as applied to plaintiff's conduct, the context showing the court to have used it as synonymous with "careless."

In Error to the United States Court in the Indian Territory.

Action by George W. Powell against George A. Eddy and H. C. Cross, as receivers of the Missouri, Kansas & Texas Railway Company, to recover for personal injuries. Verdict and judgment for plaintiff. Defendants brought error. Affirmed.

STATEMENT BY THAYER, DISTRICT JUDGE.

This is a suit for personal injuries which were sustained by the defendant in error at the town of Atoka, in the Indian Territory, on the 29th day of November, 1890. The evidence introduced by the defendant in error, who was the plaintiff in the lower court, tended to show that as he was driving along a public street of the town, and had reached a point where the street crosses the track of the Missouri, Kansas & Texas Railway Company, he found the crossing of the main track partially obstructed by one of the receivers' freight trains, which had halted temporarily at the station. The train had been cut in two at the crossing, leaving a space of about eight feet between the rear and the front sections of the train, through which vehicles and pedestrians could pass. The testimony further tended to show that, when he reached the crossing, he first stopped, intending to wait until the two sections of the train had united, and had moved past the station; but that he was directed or signaled to cross the track by a brakeman or conductor attached to the train, who was standing at or near the crossing, and that he attempted to cross in compliance with such directions. While passing over the track, the engineer suddenly backed the front section of the train, for the purpose of coupling to the rear section. The wagon in which the defendant in error was riding was caught between the two sections of the train, and overturned. The defendant in error was thrown violently to the ground, and sustained injuries which disabled him for some time. The testimony in behalf of the plaintiffs in error tended to show that the defendant in error was not directed to cross the track before the train had been coupled, but that in making such attempt he acted of his own volition and negligently. There was a verdict in favor of the defendant in error in the sum of \$350.

Clifford L. Jackson, for plaintiffs in error.

R. Sarlls and *N. B. Maxey*, for defendant in error.

Before CALDWELL, Circuit Judge, and SHIRAS and THAYER, District Judges.

THAYER, District Judge, (*after stating the case as above.*) It is claimed that the judgment of the lower court was and is erroneous, because the summons did not set forth the nature of the cause of action; because the summons was served on a station agent of the receivers, and not on the receivers personally; and also because the lower court permitted an amended complaint to be filed, and erroneously refused to strike it from the files on the motion of the plaintiffs in error. The questions covered by the first and second of these assignments are disposed of adversely to the plaintiffs in error by our decision in *Railway Co. v. James*, 48 Fed. Rep. 148, and by our recent decision in the case of *Eddy v. Lafayette*, 49 Fed. Rep. 807, wherein the same objections to the process and mode of service are fully considered and overruled.

The third assignment of error, above mentioned, is also without merit. The plaintiff in the lower court first filed a complaint entitled "*Geo. W.*

Powell vs. Geo. A. Eddy and H. C. Cross, Receivers," etc., the opening paragraph of which was as follows:

"The plaintiff, George W. Powell, a citizen of the United States, residing in the Indian Territory, second judicial division, complains of the defendants, George A. Eddy and H. C. Cross, receivers of the Missouri, Kansas & Texas Railroad Company, a corporation organized under the laws of the United States, doing business in the second division of the United States court for the Indian Territory, and for cause of action alleges," etc.

The lower court held, as it seems, that the original complaint stated a case against the receivers in an individual, and not in an official, capacity, because it was not explicitly stated that the suit was brought against them as receivers; whereupon the plaintiff below asked and obtained leave to file an amended complaint. The original and amended complaint counted upon the same act or transaction. We can scarcely conceive of a case in which it would be more appropriate to grant leave to amend, or a greater abuse of discretion to refuse such leave. It is obvious that the pleader who drew the original complaint intended to sue the receivers in an official capacity. If there was any defect in the pleading, it was merely a defect in form which the statute concerning amendments was intended to remedy.

We pass to the consideration of another question presented by the record, which is more deserving of notice. The pivotal issues in the lower court (and both were for the jury) were as follows: Was the defendant in error directed or signaled by any one connected with the management of the train to cross the track, and, if so, was he guilty of contributory negligence in obeying the signal or direction? With respect to these issues the court charged the jury, in the form of two separate requests or instructions, as follows:

(1) "The court instructs the jury that if you should find that the plaintiff was upon the street or highway at the crossing of defendants' railway track in question, and that he was signaled or advised by the conductor of the train, or the agent or servant of defendants, to cross over said track, then he, the plaintiff, had a right to presume that it was safe for him to do so, unless you shall further believe that plaintiff, in so acting upon such signal or advice of defendants' conductor, agent, or servant, was exposing himself to a danger which was obvious, such that a person of ordinary intelligence and prudence would not have acted upon in similar circumstances."

(2) "The court instructs the jury that while the defendants had the right to occupy the crossing of the highway over its track in the moving of cars in the due course of business, and to casually stop their trains upon such crossing, provided such trains were not suffered thereon a needless or unreasonable time, yet the defendants owed a duty to the plaintiff, and all other persons desiring to cross such highway, to act with proper care and caution in the moving of their trains over said crossing or highway; and if the jury shall believe from the evidence that the crossing was cut, and the plaintiff, with his wagon and team, desiring to cross said highway, had stopped his team before crossing, awaiting orders or instructions from defendants' agents or servants, and that while thus waiting he was expressly or impliedly invited or instructed by the conductor or agent of the defendants to drive on and cross said highway, then he had a right to presume that it was safe for him to do so; and if in so doing he was injured the defendants are liable, unless

the obeying of such instruction was opposed to common prudence, so as to make it an obvious act of recklessness or folly."

It is contended that the giving of these requests was error. We have no doubt of the propriety of the first instruction. The defendant in error was certainly not guilty of contributory negligence in crossing the track pursuant to the direction of a person who was connected with the management of the train, and presumptively knew whether it was about to move, unless he was himself aware of some danger, such as would have deterred a man of ordinary prudence from going forward in obedience to the signal. The plaintiffs in error requested the court to charge the jury in substantially the same language. If the word "recklessness," found in the last clause of the second instruction, was employed, as it frequently is, merely as a synonym for "carelessness" or "negligence," no fault can well be found with the second direction. That it was intended to be so used admits, we think, of no doubt. Both directions are predicated on the same hypothesis,—that the plaintiff had been directed to proceed over the crossing; and it will not be presumed that the court intended to prescribe a different rule of law applicable to the same state of facts. It is also quite clear from other parts of the charge that the word "recklessness" was used as a synonym for "carelessness." On, at least, four different occasions in the course of the charge, the form of expression was changed, evidently without any intent to vary the rule of law applicable to the issue of contributory negligence. Taken as a whole, therefore, we think the jury must have understood the charge as stating the following proposition: That if the plaintiff had been directed by the conductor or brakeman to cross the track, contrary to his previous intention, and in so doing he had sustained injury, then he was entitled to recover, unless in attempting to cross he had assumed a risk of getting caught between the two sections of the train, which was known to him at the time, and was such a risk as a prudent man obviously would not have taken. A careful consideration of the record satisfies us that this was a correct statement of the law applicable to the testimony; and we accordingly affirm the judgment

ALBRIGHT v. MCTIGHE *et al.*

(Circuit Court, W. D. Tennessee. February 18, 1892.)

1. TORT-FEASORS—JOINT AND SEVERAL LIABILITY.

In an action for malicious prosecution against several defendants, a recovery may be had against one or more or all, as their liability is joint and several, and plaintiff might have brought separate actions, though he could have but a single satisfaction, except as to costs.

2. SAME—NEW TRIAL—MOTION FOR BY ONE DEFENDANT.

In such an action, where plaintiff has obtained a general verdict against all the defendants, who subsequently move for a new trial, the court has the undoubted power, upon a proper case made, to grant the motion for new trial as to one of them and overrule it as to the others.

8. SAME.

Plaintiff sued three defendants as partners in an action for malicious prosecution. They were represented by the same counsel, pleaded jointly, and verdict for \$7,500 was rendered against them all, and they jointly moved for a new trial. Subsequently S., one of them, employed new counsel, and renewed the motion on his own behalf, supported by his affidavit that he was not a partner with the others at the time of the wrongs complained of, knew nothing of such wrongs except from newspaper report, and did not know of the suit against himself thereafter until after verdict, and did not attend the trial. *Held* that, though his negligence might technically not be sufficient ground for the motion, yet, in the discretion of the court, it ought to be granted, under the circumstances, to enable him to make this defense, which was not made at the trial; and that the others should be given a new trial because the several liability of defendants as wrong-doers was not considered at all in the case before this motion, and *non constat* that the jury, upon full discussion and consideration of this question, would have given the same verdict against two defendants as was rendered against all, or would have found the same damages, if any, against S. as against the others.

At Law. Motion for new trial.

James M. Greer and J. S. Duval, for plaintiff.

McDonall & McGowan and Morgan & McFarland, for defendants.

Turley & Wright, for Sullivan.

HAMMOND, District Judge. This is an action of tort, brought by the plaintiff against "the defendants, J. S. McTighe, I. L. McKee, and T. Sullivan, doing business under the firm name of J. S. McTighe & Company," the declaration containing two counts,—one for malicious prosecution of the plaintiff upon a criminal charge, the other for false imprisonment. Four pleas were filed—*First*, not guilty, by "the defendants J. S. McTighe and T. Sullivan;" *second*, a like plea by "the defendants J. S. McTighe & Co;" *third*, a similar plea by "the defendant I. L. McKee;" and, *fourth*, "the defendants" plead not guilty, and say the imprisonment declared "was in all respects lawful, and was not false or malicious." Upon these issues a trial was had, resulting in a verdict and judgment for plaintiff "against the said defendants, J. S. McTighe, I. L. McKee, and T. Sullivan, doing business under the firm name of J. S. McTighe & Company," for \$7,500, and "the defendants" moved for a new trial. Subsequently the defendant T. Sullivan "asks that a new trial may be awarded as far as he is concerned," and files his affidavit to the effect that the said firm of J. S. McTighe & Co. was not a general partnership, but was formed for the specific purpose of carrying out two contracts, and was only intended to last during the execution of the work covered by them; that both contracts were completed nearly a year before the acts complained of in the declaration, when the special partnership terminated by limitation; and that a full and final settlement of all the affairs of the said partnership was had by the said partners some nine months before the time of the transactions for which suit is here brought. No counter-affidavits have been filed to that of Sullivan, but it appeared in proof on the trial of this case that he was a witness for the state in the prosecution against the plaintiff here, which the declaration alleges was malicious. This defendant certainly now makes a strong showing for a new trial as to himself, and especially so when considered in view of the weakness of the testimony produced against him before the jury. If the fact be that at the time of the plaintiff's ar-

rest he was not a member of the firm, that he knew nothing of that arrest except what he saw in the newspapers, and took no part in it or the prosecution of the indictment except as a witness, it may be that the jury would have found altogether in his favor, or have mitigated the damages as against him, if only technically liable. The difficulty, however, is that this defense he now makes was not pleaded by him to the declaration, nor attempted to be established by testimony on the trial. His excuse for not having made this defense is that he did not know that he was sued, nor that he was interested in the case on trial, nor that a judgment had been rendered against him, until he saw an account of this trial in the newspapers, when he consulted his present counsel. Although he was served with process, it may be true that he did not appreciate the effect of it upon him; and, as his counsel argues, he supposed he was not involved, but only the firm as it stood when the plaintiff was arrested. Certainly no separate defense was made for him by counsel for the firm, and neither in the pleadings nor the trial nor the argument, except that it was argued that there was no proof against him, was any distinction made between him and the other defendants. Undoubtedly it is too late after judgment for a defendant to say that he did not know that he was sued, or was not aware of his defense, or the like, and, technically, it is no ground for a new trial. Yet the trial court, in exercising this power to grant new trials, looks over the whole field, and considers those features of the proceeding which are sometimes hard to describe, but which nevertheless appeal strongly to the sense of justice in the application of technical rules like that. I noticed at the trial that Sullivan was not present, and seemed to be taking no interest in the suit, which was of such tremendous import, under the proof, for all who were responsible for the wrongful arrest and prosecution of the plaintiff. There was only slight proof against him, and his liability grew entirely, seemingly, out of the rule that his firm was responsible, as a firm, for the torts of its members in the prosecution of its business. Of course the court was not aware of the facts now presented in his behalf; but at one time in the trial, when counsel so strenuously argued for him that he had taken no part in the arrest or prosecution, except as a witness, and that the firm was not responsible as a firm for such torts, it occurred to me that possibly there should be a verdict for him, but finally concluding that he was liable, however passive he may have been, knowing, as he did, of the prosecution, and taking no steps to stop it, not using his power or right as a partner to stop it, or at least to disaffirm or disconnect himself with it, I made no distinction, on charging the jury, as to him, and the verdict was rendered against him on that theory. Therefore it was that no instructions were given at all with special reference to him, or to joint and several liability of the parties, and the case was tried as if all were equally liable.

But the question first presenting itself is, of course, whether a new trial can legally be granted him without awarding a new trial of the whole case, both as to him and his co-defendants. It is settled beyond all controversy that the liability of defendants in a suit of this kind is

joint and several. All the persons liable, or any one or more of them, may be sued in the same action, and a recovery may be had against one or more or all the defendants in the suit, or plaintiff may, at his election, bring several actions against persons engaged in the same wrongdoing, joining them as he pleases, and may obtain several judgments for different amounts; but his acceptance of satisfaction of any one of the judgments will operate as a satisfaction of them all, except as to the costs. *Lovejoy v. Murray*, 3 Wall. 1, 10, 11; *Chaffee v. U. S.*, 18 Wall. 516, 538; Cooley, Torts, 136. And in Tennessee, as elsewhere, the plaintiff may elect which judgment he will enforce. *Knott v. Cunningham*, 2 Sneed, 204; *Christian v. Hoover*, 6 Yerg. 505.

The defendants McTighe and McKee strenuously insist that Sullivan cannot alone be granted a new trial of the issue upon this record, as he was sued jointly with them, pleaded jointly with them, defended jointly with them at the trial, which resulted in a joint judgment against them all, and with them jointly moved for a new trial; and that his subsequent motion cannot avail him, without necessarily inuring to their benefit. That Sullivan should have a new trial, they agree, but claim that for the error as to him there must be a new trial as to them also. Before taking up that question, it may be well enough to point out that possibly Sullivan is not entitled to a new trial so much because of any error as to any of them, but only as a matter of judicial condonation of his negligence, if it may be so expressed; though I suppose it must be treated rather as an error in the trial that the court did not call the attention of the jury more particularly to the fact that as to all joint wrong-doers some may be more flagrant in their wrong-doing than others, and let the jury grade the wrong in their verdict, if need be; and the real question is, what is the effect of this error as to one joint wrong-doer upon the verdict rendered jointly against all? Upon this question there is a conflict of authority, the older cases, and perhaps some modern ones, holding that one of several defendants in an action of tort cannot be awarded another trial unless all are. *Bond v. Sparks*, 12 Mod. 275; *Parker v. Godin*, 2 Strange, 813; *Doe de Dudgeon v. Martin*, 13 Mees. & W. 810, and note *a*; 2 Tidd, Pr. 911. The better doctrine is, however, otherwise, as the cases abundantly show; and while some of them endeavor to establish distinctions from the old rule, others boldly repudiate or ignore it altogether. In *Price v. Harris*, 25 E. C. L. 159, 10 Bing. 331, the action was against 17 defendants "for injury in the nature of waste." There was a judgment by default against Proctor for £900, and a verdict for the other 16 defendants. The court granted the plaintiff a new trial as to Harris, upon payment of all costs except Proctor's, who was in no event to be held liable beyond the £900, and upon entering a *nolle pros.* as to the other 15 defendants. *Brown v. Burrus*, 8 Mo. 26, was an action of trespass against three defendants for taking away a negro girl; trial resulting in a verdict in favor of two of the defendants and against the other. Held, he could move for a new trial. In *Palmer v. Kennedy*, 7 J. J. Marsh. 498, the question was whether both defendants must join in appeal from a judgment rendered against them by a justice of the

peace, and in resolving it in the negative the court uses this language: "If there be two or more defendants, and judgment be rendered against them jointly in the circuit court, one who considers himself aggrieved may move for a new trial, and obtain it, against the will of his co-defendant." *Terpenning v. Gallup*, 8 Iowa, 74, was an action of trespass *quare clausum fregit*, with a verdict against all six defendants, who moved for a new trial. On plaintiff's motion, the verdict was set aside as to one defendant, and the court refused the others a new trial, saying:

"The objection now is that, if the verdict was set aside as to one of the defendants, it should have been as to all; that it was an entirety, and that the judgment must strictly follow the verdict. We do not so understand the law. In this action the jury could have found all the defendants guilty, or all not guilty, or a part guilty and the others not guilty. And after verdict it was perfectly competent for the court to grant a new trial to one or more of the defendants, if satisfied that they were improperly convicted, and render judgment upon the verdict as to the others."

Where defendants sued as joint tort-feasors answer separately, H. averring that he, with others not sued, committed the act, which was lawful, and that his co-defendants had no part in it, held, "it was not error to the prejudice of H. to overrule his motion for a new trial, while sustaining a separate motion by the other defendants to set aside the verdict as to them." *Heffner v. Moyst*, 40 Ohio St. 112. *Hayden v. Woods*, 16 Neb. 306, 20 N. W. Rep. 345, was an action of tort against husband and wife. Separate motions were made by them, and overruled. The contention in the supreme court was that, if the verdict against the wife could not be sustained, the husband was also entitled to a new trial:

"*Per Curiam*. If no other reason for the opposite rule could be assigned, we think one can be found in the separation of their motions for new trial and their petitions in error, by which they have separated and severed their rights and interests. But to our minds it is clear that the results claimed by plaintiffs in error do not necessarily follow. While it is true that the action is against both jointly, it by no means follows that the verdict must be against both or neither. * * * A cause of action is stated against both the plaintiffs in error in certain counts, and the proof makes a case against one of them, but, in our opinion, not against the other. Could not the jury have found against one and not the other, and their verdict stand? If so, why cannot a new trial be granted to one and not the other? * * * Tort-feasors are jointly and severally liable. An action may be maintained against one or all, at the option of the injured party. Several and separate judgments may be rendered in separate actions, but the satisfaction of one satisfies all, and to this extent only may their liability be said to be joint."

Citing the above cases and others, it is said in 16 Amer. & Eng. Enc. Law, p. 645, that this rule applies "to a motion by the defendants in actions against two or more tort-feasors, and a verdict may be set aside as to one and a judgment rendered against the others." *Houston v. Bruner*, 39 Ind. 376.

Such is believed to be the well-settled law in this state. In *Smith v. Foster*, 3 Cold. 147, there was a verdict and judgment against several defendants for \$25,000 in an action of tort. An application by Cox, a defendant, was made by petition to set aside the judgment as to himself

and the other defendants, which was denied, and an appeal taken. The supreme court in its opinion regards and treats Cox's petition "as in the nature of an application for a new trial," and, in affirming the judgment as to two of these defendants and reversing as to the others, says:

"In an action of this kind, where the legal liability of the parties is several, as well as joint, and the plaintiff might maintain the action against any one or all the defendants, they cannot be heard to say that because the judgment is erroneous as to one or more of their co-defendants, it is therefore erroneous as to them."

And even in an action by the state upon a liquor license bond, where the judgment was against all the parties to the bond who were defendants, and new trial refused below, the court, affirming the judgment as to two of them, and remanding for a new trial as to the other, says:

"The rule that a judgment is an entire thing, and therefore, if void as to one party, cannot be allowed to stand as to any of the other parties, is a purely technical one. A judgment may be correct as to one, and altogether erroneous as to another joint party." *Webbs v. State*, 4 Cold. 199, 204; *Gordon v. Pitt*, 3 Iowa, 385.

Of the cases cited to the contrary of this rule by counsel for defendants, *Sperry v. Dickinson*, 82 Ind. 132, was an action for the foreclosure of a mortgage; *Riggs v. Hatch*, 16 Fed. Rep. 839, an action upon a promissory note; *Draper v. State*, 1 Head, 262, a "joint" action upon a sheriff's bond; *Findlay v. Hinde*, 1 Pet. 241, an equity cause, in which the question was one of proper parties; *Trousdale v. Donnell*, 4 Humph. 273, an action of debt simply; and *Bank v. McClung*, 9 Humph. 98, a joint action upon a note, in which judgment was rendered against the makers and in favor of accommodation indorsers. *Ouly v. Dickinson*, 5 Cold. 486, so much relied on, was replevin when service was had on only one of two defendants. In awarding a new trial to both, the supreme court bases its judgment on the idea that in replevin upon a restoration of the property involved, in case plaintiff should fail in the action, "the title or right of possession may be with the defendants jointly;" the opinion using this language: "It is enough that in a case of this kind it appears that the interests and rights of the defendants are so blended that it is not proper to sever them in the record."

Without further citation or review of the authorities, I am well satisfied that the court has power to grant Sullivan a new trial of this case, and overrule the motion as to the other defendants; and, in view of all the facts and circumstances of the case, and of the defenses set forth in his affidavit filed in support of his motion, and in order that he may have opportunity to make such defense upon its merits, and that, notwithstanding the technical reasons disclosed by the pleadings and record in this suit, there may be no failure of justice, I have concluded to grant him a new trial. The impression made upon me at the argument of his motion was that this course should be pursued unless prevented by some rule requiring a different judgment. Such rule does not seem to exist here. This verdict imposes upon Sullivan a penalty for a wrong which, if his affidavit be true, he did not commit, at least not actively;

and, if he be liable at all, it is only because he was a partner in the business about which the trouble arose with those who committed it against the plaintiff, and did not, knowing the facts, disaffirm it for himself. The facts as to him were not before the jury as they really existed, and, although this is technically his own fault or that of his counsel,—one or the other, or both,—it does not seem to me entirely just that a verdict, which perhaps the jury would not have given against him to its full extent if they had known all the facts, should stand only because of his negligence of his defense. It is a very severe penalty for negligence in the conduct of a lawsuit by one who treated it so lightly that he gave it no attention, and did not attend the trial. This shows that he did not appreciate its importance to him or the nature of his defense.

Without considering all the numerous grounds upon which the other defendants make their motion for a new trial of this entire case, or ruling upon the many perplexing questions presented by them, I have concluded, after much hesitation, to grant a new trial as to all of the defendants. The question of the joint and several liability of these defendants as tort-feasors was not much discussed before the jury, if at all. Proof was admitted showing the solvency of the firm of McTighe & Co., and its ability to answer any probable verdict that might be found against the firm. It by no means follows that this or another jury would compute the same damages against two of the defendants as against all three of them, and while, perhaps, in strict law, this would not be a sufficient technical ground for a new trial in an action of tort like this, where the defendants are jointly and severally liable to the plaintiff for such damages as he may recover, yet, exercising that discretion which all courts possess in the matter of new trials, and to enable the defendants to more fully present this view of the case to the consideration of another jury, I am constrained to direct a new trial of this case, solely because I feel that it may be unjust to McTighe and McKee, whatever wrong they may have committed against the plaintiff, however enormous the outrage upon him may have been, and however justly they may deserve this verdict, to assume that the jury, with all the facts before them as to Sullivan, and excusing or mitigating the wrong as to him, would have given the same verdict as to them. There were three partners sued, and all were supposed to be equally guilty and equally liable. From the beginning to the end, no distinctions were made between them, and the verdict was given on this basis. However technically we may have the power (and I do not doubt it) to enforce against two a verdict which was given against three, it seems to me it would be yielding too much to a sense of justice to an outraged plaintiff, and in some sense would be assuming the power and authority of the jury in affixing the damages, for the court to discharge one of three, and hold only the two, when the jury had not had their attention called to the matter in any way. To invoke the rule of the separate liability of each and every one of several joint tort-feasors for the very first time in the trial of a case upon the motion for a new trial, and to enforce it by a

ruling that one may be discharged after verdict against all, and the others held, may be lawful enough under some circumstances; but a court acting impartially towards all parties must feel a sense of its injustice when it appears that neither in the declaration, the pleas, the arguments of counsel, nor the charge of the court were the jury invited to give their consideration to that subject, and that they rendered a verdict supposing, as they might do, that all were to share its burdens, if all were able to do it. It is too much like a verdict by the court than one by the jury to take advantage of these technicalities by refusing two of the defendants a new trial which is given to the other. Another jury will vindicate the plaintiff just as surely as this has done, if the facts and the law entitle him to the vindication he has received at the hands of this jury, whose enforcement of the right of exemption from wrongful arrest and imprisonment is in every way to be commended, and whose verdict is set aside most reluctantly for no fault of theirs. But the court will be better satisfied that such vindication comes from the verdict of a jury, with full knowledge of all the facts, than from a ruling of the court, however technically correct, that imposes upon two a liability the jury intended that three should bear.

New trial granted.

In re WILMERDING et al.

(Circuit Court, S. D. New York. March 9, 1892.)

CUSTOM DUTIES—TARIFF ACT OF OCTOBER 1, 1890—CRASH OR CANVAS.

Crash or canvas, 15 and 17 inches in width, respectively, made of flax tow, and of from 1 to 2 per cent. of cotton, and containing less than 100 threads to the square inch, counting both warp and filling, is not dutiable at 40 per cent. *ad valorem*, as manufactures of other vegetable fiber except flax, or of which other vegetable fiber except flax is the component material of chief value, under the provision for such manufactures contained in paragraph 874 of the tariff act of October 1, 1890, (chapter 1244, 26 U. S. St. p. 567.)

At Law. Appeal by importers from decision of the board of United States general appraisers.

During the year 1891 the firm of Wilmerding & Bisset imported from a foreign country into the United States at the port of New York certain merchandise, consisting of crash or canvas. This merchandise, having been returned by the local appraiser as manufactures of flax and jute, flax chief value, not exceeding 100 threads to the square inch, was classified for duty as manufactures of flax, under the provisions for such manufactures contained in paragraph 371 of the tariff act of October 1, 1890, (chapter 1244, 26 U. S. St. p. 567,) and duty at the rate of 50 per centum *ad valorem*, as provided by that paragraph, was exacted thereon by the collector of customs at that port. Against this classification and this exaction the importers protested, claiming that this merchandise, having, as its component material of chief value, tow,

was dutiable at the rate of 40 per centum *ad valorem* under the provision for "all manufactures of jute, or other vegetable fiber, except flax, hemp, or cotton, or of which jute, or other vegetable fiber, except flax, hemp, or cotton, is the component material of chief value, not specially provided for in this act," contained in paragraph 374 of the same tariff act. The board of United States general appraisers, to which the invoice of this merchandise, and all the papers and exhibits connected therewith, were transmitted by the said collector pursuant to section 14 of the administrative customs act of June 10, 1890, (chapter 407, 26 U. S. St. p. 131,) after taking evidence, (September 17, 1891, § 11,882, G. A. § 73,) found that this merchandise was crash or canvas, 15 and 17 inches in width, respectively; that it consisted mainly of flax tow, and, in the case of one portion thereof, 1 per cent of cotton; of another portion, 1½ per cent. of cotton; and of still another portion, 2 per cent. of cotton; that it contained less than 100 threads to the square inch; that tow was the coarse and broken part of flax; that, by specific provision of the aforesaid act, such portion of flax, when imported in bulk, was dutiable at one-half of 1 cent per pound; that textile fabrics, however, woven of this substance, become a manufacture of flax, and are subject to the rate of duty applicable thereto, when imported into the United States; and that the aforesaid classification of the collector was correct. From this decision of the board the importers appealed to the United States circuit court for a review of the questions of law and fact involved therein. Thereafter the board made its return, and upon the same the case was tried.

W. Wickham Smith, of Curie, Smith & Mackie, for importers, argued, in substance, that, as tow of flax was specifically provided for by paragraph 359 of the aforesaid tariff act, the merchandise in suit was therefore not a manufacture of flax, within the meaning of the provision for such manufactures contained in said paragraph 371; but was a manufacture of a vegetable substance other than flax, and dutiable as such, under the provision for such manufactures contained in said paragraph 374; citing, in support of this contention, the remarks of the supreme court as to "shoddy" found in the case of *Seeberger v. Cahn*, 137 U. S. 95-97, 11 Sup. Ct. Rep. 28.

Edward Mitchell, U. S. Atty., and *Thomas Greenwood*, Asst. U. S. Atty., for collector.

LACOMBE, Circuit Judge, (*orally*.) I shall affirm the decision of the board of United States general appraisers in this case, upon the ground that I cannot find that this article is composed of any other vegetable fiber except flax; and therefore I do not find that it is within the designation of the particular paragraph referred to by the importers. Whether or not it is a manufacture of flax I do not now decide. I cannot see that it is a manufacture of some vegetable fiber other than flax. Decision of the board of United States general appraisers affirmed.

In re SCHEFER et al.

(Circuit Court, S. D. New York. March 9, 1892.)

CUSTOMS DUTIES—CLASSIFICATION—WORSTED SHAWLS EMBROIDERED.

Worsted shawls, embroidered with silk, are dutiable as worsted shawls under Schedule K, par. 392, tariff act of October 1, 1890, and not as embroideries made of worsted, under the proviso contained in paragraph 373, Schedule J, and paragraph 398, Schedule K, of said tariff act.

At Law. Application by the importers under the provisions of section 15 of the act of congress, entitled "An act to simplify the laws in relation to the collection of the revenues," approved June 10, 1890, for a review by the United States circuit court of the decision of the board of United States general appraisers at the port of New York, affirming the decision of the collector on the classification for duty of certain merchandise imported into said port in the month of April, 1891. The merchandise in question consisted of so-called shawls, being manufactures of worsted embroidered with silk. They were returned by the United States appraiser as "worsted shawls, embroidered, 60/60," and duty was assessed thereon by the collector at the rate of 60 cents per pound, and 60 per centum *ad valorem* under the provisions of paragraph 398 of Schedule K, and the proviso contained in paragraph 373, Schedule J, of the tariff act of October 1, 1890. Said paragraph 398, omitting the provisions immaterial to this case, is as follows:

"On webbings, * * * and embroideries * * * wrought by hand or braided by machinery, * * * made of wool, worsted, the hair of the camel, goat, alpaca, or other animals, * * * the duty shall be sixty cents per pound, and in addition thereto sixty per centum *ad valorem*."

The proviso in paragraph 373 is as follows:

"Provided that articles of wearing apparel, and textile fabrics, when embroidered by hand or machinery, and whether specially or otherwise provided for in this act, shall not pay a less rate of duty than that fixed by the respective paragraphs and schedules of this act upon embroideries of the materials of which they are respectively composed."

Against this classification the importers protested, claiming (1) that the goods were specifically provided for in Schedule K, paragraph 392, of the act of October 1, 1890, and, being worth over 40 cents per pound, were dutiable at 44 cents per pound, and 50 per centum *ad valorem*; or (2) that the shawls were dutiable as wearing apparel under paragraph 396 of Schedule K of said tariff act; or (3) that the goods were not at and prior to October 1, 1890, commercially known as "embroideries." Said paragraph 392, as far as applicable, provides as follows:

"On woollen or worsted cloths, shawls, * * * valued at above forty cents per pound, the duty per pound shall be four times the duty imposed by this act on a pound of unwashed wool of the first class, and, in addition thereto, fifty per centum *ad valorem*."

The board of United States general appraisers affirmed the decision of the collector, and the importers thereupon procured the return of the

said board of general appraisers to be filed in the United States circuit court pursuant to the provisions of the above-mentioned act of June 10, 1890; and, there being no issue of fact involved, the case came on to be tried in the circuit court upon the return of the said board of general appraisers.

On behalf of the government it was urged by the United States attorney that the pronoun "they," occurring in the last clause of the proviso in paragraph 373, namely, "upon embroideries of the materials of which they are respectively composed," referred to the substantives which were the subjects of the proviso, namely, "articles of wearing apparel and textile fabrics;" and that the intent of congress was that no article or fabric composed of wool or worsted, even if embroidered with other materials, should be admitted at a less rate of duty than that provided for embroideries made of wool or worsted in paragraph 398 of the tariff act under consideration; and that these goods, being embroidered shawls, which were articles of wearing apparel composed of worsted, should pay the duty as if they were embroideries made of worsted. The counsel for the importers contended that the pronoun "they" in the last clause of the proviso in paragraph 373 referred to the noun "embroideries," which more immediately preceded it; and urged that the shawls in question should not be entered at a less rate of duty than that affixed upon embroideries of silk under paragraph 413, namely, 60 per centum *ad valorem*, which in this case was much less than the amount contended for in the importers' protest, and which they were willing to pay, namely, 44 cents per pound, and 50 per centum *ad valorem*, under paragraph 392.

Curie, Smith & Mackie, for importers.

Edward Mitchell, U. S. Atty., and *James T. Van Rensselaer*, Asst. U. S. Atty.

LACOMBE, Circuit Judge. It seems to me to be plain that what congress meant to provide by this clause was this: that you shall not get in any of your woollen articles at any less rate than that which is specifically fixed for them, by putting some ornamentation upon them, and saying that that makes them specifically a different article, which should come in at a less rate; that you shall not do that with any other kind of goods which you may embroider; and, if the embroidery which you put on an article is of a material which pays a higher rate of duty when embroidered than the article which you put it on, you shall pay on that article when you bring it in just the same rate of duty that you would if bringing in the embroidery without using any vehicle to get it into this country. I think that was the intent of congress. And this being a shawl, and being provided for as a "woolen shawl," and having a particular duty imposed upon it in the wool schedule, at such a rate as congress supposed was sufficient to protect the industry of manufacturing woollen shawls, I do not see why the entire intent of congress is not accomplished by the provision that it shall not escape the operation of that schedule by coming in at a less rate if a cheaper embroidery is put upon it. In order to avoid that, they provide specifically that

it shall not, under any circumstances, pay a less rate than the duty imposed upon the embroidery that is put on it. I cannot see that the proviso means what the board of appraisers seem to think it was meant to accomplish; it seems to me it means just as plainly the opposite. The decision is reversed.

In re MEGROZ et al.

(Circuit Court, S. D. New York. March 8, 1892.)

CUSTOMS DUTIES—ADMINISTRATIVE CUSTOMS ACT OF JUNE 10, 1890—UNITED STATES GENERAL APPRAISER—REAPPRAISEMENT.

A United States general appraiser, when reappraising the value of imported merchandise, pursuant to the requirements of section 13 of the administrative customs act of June 10, 1890, (chapter 407, 26 U. S. St. p. 131,) is not constrained at all by the rules that pertain to courts, but may reappraise such merchandise at a higher value than that fixed by the local appraiser, even though such reappraisement be had at the instance of the importer thereof, and not at that of a collector of customs.

At Law. Appeal by importers from a decision of the board of United States general appraisers.

During the month of August, 1890, the firm of Megroz, Portier, Magny & Co. imported from a foreign country into the United States at the port of New York certain merchandise. This merchandise was appraised by the local appraiser at a value greater than the entered value thereof. Pursuant to the provision of section 13 of the administrative customs act of June 10, 1890, (chapter 407, 26 U. S. St. p. 131,) the importers, within the time prescribed thereby, gave notice of their dissatisfaction with the appraisement made by the local appraiser to the collector of customs, who at once directed a reappraisement of this merchandise by one of the general appraisers, who appraised this merchandise at a value above that fixed by the local appraiser. Thereafter, pursuant to the provisions of said section 13, the importers, within the time prescribed thereby, gave notice of their dissatisfaction with the appraisement made by the one general appraiser to the collector of customs, who transmitted the invoice of this merchandise, and all papers appertaining thereto, to a board of three general appraisers, who, after examination, decided that the value of this merchandise, as appraised by the one general appraiser, was the dutiable value thereof. Upon the value of this merchandise so decided to be the dutiable value the collector of customs assessed duty at the rate prescribed for such merchandise by the tariff act in force at the time of its importation. Against the assessment of duties on the value of this merchandise, decided as aforesaid to be the dutiable value thereof, the importers protested, claiming, in substance, that the reappraisement was illegal and void, on the ground that the said one general appraiser had no authority on reappraisement to raise values above those fixed by the local appraiser, the appeal from the appraisement made by the latter not having been

taken by the collector, but by the importers. Upon receipt of this protest, as provided by section 14 of the aforesaid administrative customs act, the collector submitted the case thus presented to a second board of three general appraisers at this port, who overruled the importer's protest, and affirmed the decision of the collector as to the aforesaid assessment of duties. Within the time prescribed by section 15 of the aforesaid administrative customs act the importers applied to the United States circuit court for this district for a review of this last-mentioned decision.

W. Wickham Smith, of Curie, Smith & Mackie, for importers.

Edward Mitchell, U. S. Atty., and Thomas Greenwood, Asst. U. S. Atty., for collector.

LACOMBE, Circuit Judge, (*orally.*) An appraiser, whenever called upon to act, is not constrained at all by the rules that pertain to courts, but goes to work to satisfy his own mind, in the best way he can, what goods are worth; and he can do that notwithstanding he reaches the conclusion that the goods are worth more than the value fixed by the local appraiser. The decision of the board of United States general appraisers is therefore affirmed.

In re QUAINANCE.

(*Circuit Court, S. D. New York. March 9, 1892.*)

CUSTOMS' DUTIES—CLASSIFICATION—SILK AND COTTON SHIRTINGS.

Silk and cotton shirtings, invoiced as "mixed shirtings," consisting of cotton warp threads, some white and some colored, and silk weft threads, the cotton constituting 63.27 per cent. in weight of the fabric, and the silk 36.73 per cent. in weight, the silk being largely the component material of chief value, *held*, that the merchandise was dutiable at 50 per cent. *ad valorem* under paragraph 414 of the tariff act of October 1, 1890, and not, as classified by the collector, at 10 cents per square yard, and 35 per cent. *ad valorem*, under paragraph 348 of the same tariff.

At Law.

Application by the collector of customs at New York for a review of the decision of the board of United States general appraisers reversing the decision of the collector on the classification of certain merchandise entered at the port of New York in March, 1891, which was invoiced as "mixed shirtings," and returned by the appraiser as "silk and cotton shirtings, silk chief value, 10/35," and duty accordingly assessed thereon by the collector at the rate provided for cotton cloth containing an admixture of silk, at 10 cents per square yard, and, in addition thereto, 35 per cent. *ad valorem*, under Schedule I, par. 348, of the tariff act of October 1, 1890. Against this classification the importers protested, claiming that their goods were dutiable only at 50 per cent. *ad valorem*, under the provisions of Schedule L of said tariff act, (paragraph 414,) as

manufactures of which silk is the component material of chief value, not specially provided for in the act. The board of general appraisers sustained the protest of the importers, finding as matters of fact: "(1) That the merchandise is known commercially as 'shirting;' (2) that it is not cotton cloth, but is a mixed fabric, composed of silk and cotton, of which materials silk is the greater value; (3) that it contains less than 200 threads to the square inch, counting both the warp and filling;" and that the merchandise was dutiable at 50 per cent. *ad valorem* under paragraph 414 of the tariff act. The collector procured the return of the board of general appraisers to be filed in the circuit court, pursuant to the provisions of section 15 of the act of June 10, 1890, and thereupon obtained an order from the court referring the matter to one of the said board of general appraisers as an officer of the court to take testimony therein. Upon this reference it was proved that the material in question consisted of cotton warp threads, some white and some colored, comprising 63.27 per cent. in weight of the whole fabric, and of silk weft threads, constituting 36.73 per cent. in weight of the whole. It was impossible to contradict the finding of the board of general appraisers that silk was largely the component material of chief value. On the trial in the circuit court it was contended on behalf of the government that the term "cotton cloth," as used in the present tariff, was not a trade term, as it was not under similar provisions in the tariff of 1883, as decided by the circuit court in *Ullmann v. Hedden*, 38 Fed. Rep. 95; and that the provision for cotton cloth with admixture of silk, in paragraph 348, was more specific than the provision for manufactures of silk in paragraph 414; and that the undisputed evidence showed the material was composed in weight of nearly two-thirds cotton and a little over one-third silk.

Edward Mitchell, U. S. Atty., and *J. T. Van Rensselaer*, Asst. U. S. Atty.

Comstock & Brown, for importers.

LACOMBE, Circuit Judge. I do not find any difficulty in interpreting paragraphs 348 and 414. Reading them together, they seem to provide that cotton cloth shall pay a certain rate of duty when it contains an admixture of silk, but, if that admixture of silk is present to such an extent that it becomes a manufacture of which silk is the component material of chief value, then the rate of duty to be paid by the article is not the one provided by paragraph 348, but is that provided by paragraph 414. I shall therefore affirm the decision of the board of appraisers.

In re MUSER et al.

(Circuit Court, S. D. New York. March 21, 1892.)

1. CUSTOMS DUTIES—BOARD OF APPRAISERS—REVIEW BY CIRCUIT COURT—EVIDENCE.

On a review by the circuit court, under Act Cong. June 10, 1890, § 15, of the decision of the board of general appraisers, a motion to strike out testimony taken before the board will be denied, although the record, as certified, states that the facts were found "from the evidence and common knowledge," and included evidence taken in other cases, in which the importers were not concerned, and had had no opportunity to answer or controvert the same.

2. SAME.

It is clearly the intention of the act, as shown by the proceedings in congress leading to its passage, that the board of general appraisers should possess expert knowledge of their own, and that their decision should be based upon such knowledge and the evidence submitted, or upon no evidence at all, or in the absence of the importer and his witnesses. *Rector of Holy Trinity v. U. S.*, 12 Sup. Ct. Rep. 511, applied.

3. SAME—EVIDENCE.

All evidence taken before the board is by section 15 made competent before the circuit court on review, but the importer is then entitled to controvert it under the ordinary rules of evidence.

At Law.**STATEMENT BY LACOMBE, CIRCUIT JUDGE.**

The importers in this case have applied to the circuit court for a review of the decision of the board of general appraisers, acting under the act of June 10, 1890, known as the "Administrative Customs Law." The board had duly filed the return required by section 15 of that act, and motion is now made to strike therefrom certain evidence included in such return.

W. W. Smith, for the motion.

Edward Mitchell, U. S. Atty., and *Henry C. Platt*, Asst. U. S. Atty., opposed.

LACOMBE, Circuit Judge. The importers, in this case, being dissatisfied with the decision of the collector as to the classification of their goods, and rate of duty imposed thereon, gave the notice in writing required by section 14 of the customs administrative act. Thereupon all the papers and exhibits were transmitted to the board of three general appraisers, which board proceeded to examine and decide the case thus submitted. To assist them in reaching a conclusion the testimony of witnesses produced by the importers and by the collector of the port of New York was taken under oath, and such testimony is returned by them. A statement of the facts involved in the case, as found by the board, is duly certified to this court, prefaced by the statement that they find the facts "from the record and the evidence, and from common knowledge." There is also included in the return evidence taken in two other cases, with which these importers had no concern, of the existence of which testimony they were wholly ignorant, and which they never had any opportunity to answer or controvert before the board. If the proceedings in these cases before the board of general appraisers are to

be regulated in accordance with the principles which prevail on the trial of causes in courts, a system of procedure as abnormal as this could be supported only by the clearest and most unmistakable language in the statute providing for it. But the board of appraisers do not sit merely as a tribunal created to determine a controversy between parties upon evidence introduced by one side or the other. Whatever may be the language of the statute, the true rule for its interpretation is to be found in the intention of its makers, and we may find that intention in the record of the proceedings which terminated in its enactment. *Rector, etc., of Holy Trinity Church v. U. S.*, 12 Sup. Ct. Rep. 511. The excerpts from the debates in the senate (volume 21, pt. 4, Cong. Rec. 51st Cong. 1st Sess. p. 4004 et seq.) which were submitted on the argument by the district attorney leave no doubt as to the character and functions of the board which congress intended to create. The appraisers were to be experts, with knowledge of their own as respects the values and classification of imported goods,—knowledge derived, not only from sworn evidence taken in the particular case in hand, but from countless other cases involving similar goods. A clause securing to the importer the privilege of being present before the board of general appraisers, with or without counsel, as he might elect, was stricken out before passage, with the express intent that the proceedings before the board might be to a large extent informal, and that they might sit, not as a court, but as an *ex parte* revenue tribunal, before which the parties were to have no right to be heard by counsel, to be confronted with witnesses, or to make argument, although the board might, if it chose, require the attendance of witnesses, and invite the importer to attend and state his case personally or by counsel. It was plainly contemplated by the framers of the act that the board would sit as experts to decide in a summary manner questions of value and classification arising under the tariff laws, reaching their decision from their own expert knowledge and from the evidence submitted to them, or such as they might obtain. A remonstrance by importers against the passage of the act in its present shape, which was presented and read in the senate, expressly criticised the pending bill because "no right is given to the importer to be present, with or without counsel, at the proceedings of the board, or to cross-examine the government's witnesses," and because "the board can fix the classification and rate upon any or even no evidence at all, in the absence of the importer and any witnesses he might be able to secure," and because "all the testimony that the board may thus obtain or choose to use is made competent evidence before the circuit court, if an appeal is taken." I do not find anything in the letter of the act itself which requires a different interpretation of its meaning, and, even if I did, should not, since the decision in the *Holy Trinity Case*, *supra*, feel warranted in abiding by its letter, in the light of such unmistakable evidence as to the intention of its makers.

As the act (section 15) expressly provides that all the evidence taken by and before the appraisers shall be competent evidence before the circuit court, and as their return shows that the evidence in the two cases with

which this importer was not concerned was taken by or before them, the motion to strike it out is denied. The importer has abundant opportunity to controvert any such evidence, upon the reference to which he is entitled under the fifteenth section of the act.

In re Cook.

(Circuit Court, E. D. Wisconsin. April 4, 1892.)

1. **HABEAS CORPUS—INTERSTATE EXTRADITION.**

In interstate rendition, the warrant of the executive is not conclusive of the fact of flight. The courts upon *habeas corpus* may inquire and determine the fact, and this at any time before the actual surrender of the prisoner to the demanding state.

2. **SAME.**

The executive warrant is, however, *prima facie* evidence of flight, and, being unassailed before delivery of the prisoner to the demanding state, the surrender is lawful. The executive warrant has, upon surrender of the prisoner, spent its force. He is then held in lawful custody, under process of the state, and cannot thereafter assert that he was not a fugitive from justice.

3. **SAME—FUGITIVE FROM JUSTICE.**

One who personally, within a state, has set in motion the machinery for crime, and departs the jurisdiction, after the commission of an act in furtherance of, but before the consummation of, the offense, is a "fugitive from justice," within the meaning of the law.

4. **SAME—TRIAL FOR OTHER OFFENSES.**

Whether one surrendered by one state to another can be tried for any other offense than that for which he was surrendered, *quære?*

(*Syllabus by the Court.*)

Writ of Habeas Corpus.

STATEMENT BY JENKINS, DISTRICT JUDGE.

On the 13th of February, 1892, upon the petition of Charles E. Cook, claiming to be restrained of his liberty by one Colden A. Hart, sheriff of the county of Dodge, state of Wisconsin, a writ of *habeas corpus* was issued out of this court, to which the sheriff made due return, which the petitioner duly traversed. The facts disclosed by the record, so far as essential to the determination of the matter, are substantially these:

On the 5th day of March, 1891, one George W. Morse complained to a justice of the peace of the county of Dodge that the petitioner, Charles E. Cook, and one Frank Leek, on the 7th of May, 1889, opened a bank at Juneau, in the county of Dodge, styled the "Bank of Juneau," and entered upon and engaged in a general banking business, having a pretended capital of \$10,000, and continued in such business, soliciting and receiving deposits up to and including the 20th day of June, 1890, upon which day the bank closed its doors and failed. That Cook was the principal owner of such bank, owning nine-tenths interest therein, Leek owning one-tenth interest therein. That Cook was an officer of the bank, and had the general supervision of the business, which was transacted either by him personally, or, under his order and direction, by one Richardson, acting as his agent. That from January 6, 1890, to

June 20, 1890, Cook, by the inducements and pretenses so held out by him, received and accepted on deposit, from citizens of the county, money to the amount of \$25,000. That this was done by the express order and direction of Cook, and with his full knowledge; and that no part of said amount has been paid or returned to the depositors. That on the 6th day of January, 1890, Cook and Leek and the bank were severally insolvent, and have since so continued, and that such insolvency of the parties and of the bank was well known to Cook on and ever since the 6th of January, 1890; and that, at the time of receiving all the deposits stated, Cook knew, and had good reason to know, that he and Leek and the said bank were each and all of them unsafe and insolvent. That on the 20th of June, 1890, at Juneau, in the county of Dodge, Cook, as such banker, did accept and receive a deposit in said Bank of Juneau from one Herman Becker, a resident of the county of Dodge, of \$175, which has never been paid or returned; and that, at the time of receiving such deposit, Cook knew, and had good reason to know, that he and the said Frank Leek and the said Bank of Juneau were each and all of them unsafe and insolvent, and that such deposit from Becker, and all the other deposits mentioned, were received by Cook with intent to cheat and defraud, contrary to the statute of Wisconsin. Thereupon the justice of the peace to whom the affidavit and complaint had been presented issued the usual warrant for the arrest of Cook, upon which, accompanied with several affidavits in support of the principal charge; and also upon an affidavit of the then sheriff of the county of Dodge, who states certain ineffectual attempts to find Cook in the city of Chicago, and who states "that he knows that said Charles E. Cook was at said times, and now is, a fugitive from justice;" and also upon the application of the district attorney for the county of Dodge, who states that "said Charles E. Cook is a fugitive from justice, and has fled from the justice of the state of Wisconsin, and avoided arrest,"—the governor of the state of Wisconsin, on the 9th day of March, 1891, issued his requisition upon the governor of the state of Illinois, requiring the apprehension of the said Cook, and his delivery to an agent deputed to receive and convey him to the state of Wisconsin. That requisition was honored by the executive of the state of Illinois, who issued his warrant on the 10th day of March, 1891, to the proper peace-officers of that state, reciting that the executive authority of the state of Wisconsin had demanded the apprehension and delivery of Charles E. Cook, "represented to be a fugitive from justice," and had produced and laid before him authenticated copies of the charge hereinbefore recited, and requiring the officers to whom the warrant was addressed, to arrest and secure the said fugitive, Charles E. Cook, if to be found within the limits of the state, and to deliver him into the custody of the agent of the executive authority of the state of Wisconsin, appointed to receive the said fugitive. Under such warrant Cook was arrested by the sheriff of the county of Cook, in the state of Illinois, and delivered to the agent of the executive authority of Wisconsin, who conveyed him to the county of Dodge, in the state of Wisconsin, where he was examined before the magistrate issuing the warrant,

and held to answer to the charge. Subsequently, and in November, 1891, the district attorney filed his information against the petitioner, Cook, setting forth the offense charged in the original complaint before the magistrate, upon which he was arraigned, and to which he was compelled to plead, and held to bail in the sum of \$5,000. Afterwards, and prior to the writ of *habeas corpus*, Cook was surrendered by his bail, and was held by the sheriff of the county of Dodge under process issued out of the said court, to answer the charge. At the February term, 1891, of the circuit court of Dodge county, the grand jury of the county presented seven indictments against the petitioner, Cook, charging him with different violations of the criminal laws of the state of Wisconsin, some for larceny, some for embezzlement, and some for receiving deposits in the bank, knowing the bank to be unsafe and insolvent. All these offenses are charged to have been committed in connection with this business of banking; the times of the alleged offenses varying, but all charged to have been committed between the 3d and 20th days of June, 1890. To the several indictments Cook was required to plead, and under them he was held to bail, and subsequently, and before this writ of *habeas corpus*, by his bail surrendered to the sheriff, in whose custody he was at the time of the issuance of the writ. The sheriff justified his detention of Cook under the writs issued upon the information and the several indictments stated.

It was established upon the hearing, to the satisfaction of the court, that Cook, for some years prior to the 20th of June, 1890, and for some years prior to his arrest upon the warrant of the executive of Illinois, had been, and still is, a resident of the city of Chicago, in the state of Illinois; that he had made occasional visits to the state of Wisconsin in connection with his banking business at Juneau and elsewhere; that he left Chicago on the 17th day of June, and went to Hartford, in the county of Washington, state of Wisconsin, where he spent the whole of the 18th day of June, thence proceeding to Beaver Dam, in the county of Dodge, where he was engaged during the whole of the 19th of June in business not connected with the Bank of Juneau; that early on the morning of the 20th of June, he left Beaver Dam, and made a continuous journey to Chicago, arriving there at 2 P. M. of the 20th, and did not, on the occasion of that visit to Wisconsin, visit or pass through the village of Juneau, and had not been at Juneau for some three weeks prior to the closing of the doors of the bank on the 20th of June. It was also conceded at the hearing that the particular deposit by Herman Becker, charged in the complaint upon which the requisition proceedings were had, was actually made at 4 o'clock in the afternoon of the 20th of June, and after the petitioner's arrival in Chicago. It is also proper to state that the petitioner testified at the hearing that he was a large stockholder in the Park National Bank of Chicago, which was closed by the comptroller of the currency on the 20th day of June, 1890; that he left Beaver Dam for Chicago upon a telegram stating that trouble existed with reference to that bank; that that bank was in fact solvent, and has paid all its debts, and that it should not have been closed by the comptroller;

that the closing of that bank compelled the closing of the doors of the Bank of Juneau; that up to that time, as he claims, not only the Bank of Juneau, but that he and Mr. Leek, were solvent, and that their subsequent insolvency was brought about by the improper closing of the Park National Bank.

Chas. H. Aldrich and Jos. V. Quarles, for petitioner.

W. C. Williams and P. G. Lewis, Dist. Atty., for respondent.

Before GRESHAM, Circuit Judge, and JENKINS, District Judge.

JENKINS, District Judge, (*after stating the facts as above.*) The record presents for consideration several grave and important questions: *First.* Whether it be competent for the judicial tribunals to review the action of the executive of Illinois in issuing his warrant. *Second.* If his action be subject to review, whether that action can be inquired into after the surrender of the alleged fugitive from justice, and when he is held under state process. *Third.* Whether the petitioner was a fugitive from justice. *Fourth.* Whether, assuming the legality of the proceeding for his rendition, he can be held or tried upon any other charge than that for which he was surrendered.

Undoubtedly, as between independent sovereignties, the surrender of fugitives rested merely in comity, and was confined to those whose crimes "touched the state," or were so enormous as to make them *hostes humani generis*. Vattel, book 1, c. 19; Vattel, book 2, c. 6. If there existed any moral obligation, it was quite imperfect, and was not recognized by the law of nations. The surrender could not be demanded as of right; but as Mr. Marcy observes in his Hulsemann letter, "comity may sometimes yield what right withholds." So, also, before the Revolution, a criminal fleeing from one colony found no protection in another. He was arrested wherever found, and sent for trial to the place of his offending; and this without formal compact, treaty, or agreement between the colonies. *Com. v. Deacon*, 10 Serg. & R. 129. In all such cases the manner in which he was brought within the jurisdiction could not be pleaded by the prisoner as a defense to the crime with which he was charged, or as ground for his discharge without trial. Each sovereignty had the right to determine for itself whether a fugitive from the justice of another sovereignty should find refuge within its jurisdiction; and, if it so pleased, to deliver the fugitive to the sovereignty whose justice he had offended. Every independent nation possesses, in absence of positive law, or of treaty obligation, the inherent right of expulsion of undesirable inhabitants. So, also, the prisoner could not rightly urge, by way of defense or in abatement, that he was forcibly and by abduction brought within the jurisdiction from a foreign country. The violation of the sovereignty of an independent nation is matter which touches the political relations of the two countries, and is of no concern to him. He may have, it is true, recourse in the law for the forcible abduction, but the manner of his subjection to the jurisdiction does not impair that jurisdiction, nor avail the prisoner against responding for his offense. *Ex parte Scott*, 9 Barn. & C. 446; *State v. Brewster*,

7 Vt. 118; *Dows' Case*, 18 Pa. St. 37; *Ker v. Illinois*, 119 U. S. 436, 7 Sup. Ct. Rep. 225. It is, however, more than doubtful whether in those countries where the common law prevails, and where personal liberty is the chief concern of the state, and is protected by constitutional safeguards, there exists any power, in the absence of treaty,—which is a law of the land, (*U. S. v. Rauscher*, 119 U. S. 407, 7 Sup. Ct. Rep. 234,)—to make surrender of a fugitive. It is true that such surrender was made by this government in 1864, in the case of Arguelles. In that case no opportunity was permitted by writ of *habeas corpus* to test the legality of the seizure. The action of the executive was severely criticised, and was sought to be justified upon the ground that “a nation is never bound to furnish asylum to dangerous criminals who are offenders against the human race.” Possibly the nature of the offense—selling human beings into slavery—may have induced the action of the executive, and may extenuate an act which is opposed to the holding of the state department from an early date to the present time, and to the declared opinions of such eminent statesmen as Albert Gallatin, John Quincy Adams, Mr. Livingston, Mr. Forsyth, Mr. Calhoun, Mr. Cass, Mr. Marcy, Mr. Hamilton Fish, Mr. Evarts, Mr. Frelinghuysen, and Mr. Bayard, and would seem a violation of the fundamental law that no man “shall be deprived of life, liberty, or property without due process of law.” In most civilized countries the imperfect moral obligation to surrender fugitives from justice has, by force of treaties, ripened into absolute duty. It cannot now be doubted that in those countries dominated by the common law extradition can only be had as provided by treaty, and for those offenses only denominated in the treaty.

The question of interstate rendition rests, however, upon different ground. The states are not, in respect to the surrender of fugitives, independent sovereignties. They cannot contract with each other for such surrender. By the compact of union they have yielded their sovereignty in that regard to the federal government. Such rendition of fugitives can only be rightfully effected under the provisions of the federal constitution, and the laws passed in pursuance thereof. That constitution provides (subsection 2, § 2, art. 4) that “a person charged in any state with treason, felony, or other crime, who shall flee from justice and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime.” Whether, since the constitution, a fugitive forcibly abducted from one state and delivered into the jurisdiction of another can be held for trial in the latter, may perhaps be an open question. In *Mahon v. Justice*, 127 U. S. 700, 8 Sup. Ct. Rep. 1204, such a case was presented to the supreme court. It was held by the court, Justice BRADLEY and Justice HARLAN dissenting, that no right secured under the constitution of the United States had been violated by such abduction, and the federal court could not interfere, “whatever effect may be given by the state court to the illegal mode in which the defendant was brought from another state.” Notwithstanding some expressions in the opinion of the court which would

seem to assert the lawful jurisdiction of the state courts under such circumstances, the point ruled is that no federal question was involved. Upon the main question the authorities are not in accord. It is happily not necessary for us to consider that question here. This constitutional provision was adopted, as one author has expressed the thought, that "the law might everywhere and in all cases be vindicated." The duty imposed is imperative, taking away all discretion, in case of an executive demand, "and makes that a matter of duty which else had been a matter of grace." Chief Justice GIBSON, *Dows' Case*, 18 Pa. St. 37. See, also, *In re Voorhees*, 32 N. J. Law, 145. The constitutional provision not being self-executing, congress provided for its enforcement by act of 12th February, 1793, preserved as section 5278 of the present Revision. It was thereby enacted that—

"Whenever the executive authority of any state or territory demands any person as a fugitive from justice of the executive authority of any state or territory to which said person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any state or territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the state or territory from whence the person so charged has fled, it shall be the duty of the executive authority of the state or territory to which such person has fled to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within six months from the time of the arrest, the prisoner may be discharged. All costs or expenses incurred in the apprehending, securing, and transmitting such fugitive to the state or territory making such demand shall be paid by such state or territory."

It is apparent that the act provides no means to compel the performance of the obligation enjoined, and that the duty of the executive upon whom demand is made is imperative. Whenever the executive of a state shall demand any person as a fugitive from justice of the executive of the state to which such person has fled, and shall produce a copy of the charge, certified by the executive of the state from whence the person so charged has fled, it shall be the duty of the executive of the state to which such person shall have fled to cause his arrest and surrender to the demanding state. The certificate of the executive authority of the demanding state is conclusive as to the charge of crime. The executive of the state where the fugitive is found has no right to look behind it, or to question it, or to inquire into the character of the crime charged. *Com. v. Dennison*, 24 How. 66. Whether the person demanded be a fugitive from justice is a question of fact to be determined in the first instance by the executive of the state upon whom demand is made, upon such evidence as he may deem satisfactory. *Roberts v. Reilly*, 116 U. S. 80, 95, 6 Sup. Ct. Rep. 291. But this investigation is purely *ex parte*, the demanded person having no right of opportunity to be heard. Here there was no finding by the executive in terms that Cook was a fugitive from justice. The recital in the writ is:

"The executive authority of the state of Wisconsin demands of me the apprehension and delivery of Charles E. Cook, represented to be a fugitive from justice." It is, however, ruled that the issuance of the warrant of rendition is of itself *prima facie* finding of the fact of flight, and sufficient to justify the removal until the presumption in its favor is overthrown by contrary proof. *Roberts v. Reilly, supra.* That decision by its very terms implies that the action of the governor is only presumptively regular, and can be reviewed by the courts. Surely it cannot be claimed that such action is conclusive upon personal right, and may not be inquired of by judicial tribunals. Surely it cannot be that the right to personal liberty hangs upon so slender a thread as the arbitrary will of the authorities of the demanding and surrendering states. "No person shall be deprived of life, liberty, or property without due process of law." That is the fundamental law of the land, coming to us from *Magna Charta*. It is not due process of law which condemns without hearing, which convicts without trial. The phrase "due process of law," or its synonym, "law of the land," cannot have better definition than that given by Mr. Webster in the *Dartmouth College Case*:

"By 'law of the land' is most clearly intended the general law;—a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society." *Dartmouth College v. Woodward*, 4 Wheat. 518.

It is essential to compliance with such executive demand that the person whose surrender is demanded should be adjudged a fugitive from the justice of the demanding state. The decision of the executive is not conclusive of that fact. And so we are of opinion that the action of the executive is reviewable by federal tribunals, and that it is competent for the courts to determine whether in fact the demanded person is a fugitive from justice. *In re Manchester*, 5 Cal. 237; *Ex parte Joseph Smith*, 3 McLean, 121; *Jones v. Leonard*, 50 Iowa, 106; *In re Mohr*, 73 Ala. 503; *Hartman v. Aveline*, 68 Ind. 353; *Wilcox v. Nolze*, 34 Ohio St. 520, 521.

But it is said that here the petitioner has been rendered to the demanding state, and is now held, not under the constitutional provision, but by virtue of state process. In other words, that the act of rendition has been consummated; that the federal process has spent its force, and is *functus officio*; that the writs of the state control the custody of the petitioner, and no federal question is here involved. In respect of this question we are without the decisive guidance of the ultimate judicial authority. We are referred to but two cases in the subordinate courts, and in these cases the judges seem to have arrived at opposite conclusions. In the *Case of Noyes*, 17 Alb. Law J. 407, before Judge NIXON, of the district of New Jersey, it was held that a fugitive from justice, extradited from one state in the Union to another, may be detained for prosecution, notwithstanding it may appear that the arrest under the rendition proceedings was without legal authority. In *Tennessee v. Jackson*, 36 Fed.

Rep. 258, Judge KEY reached an opposite conclusion, and held that, as the petitioner had never been in the demanding state, he could not be a fugitive from the justice of that state, and that the jurisdictional question could be asserted after his rendition had been accomplished, and he was held under process of the demanding state. The proceedings here were instituted by the state now claiming jurisdiction of the petitioner. The custody of him has been obtained solely by virtue of that demand. He is subjected to the custody of the state of Wisconsin by the power of the United States, acting through the executive of Illinois at the instance and upon the demand of the state of Wisconsin. It is insisted for the petitioner that, if he was not in fact a fugitive from justice, the executive of Illinois was without jurisdiction to yield him to the state of Wisconsin; that the latter state cannot claim any benefit of its unauthorized act, and hold him under its process, because such custody was obtained by the wrongful act of the state, in violation of the supreme law of the land. It is said that in such case, when the original proceeding by which one is brought within the jurisdiction is unauthorized by law, the detention is improper, although sought to be justified under process valid within the jurisdiction to which the party has been unlawfully brought; that, wanting the jurisdictional fact of flight, the proceeding was *coram non judice*; that the question of flight, being jurisdictional, is open to inquiry as well after as before the surrender; that the petitioner is physically within the state because compelled by the supreme law unlawfully put in operation, but that he is not here for the purpose of jurisdiction by the state so unlawfully, under guise of the law, obtaining the possession of his body. Upon the other hand, it is urged that the executive had the right, in the first instance, to determine the question of flight upon such evidence as to him was persuasive of the fact; that his warrant, unassailed, is sufficient to justify the removal and surrender of one charged with crime, and is a perfect justification for the arrest and custody of the alleged offender; that the surrender of his body to the demanding state by virtue of such warrant was lawful; that upon surrender the warrant had spent its force, and thereafter the prisoner is in custody rightfully, not by virtue of the warrant, but under process of the state; and that, therefore, no federal question is involved.

We are of opinion that the contention in behalf of the petitioner cannot be sustained. The vice of this position is in the assumption that the fact of flight is jurisdictional in the sense that executive action is void if, in point of fact, the demanded person be not a fugitive from justice. The power to act upon a given state of facts, and to decide whether that state of facts exists, constitutes jurisdiction. The decision therein is conclusive until properly set aside. The constitution and the act of congress have lodged with the executive of the state upon whom proper demand is made for one alleged to be a fugitive from justice the jurisdiction to determine whether the person so charged be such fugitive, and his determination is sufficient to justify the surrender. He has, by virtue of the law and of the action of the executive of the demanding state,

jurisdiction of the subject-matter. He has jurisdiction of the person of the petitioner by virtue of his presence within the state. His determination partakes of the nature of a judicial proceeding. It is true, his action is *ex parte*. Therefore it is that the courts will review his determination. But that fact is not availing to destroy jurisdiction. He may err, but—to use the expression of Chief Justice RYAN—he had “jurisdiction to commit the error.” His determination of the fact of flight, evidenced by the issuing of his warrant, suffices to justify the removal until the presumption in its favor is overthrown by contrary proof in a proper proceeding. *Roberts v. Reilly*, 116 U. S. 80–95, 6 Sup. Ct. Rep. 291. His warrant, unassailed by competent authority, is complete justification for the arrest and surrender of the alleged fugitive. When so delivered by virtue of such warrant, his surrender is lawful, and the demanding state obtains rightful possession of his person, and may lawfully subject him to its criminal process for the offense charged. The executive warrant has then spent its force. It is no longer operative. The alleged offender is no longer subjected to deprivation of liberty by virtue thereof, but is rightfully held under the process of the state. When that has happened, no federal question remains. If the fact of flight be jurisdictional in the sense that it must exist as essential to the validity of any action by the executive, then it must always remain open to inquiry,—as well after surrender as before; as well after trial and conviction as before; as well after sentence as before; as well during imprisonment upon conviction and sentence as before surrender or trial,—for the reason that upon such postulate the executive would not have jurisdiction because he so determined; and any inquiry by *habeas corpus*—the only means of review of his decision—would not bar another writ. In such case, also, the officer executing the warrant of the executive would not be justified by the writ, but by the jurisdictional fact of flight upon which the writ is predicated, and which, if the jurisdictional fact did not exist, would be mere waste paper. Such confusion, necessarily resulting from such holding, is not to be lightly entertained. It cannot be assumed that any such meaning of the constitutional provision or the act of congress was possible to the minds of the framers. The fact of flight may be in a sense jurisdictional to removal, as one says a criminal court has jurisdiction only of crime. But such court has jurisdiction to determine whether a certain act charged to have been committed is or is not a crime. Its decision therein, although erroneous, is not void. So here, the jurisdiction to determine the fact of flight is lodged with the executive. He has jurisdiction of the subject-matter. His warrant is valid until his determination of the fact of flight is properly reversed. When, therefore, such valid warrant has been executed, the surrender thereunder is lawful, and the party lawfully subjected to the state jurisdiction.

It was urged in argument that under such ruling there will exist opportunity for oppression; that the executive may be imposed upon by *ex parte* and false evidence, and the warrant be improvidently issued; and that so it may happen, as was the case in *Tennessee v. Jackson*, *supra*,

that one be surrendered who was never in the demanding state, and could not, therefore, be a fugitive from its justice. This is possible, but the remedy would seem to rest with the executive to take action to allow the prisoner proper opportunity to appeal to the law. Possibly the case stated would be deemed such a fraud upon the law as to bring it within cognizance of the courts.

If, however, we should prove to be in error in our conclusion, and the question of flight remains open for consideration notwithstanding the surrender under the warrant, we are persuaded that here the executive warrant was providently issued, and the surrender justified by the facts and the law.

We come now to the consideration of the question whether the petitioner was a fugitive from justice within the intendment of the constitution. In this connection it is insisted for the petitioner that it was impossible for him to have committed the crime charged against him, because it is conceded that he was not within the state of Wisconsin at the time of, or voluntarily after, the receipt of the deposit charged, and could not therefore be a fugitive from justice. The law of Wisconsin (Rev. St. Wis. § 4541) renders it criminal for any officer, director, stockholder, cashier, teller, manager, messenger, clerk, or agent of any bank to accept or receive on deposit or for safe-keeping any deposit of money when he knows, or has good reason to know, that such bank is unsafe or insolvent. In construing the act, regard must be had to the mischief sought to be prevented. The purpose of the law is manifest. The act was designed to prevent fraudulent banking, and to protect the public from dealing with such unsafe or insolvent concerns. The manual receipt of the deposit is but one step, and the final step, in the consummation of the offense. There must precede the unsafe and insolvent condition the representation of safety and solvency, and the knowledge of the unsafe and insolvent condition. These are the essentials of the offense. The receipt of the deposit may be by an innocent instrument of a guilty officer of the bank. It is a criminal act to hold out an insolvent bank as safe or solvent, effective to the consummation of crime upon the receipt of the deposit. The open door of a bank is an invitation to depositors. The open door of a bank is a representation to the public that the bank is safe and solvent. The keeping open of a bank by the superintending officer or proprietor is an authority to his clerks to receive deposits. If the doors are opened for the purposes of business, with guilty knowledge by him of the unsafe or insolvent condition of the bank, and a deposit is received by his agents, it is received by him. It was his act, for which he must respond to the law. His actual presence at the time is unessential. In contemplation of law, he is present by his agent deputed to perform the wrongful act he has planned. It was his act as certainly as though he personally received the deposit. *State v. Caldwell*, (Sup. Ct. Iowa,) 44 N. W. Rep. 700. His will contributed to the wrong-doing, and he is responsible for the act done by his agent by his authority, the same as though performed by himself alone. It is because his will set the force in motion that was operative to crime. Thus, Mr. Bishop observes, one may commit

an offense against a state upon whose soil he has never set his foot, as in putting forth a libel, (*Com. v. Blanding*, 3 Pick. 304,) or a threatening letter, (*Esser's Case*, 2 East, P. C. 1125,) or a letter inclosing a forged instrument to defraud the one to whom it is addressed, (*People v. Rathbun*, 21 Wend. 509,) or a letter making a false pretense to one who parts with his goods in the place of the receipt of the letter, (*Reg. v. Jones*, 1 Eng. Law & Eq. 533; *Reg. v. Leech*, 36 Eng. Law & Eq. 589; *Norris v. State*, 25 Ohio St. 217.) But it is objected that the charge is that the petitioner received the deposit, and therefore his personal presence was essential to the commission of the act charged. The objection is untenable. "The act may be charged directly as his act, and proof that he did the act through the agency of another will sustain a conviction." *State v. Caldwell*, *supra*.

In *Roberts v. Reilly*, 116 U. S. 80-97, 6 Sup. Ct. Rep. 291, the supreme court defines the phrase "fugitive from justice," and declares that, to be a fugitive from justice in the sense of the act of congress regulating the subject, "it is not necessary that the party should have left the state in which the crime is alleged to have been committed, after an indictment found, or for the purpose of avoiding a prosecution, anticipated or begun, but simply that, having within a state committed that which by its laws constitutes a crime, when he is sought to be subjected to its criminal process to answer for his offense he had left its jurisdiction, and is found in the territory of another." In other words, there need be in his departure from the state no element of conscious flight. It suffices that after the commission of the offense he has merely departed the jurisdiction of the state.

The question then recurs: Was the petitioner within the state of Wisconsin, within the intendment of the law, at the time of the commission of the alleged offense? In *Ex parte Reggel*, 114 U. S. 642-653, 5 Sup. Ct. Rep. 1148, it was ruled that the proof tendered the executive made a *prima facie* case of flight. There, as here, the statement was only that the person demanded "was a fugitive from justice," without statement of probative facts. In *Roberts v. Reilly*, *supra*, the supreme court—referring to the question of flight—also declared that "the determination of the fact by the executive of the state in issuing his warrant of arrest upon the demand made on that ground, whether the writ contains a recital of an express finding to that effect or not, must be regarded as sufficient to justify the removal until the presumption in its favor is overthrown by contrary proof." Presumably, therefore, this petitioner was a fugitive from justice. The *onus* is cast upon him to satisfy the court that he was not. He claims that it is conclusively established that he was not such fugitive, because he was not within the demanding state at the time the deposit was made. He has certainly established that fact; but is that conclusive that he was not a fugitive from justice? Or, to express the proposition differently, is one who within the jurisdiction hath set in motion the machinery for crime, and departs the jurisdiction before the consummation of the crime, a fugitive from justice? When the criminal act charged is one as to which it is essential that sev-

eral acts or facts should concur, and which may occur at different times, if the party charged commits within the state any one of the acts constituting the crime, but departs the state before the happening of other acts contemplated and authorized by him, or upon the happening of events necessarily resulting from his act, can he be deemed a fugitive from justice? We are of opinion that he must be so regarded. The purpose of the constitutional provision was that criminals should find no asylum within any state of the Union; that "the law might everywhere and in all cases be vindicated." It will not do to refine too curiously upon such enactments, so that the very design of the law shall prove abortive, so that that shall become a shield and a protection which was designed as a weapon of offense. Can it be that one may not be regarded a fugitive from justice who within a state hires another to kill and murder, but before the killing departs the jurisdiction to avoid the consequences of the murder he has designed? Can it be that, if one within a state makes false representations to procure the goods of another, and departs the state before that other actually parts with his property on the faith of these representations, he may not be deemed a fugitive from justice? Or, to use the forcible illustration of counsel at the argument, if one places a dynamite bomb with clock attachment upon the premises of another, that will explode only after the lapse of a certain time, and death results, so that the act is murder, but departs the state before the explosion to avoid the consequences of his act, is he not to be regarded as a fugitive from justice? To put the question is to answer it. The subsequent event was the consequence of the act, naturally resulting from it. The subsequent event was designed to happen from and by reason of the act done. The event, when it occurs as the consequence of the act, gives quality to the act, rendering it criminal. The result was the foreseen and designed consequence of the act, stamping it as a crime. It is immaterial whether the agency employed be an inanimate object or a sentient being. The result was designed by and naturally flowed from his original act, which, by reason of the result, and the foreseen and intended consequence, is criminal. Departure from the jurisdiction after the commission of the act, in furtherance of the crime, subsequently consummated, is a flight from justice within the meaning of the law. So here, if, as charged, this bank was insolvent or unsafe on and after the 6th day of January, 1890, and if, as charged, Cook had guilty knowledge thereof, and notwithstanding authorized, sanctioned, and directed the keeping open of the bank, and the receipt of deposits, he must be deemed a fugitive from justice, although he departed the state before the deposit was actually received.

The petitioner has not shown that the bank was not insolvent as charged. He has not shown that he was unaware of its condition. He has merely shown that he was a stockholder in the Park National Bank to the amount of \$19,000; that that bank was improvidently closed, and has since paid its debts. He has not shown, however, that its capital was unimpaired so that his interest therein was intact. He has not shown that the Bank of Juneau or its owners possessed any means to

meet the \$25,000 of deposits charged to have been received. Nor has he shown that the closing of the Park National Bank was the occasion of any loss to the Juneau Bank, or necessarily prevented the continuance of its business. If the complaint lodged against him, and upon which he was surrendered, be true, this bank was insolvent on and after the 6th day of January, 1890, to the knowledge of Cook. Between that date and the closing of the bank on June 20, 1890, deposits were received to the amount of \$25,000, which were owing depositors at the time of closing the doors. At that time its entire assets consisted of \$3,048 in cash and \$2,000 in securities, and Cook is charged to have withdrawn all the capital and all of the deposits except the amount of the assets stated. And on the 23d of June the proprietors of the bank assigned. These allegations we must regard, under the ruling of the supreme court, so far as they bear on the question of flight, as presumptively true. They have not been contradicted. Cook has merely shown that his interest in the Park National Bank was put in jeopardy. But stock in one bank is not capital in another. He has failed to declare what became of the capital of the Juneau Bank, or of the deposits received. He has failed to account for the meagre assets of the bank. So, upon this showing, and in the face of the *prima facie* evidence of flight derived from the action of the executive of Illinois in issuing his warrant of rendition, we are bound to assume, for the purposes of this hearing, with a view to ascertain if he may be regarded a fugitive from justice, that when last within the state of Wisconsin, some two or three weeks prior to the closing of the bank, that bank was unsafe and insolvent, to his knowledge, and was by his direction thereafter kept open for business with the design that his servants should take and receive deposits; that he designed the fraud which was consummated by the actual receipt of the deposit, departing the jurisdiction intermediate the design and the act to accomplish that design and the actual receipt of the deposit. He was, therefore, in our judgment, a fugitive from justice within the intendment of the law.

It is further urged that, being rendered by the executive of Illinois for trial upon the offense charged, Cook cannot be held or tried upon any other charge until he has had proper opportunity to return to the state of Illinois. It was held in *U. S. v. Rauscher*, 119 U. S. 407, 7 Sup. Ct. Rep. 234, that when one was extradited by the government of Great Britain, under a treaty, for trial upon the particular offense charged, he cannot lawfully be tried for any other offense; that he is clothed with the right to exemption from trial for any other offense, until he has had opportunity to return to the country whence he was taken for the purpose alone of trial for the offense specified in the demand for his surrender. If the principles of extradition are applicable and controlling in interstate rendition, this ruling must be held to determine the right of exemption, notwithstanding the decision of the supreme court of Wisconsin in *State v. Stewart*, 60 Wis. 587, 19 N. W. Rep. 429. It is not essential, however, that we should at this time pass upon this question, as the petitioner must be remanded to the jurisdiction of the state court.

If, after trial upon the charge upon which he was surrendered, he should be held upon another charge, or should be placed upon trial for such other charge before his trial upon the charge for which he was surrendered, the federal tribunals will be accessible to him, if his right be thereby invaded.

UNITED STATES v. BARDENHEIER.

(District Court, E. D. Missouri, E. D. January 4, 1892.)

1. REVENUE LAWS—ALTERATION OF INSPECTION STAMP.

The "obliteration" of a portion of a government inspection mark or stamp is a "change or alteration" thereof, within the meaning of Rev. St. U. S. § 3326.

2. SAME—INFORMATION.

An information which avers that the defendant "did unlawfully change and alter" the marks and stamps, sufficiently shows that the act was done willfully and intentionally.

3. SAME.

An information under Rev. St. U. S. § 3326, for using casks or packages previously inspected for the sale of other spirits, or spirits of a different quality from those contained in them at the time of inspection, must show that the change was brought about by filling them with other spirits after the original contents, or a part thereof, had been withdrawn; and a count alleging that spirits of 102 degrees proof were fraudulently sold in casks marked "105 degrees proof," without stating the cause of such change in quality, is defective.

At Law. Information against John Bardenheier for violation of the internal revenue laws.

STATEMENT BY THAYER, DISTRICT JUDGE.

This is an information containing eight counts, under section 3326, Rev. St. The first series of counts (Nos. 1, 2, 5, and 6) are for altering "distillery warehouse stamps" and "inspection marks" on certain barrels of distilled spirits, by "obliterating and making illegible" the dates of such stamps and marks. In the second series of counts (Nos. 3, 4, 7, and 8) it is charged, in substance, that defendant unlawfully and fraudulently used casks having thereon United States internal revenue inspection marks, showing distilled spirits of 105 degrees proof to be contained therein, for the purpose of selling therein to one George Autenrieth distilled spirits of 102 degrees proof, and for the purpose of falsely representing to Autenrieth that the spirits sold were of 105 degrees proof, and then and there cheating and defrauding him.

George D. Reynolds, U. S. Dist. Atty.

Hough & Hough, for defendant.

THAYER, District Judge, (after stating the facts.) The chief objections to the first series of counts are that an "obliteration" of a portion of a government inspection mark or stamp is not a "change or alteration" thereof, within the meaning of section 3326; and, secondly, that the counts are bad because it is not alleged that the marks and stamps were knowingly and intentionally altered in the respects stated.

Neither of these objections appears to the court to be tenable. A stamp or inspection mark is changed or altered from its former condition when a portion of it is obliterated or rendered illegible, as well as when some part of the stamp is erased, and something else is substituted in lieu of the part erased. The same conclusion follows when the purpose of the law is considered. Inspection marks and stamps are required to be placed on casks and packages of distilled spirits to enable the government to readily trace the origin and history of each cask, and thus effectually prevent frauds upon the revenue. The system is elaborate, and, as a whole, was so framed that each package might tell its own story,—where it was made, when it was made, and if the tax thereon had been paid. It would be nearly or quite as mischievous to permit dealers to obliterate a portion of a government inspection mark or stamp found on a barrel of distilled spirits as it would be to permit a falsification of such mark. Therefore, the words “change or alter,” as used in the statute, must be construed to cover an intentional erasure of any essential part of a mark or stamp which congress has required to be placed on packages of distilled spirits.

It will be conceded that an unintentional or accidental erasure of a stamp, or some part of it, is not an offense under section 3326. An indictment or information thereunder should accordingly allege that the act was done knowingly and intentionally, or it should employ language of a similar import. The present information avers that the defendant “did unlawfully change and alter” the marks and stamps in question. This sufficiently shows that the act was done willfully and intentionally, as otherwise it could not be said to have been done unlawfully.

2. The second series of counts must be adjudged insufficient. The statute (section 3326) imposes a penalty on one who “fraudulently uses any cask or package having any inspection mark or stamp thereon, for the purpose of selling other spirits, or spirits of quantity or quality different from the spirits previously inspected therein.” The fraud in this clause intended is evidently a fraud upon the government, to be effected by putting into a cask, after it has been inspected or stamped, other spirits, either of the same or a different quality, that were not therein at the time of such inspection or stamping. It is apparent that congress was legislating for the protection of the revenue, rather than for the prevention of merely private wrongs. It intended to prevent frauds on the revenue that might be perpetrated by filling barrels that had been inspected or stamped with other spirits, after the original contents had been wholly or partially withdrawn. The second series of counts do not charge with certainty such a fraud as this clause of the statute was intended to prevent. They show, no doubt, that defendant made use of the inspection marks to misrepresent the proof of the liquor to one of his customers, or to aid in such misrepresentation, but it is not alleged that the change in proof was due to the fact that other spirits had been placed in the several casks after the original inspected contents had been wholly or partially withdrawn. The reduction in proof may have been due to natural causes, or to the addition of water after a por-

tion of the original contents had leaked out or had evaporated. If the reduction in proof was due to the addition of water, the penalty sued for was not incurred, since no wrong was thereby done to the government. The penalty is imposed for the doing of some act whereby the government is or may be defrauded. *In re Three Packages of Distilled Spirits*, 14 Fed. Rep. 569. See, also, *U. S. v. Thirty-Two Barrels of Distilled Spirits*, 5 Fed. Rep. 188.

The second series of counts will be quashed. The demurrer and motion to quash the first series will be overruled.

UNITED STATES v. STONE.

(District Court, D. Idaho. January 4, 1892.)

1. PUBLIC LANDS—TIMBER TRESPASS.

Criminal procedure may be maintained under section 2461, Rev. St. U. S., for a violation of its provisions; and it is sufficient to allege in the indictment that the cutting and removing of the timber was for use other than that of the navy of the United States. It is not necessary to allege that defendant was not justified under any of the various land laws of the United States.

2. SAME.

Charging the "cutting and removing" of timber does not constitute the allegation of two offenses to one count.
(Syllabus by the Court.)

At Law. Demurrer to indictment.

Fremont Wood, U. S. Atty.

McBride & Allen, Albert Hagan, and L. Vineyard, for defendant.

BEATTY, District Judge. By the indictment, in pursuance of the provisions of section 2461, Rev. St., the defendant is charged in this case with the cutting and removing of timber from the public lands of the United States, with the intent to export, dispose of, and use the same in a manner "other than for the use of the navy of the United States." In the argument and consideration of the demurrer interposed by defendant to such indictment, the defendant, in support thereof, claimed—*First*, that, under said section, a criminal prosecution cannot be maintained for timber trespasses on the general public lands of the United States; *second*, that the indictment does not set out the use to which defendant appropriated the timber, and fails to show he does not come within the provisions of some of the statutes modifying said section, or, in other words, that it has not negatived the defendant's defenses; and, *third*, that the indictment, in charging the cutting and removing of such timber, has charged two offenses in one count.

1. The first objection, I think, may be clearly determined by an analysis of the section involved, without a consideration of the adjudicated cases. The first clause of this section is limited to the cutting or wanton

destruction of any timber on any lands of the United States "reserved or purchased for the use of the United States for supplying or furnishing therefrom timber for the navy of the United States." The second clause refers alone to the removal of such timber from such lands reserved for such naval use, but the third clause provides against the cutting or removing of live oak, red cedar, or *other* timber from *any other* lands of the United States, with intent to export, dispose of, or use the same for any other purpose than the use of the navy, and the fourth and last clause provides the penalty for a violation of the provisions of the section, which includes both fine and imprisonment. The first two clauses apply alone to the cutting, destruction, or removal of any timber; only on those lands reserved for naval use, while the third clause is to prevent the cutting or removal of timber from *any other* lands of the government. What other lands are referred to? The phrase "any other lands" is easily construed, when considered in connection with what precedes it. The lands before named were those set apart for naval use, and it can only mean all other lands which the government owns than those so reserved for naval use, and such as may be elsewhere otherwise excepted. It seems indisputable that it was designed by this statute to prevent the cutting and removal of timber from such lands as are referred to in this indictment, which are not those reserved for naval use, but those belonging to that class of public lands which are open to settlement under some of the general land laws of the United States. While the defendant does not positively controvert this conclusion, he insists that the provisions of the section cannot be enforced by criminal procedure. In support of this view, he refers to section 5388 as the one applied to criminal procedure; that such procedure is invoked only in trespasses on lands reserved for some special purpose; and that the lands here trespassed upon do not belong to any such reserved class. To this it must be answered that the provisions of the last section are an exception only to those of the other section, and for an entirely different and independent purpose. They are intended to prevent the cutting and wanton destruction of timber on, and not its removal from, lands reserved for military or other purposes; the phrase "other purposes" to be construed to be for some purpose similar to a military use. The two sections together provide against the wanton destruction of timber on lands reserved for the use of the navy and military and like purposes, and the last section does not refer to the general class of lands defined in the third clause of section 2461. But the fourth clause of section 2461, in providing a penalty of fine and imprisonment for a violation of its provisions, fully negatives the defendant's claim that a criminal procedure cannot be maintained thereunder. Such penalty applies only to a criminal action. This question is further put at rest by the provisions of section 5, p. 90, 20 St., which relieves in certain cases from prosecution under this section. In *U. S. v. Scott*, 39 Fed. Rep. 900, it was held by the late circuit judge of this circuit that a compliance with the provisions of this last statute relieved the party only from a criminal prosecution, under section 2461, and not from the civil action for the

timber taken. The conclusion must be, and is, that a criminal prosecution may be maintained for a violation of the provisions of section 2461, and, while there is some slight disagreement among the adjudicated cases, the weight of authority sustains this conclusion. As bearing upon the question are cited *U. S. v. Briggs*, 9 How. 354; *U. S. v. Garretson*, 42 Fed. Rep. 22; *U. S. v. Konkapot*, 43 Fed. Rep. 64; *U. S. v. Murphy*, 32 Fed. Rep. 376; and *U. S. v. Nelson*, 5 Sawy. 68.

2. If the second objection defendant makes to this indictment is good, it must be conceded the government could seldom successfully prosecute any timber trespasses, for it would not only have to allege that the defendant had not appropriated the timber in pursuance of any of the various land laws, but would have to prove all such negative allegations. Such a practice should be followed only in pursuance of clear statutory authority or well-considered judicial determinations. It is true that a negative allegation must sometimes be pleaded, but it is only in those cases where the statute defining an offense, is so framed as to constitute the failure to perform some specific act an element of the offense. On the contrary, it is a general rule that, when there is a proviso or condition attached to some criminal statute defining an offense, if such proviso does not constitute an element of the offense it need not be referred to in the indictment. In *U. S. v. Cook*, 17 Wall. 173, it is said:

"Where a statute defining an offense contains an exception, in the enacting clause of the statute, which is so incorporated with the language defining the offense that the ingredients of the offense cannot be accurately and clearly described if the exception is omitted, the rules of good pleading require that an indictment founded upon the statute must allege enough to show that the accused is not within the exception; but, if the language of the section defining the offense is so entirely separable from the exception that the ingredients constituting the offense may be accurately and clearly defined without any reference to the exception, the pleader may safely omit any such reference, as the matter contained in the exception is matter of defense, and must be shown by the accused."

See, also, *U. S. v. Cook*, 36 Fed. Rep. 896. The defendant is not complaining that some condition or exception in and a part of the statute defining the offense is omitted, but that it does not allege and show that the defendant has not appropriated the timber by virtue of any of the several laws granting him such right. In *U. S. v. Murphy*, 32 Fed. Rep. 378, the court says the *onus probandi* rests upon the defendant to show a defense based upon some exception to the law, and further on (page 384) it is said:

"Under the provisions of section 2461, whoever cuts and removes timber from public lands, which includes all that the government holds title to, must be prepared to show, when indicted or sued as a trespasser, lawful authority for his act."

Section 8, p. 1099, 26 St., provides that, in actions either civil or criminal, the defendant for his defense may show such use of the timber as exempts him under the law from liability.

These authorities must lead to the conclusion that any rights or privileges which defendant may have had to appropriate the timber in ques-

tion are simply matters in defense, which he must plead, and which the government could omit in the indictment.

3. That the allegation of the "cutting and removing" timber under this statute, is not a statement of two offenses in one count, has been held in another case in this court, and I do not see any good reason to now change that view. While in 9 How. 354, and 32 Fed. Rep. 376, *supra*, the question was not directly raised, the indictments were for the cutting and removing of timber; and in *U. S. v. Fero*, 18 Fed. Rep. 901, with a somewhat similar statute under consideration, the above view was sustained. The demurrer is therefore overruled.

UNITED STATES v. LYNCH *et al.*

(District Court, S. D. California. March 10, 1892.)

LOTTERIES—MAILS—INDICTMENT.

Under Act Cong. Sept. 19, 1890, making it a misdemeanor to deposit in the mail any newspaper containing the advertisement of a lottery, an indictment charging, in the language of the act, that defendant committed the offense by depositing such newspaper in the mail, etc., and setting forth the name and address of the person to whom it was sent, is sufficient without alleging prepayment of postage thereon.

At law. Indictment against Joseph D. Lynch and James J. Ayers for mailing lottery advertisements. Demurrer to the indictment. Overruled.

M. T. Allen, U. S. Atty.

A. B. Hotchkiss and *Jay E. Hunter*, for defendants.

Before Ross, District Judge.

Ross, District Judge. The statute on which the indictment in this case is based declares, among other things, that—

"No letter, postal-card, or circular concerning any lottery, * * * and no list of the drawings at any lottery, * * * shall be carried in the mail, or delivered at or through any post-office or branch thereof, or by any letter-carrier; nor shall any newspaper * * * containing any advertisement of any lottery, * * * or containing any list of prizes awarded at the drawings of any such lottery, * * * whether said list is of any part or of all of the drawing, be carried in the mail or delivered by any postmaster or letter-carrier. Any person who shall knowingly deposit or cause to be deposited * * * anything to be conveyed or delivered by mail in violation of this section * * * shall be deemed guilty of a misdemeanor," etc.

It is quite obvious from this language that any person who shall knowingly deposit or cause to be deposited in a United States post-office, to be conveyed or delivered by mail, any newspaper containing any list of prizes awarded at the drawing of any such lottery, whether the list is of any part or of all of the drawing, is guilty of the offense denounced by the statute. The words of the statute themselves fully, directly, and

expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished; and, that being so, an indictment that charges the offense in the language of the statute is sufficient. *U. S. v. Carll*, 105 U. S. 611. Turning to the indictment, it is seen that it charges that the defendants, at a certain designated time, did willfully, unlawfully, wrongfully, and knowingly deposit and cause to be deposited in the United States post-office at the city of Los Angeles, to be conveyed and delivered by United States mail, a certain newspaper, (describing it,) which said newspaper then and there contained a list of prizes awarded at the drawing of a certain lottery, (describing it;) the defendants then and there well knowing that the said newspaper then and there by them deposited and caused to be deposited, to be conveyed and delivered by the said mail, contained such list of prizes awarded at the drawing of such lottery, and then and there concerned a lottery, and then and there to be unmaillable matter. The newspaper described in the first count of the indictment, and alleged to have been so deposited and caused to be deposited, to be so conveyed and delivered, is therein alleged to have been addressed to "John Wolf-skill, Santa Monica." Similar offenses are alleged in the second, third, and fourth counts of the indictment, except that in the second the newspaper therein charged to have been by the defendants deposited and caused to be deposited, to be conveyed and delivered by the United States mail, is alleged to have been addressed "Outlook X;" in the third, to have been addressed "F. R. Ellis;" and in the fourth, "Santa Monica." The address goes only to the point of the identification of the paper alleged to have been deposited and caused to be deposited, and to indicate to whom or where it is to be conveyed and delivered. The gist of the offense consists in the depositing or causing to be deposited, to be conveyed or delivered by the mail, any newspaper containing or relating to the prohibited matter. Nor is it good ground of objection to the indictment that it does not allege the payment of postage upon the papers in question. The statute does not make prepayment of postage an element of the offense defined. The indictment is, in my opinion, sufficient, and the demurrer is therefore overruled.

UNITED STATES v. EQE.¹

(District Court, E. D. Pennsylvania. February 25, 1892.)

FALSE ENTRIES IN STATEMENT—NATIONAL BANKS—EVIDENCE.

False entries in a statement, made by a book-keeper at the request of the bank examiner, purporting to give the balances due depositors, which statement it was the duty of the examiner to make, and not of the book-keeper, will not sustain an indictment for making "false entries in * * * a statement of the association," under Rev. St. 5209.

¹Reported by Mark Wilks Collet, Esq., of the Philadelphia bar

At Law.

Indictment under Rev. St. 5209, of Charles R. Ege, book-keeper of the Keystone National Bank of Philadelphia, the charge being that he had made entries in a statement prepared by him at the request and for the use of the bank examiner. The statement contained three kinds of misstatements—*First*, accounts appearing in the individual ledger were omitted in balance-sheet; *second*, checks were improperly deducted; *third*, balances were entered at less amounts than were actually to the credit of the depositors,—all tending to make the liability of the bank to the depositors less. The evidence showed that Ege had been requested to make the statement by the examiner on the ground of the illness of the examiner's assistant, and that it was the custom of the examiner to make such a statement personally, and it was no part of the duty of the bank's book-keeper to do it. Verdict directed for defendant.

W. W. Carr, Asst. U. S. Atty., and John R. Read, U. S. Atty.

John M. Strong, Hampton L. Carson, and Richard P. White, for defendant.

BUTLER, District Judge, (*charging jury, orally.*) I am decided in the opinion that it would be unjust to hold that congress, in fixing the responsibility of bank officers, intended to cover such an act as was performed by this defendant, at the expense of the examiner. The statute defines explicitly the duties of such officers; the books which the clerks should keep; the statements and reports they shall make; and requires faithfulness and honesty in the discharge of these duties, making the officers responsible criminally, and subjecting them to severe penalties for failure. I consider it clear that a proper construction of the statute will not permit the defendant to be held responsible under it for the services he rendered the examiner. His act in complying with the examiner's request was voluntary; as an officer of the bank, he was not required to perform it. Even if this view was open to question, the defendant should have the benefit of the doubt; but in my judgment there is no room for doubt. The statute is highly penal, and should therefore receive a strict construction. The defendant is therefore entitled to an acquittal. While it is not before us for consideration, the explanation made by his counsel—that the defendant wrote the statement in question without seeing the books from which it purported to be made, the items and figures being read out to him by another officer of the bank, who is now suffering for his crimes—is doubtless worthy of credit.

SCRIBNER *et al.* v. HENRY G. ALLEN Co.SAME v. FUNK *et al.*

(Circuit Court, S. D. New York. March 16, 1892.)

1. COPYRIGHT—FICTITIOUS BUSINESS NAME—INFRINGEMENT.

One who does business under a conventional or fictitious partnership name may obtain a valid copyright under that name, and may sue to restrain an infringement thereof without averring the filing of the certificate required by the New York statutes.

2. SAME—PLEADING.

A bill for infringement of a copyright, which avers that two copies of the book were deposited in the librarian's office at Washington within 10 days after publication, is sufficient, without alleging that the book was published within a reasonable time after the deposit of the copy of the title.

In Equity. Suits for infringement of copyright. On demurrer to the bills. Overruled.

Rowland Cox, for plaintiffs.

James A. Whitney, for defendants.

SHIPMAN, District Judge. These are demurrers to the plaintiff's bills in equity to restrain the alleged infringement of a copyright. The matters demurred to are the same in each bill, and the demurrers are, *mutatis mutandis*, identical. Each bill alleges that the authors of a book entitled "Scribner's Statistical Atlas of the United States" assigned all their right, title, and interest therein, before publication and before depositing a printed title thereof with the proper officer, to Charles Scribner, who then constituted and was the sole member of the firm of Charles Scribner's Sons, who, being such sole member, did the various acts required to copyright the book in the name of Charles Scribner's Sons. Subsequently Arthur H. Scribner became a member of said firm, which has continued to publish said book. The main ground of the demurrer is that no valid copyright exists, because Charles Scribner was engaged in business under a fictitious name, that no lawful justification for the use of said name is alleged, and that he should have caused the copyright to be taken in his individual name. It appears from the bill that the assignee and owner was, for a time, doing business under the name of Charles Scribner's Sons, and during this period he bought the right to obtain a copyright upon the book which he apparently proposed to publish, and did thereafter publish, in said business. At common law, individuals are permitted to "carry on business under any name or style which they may choose to adopt," (*Manham v. Sharpe*, 17 C. B., N. S., 442;) and, "if persons trade or carry on business under a name, style, or firm, whatever may be done by them under that name is as valid as if real names had been used," (1 Lindl. Partn., Ewell's Ed., 208.) In some of the states of this country, the use of a conventional or fictitious firm name is regulated or controlled by codes or statutes. I do not know whether the New York statutes in regard to the filing of certificates

apply to the circumstances of Mr. Scribner's case, but, assuming that they do, it was not necessary to aver in the bill that such certificates had been filed. An omission to file a certificate would have no effect upon the title of property which he had bought in the name of the firm. If he were the sole member, he became possessed of the title to the copyright. Cases cited in 1 Lindl. Partn. *supra*. It will be observed that the act of April 29, 1833, which was designed to prevent the use of fictitious partnership names, was repealed in chapter 593 of the Session Laws of 1886. The second ground of demurrer which is stated in the brief is that the bill simply alleges that Mr. Scribner deposited within 10 days after publication, in the librarian's office at Washington, two copies of the book, whereas it should also have alleged that the book was published within a reasonable time after the deposit of the copy of the title. The averments in the bill state a compliance with the statutory provisions, and follow the language of the statute, and are more full than those in precedents which have received the sanction of high authority. Curt. Eq. Prec. 38. The demurrers are overruled, with costs, and leave to answer on the next succeeding rule-day.

SESSIONS v. GOULD *et al.*

(Circuit Court, S. D. New York. January 29, 1892.)

1. PATENTS FOR INVENTIONS—INFRINGEMENT—PRELIMINARY INJUNCTION.

When the court is satisfied that defendants intend to manufacture and sell an infringing article, a preliminary injunction will issue, and it is immaterial whether they have already made actual sales, or have only given out samples of the goods which they offer to sell.

2. SAME—DEFENSES.

The defenses of prior public use, and that the patentee appropriated the ideas and models of the real inventor, and falsely averred them to be his own, should not be disposed of on *ex parte* affidavits under a motion for a preliminary injunction, but should be reserved for final hearing.

3. SAME.

Although the patent sued upon is evidently a narrow one, and there appears a possibility that on final hearing it may be found to be without patentable invention, yet the presumption created by the patent, when reinforced by long public acquiescence, is sufficient to warrant a preliminary injunction.

In Equity. Suit by John H. Sessions against William B. Gould and others for infringement of letters patent No. 203,860, issued May 21, 1878, to Charles A. Taylor, for an "improvement in trunk fixtures," and assigned to complainant June 1, 1878; and letters patent No. 255,122, issued March 21, 1882, to John H. Sessions, Jr., "for trunk fasteners," and assigned to the complainant July 1, 1888. Heard on motion for a preliminary injunction. Granted.

Chas. E. Mitchell, for complainant.

Briesen & Knauth, for defendants.

LACOMBE, Circuit Judge. Except for the fact that in the exhibit marked "Defendants' Catch A" the pin on the upper catch-plate is not cast with the plate, and in the exhibit "Defendants' Catch B" there is no pin at all, these catches are manifestly counter-parts of complainant's goods, and infringements of the patents sued upon. A careful examination of the affidavits and circulars leaves little doubt in my mind that, unless restrained by injunction, the defendants intend to manufacture and sell such goods. Whether they have already made actual sales, or have only given out samples of goods which they offer to sell, is immaterial, where there is reasonable ground to apprehend that they are about to sell the infringing articles. *White v. Heath*, 10 Fed. Rep. 291. If in fact they have no such intention, a preliminary injunction will do them no harm, and they cannot complain if by making and parting with Exhibits A and B, (and they do not deny that they did so,) and by issuing circulars to the trade, they have induced a belief that such is their intention.

The testimony as to the acquiescence of the public for many years in the validity of the patents sued upon is convincing, and sufficiently fortifies the presumption arising from the patents themselves to warrant the granting of a preliminary injunction. The contention that, in view of the prior state of the art, they do not disclose any patentable invention, is not sufficiently clear and convincing to overthrow the case made out by the patents themselves and the public acquiescence in their validity. The defenses of prior public use, and (as to the Sessions, 1882, patent) that the patentee appropriated the ideas and model of the real inventor, and falsely averred them to be his own, should not be disposed of on *ex parte* affidavits, but reserved for final hearing.

The defendants' goods (Exhibits A and B) embody the improvement of the Taylor patent of 1878, covering the clutching device of a loop, engaging over a shoulder projecting from the upper catch, thereby securing a wider and stronger bearing than did the dowel engaging with a hole in the tang of the upper-catch, as arranged in his patent of 1872. The absence of the cast pin of the upper catch, whose sole function is to assist in fastening the upper catch to the valence, is in my opinion immaterial, because the second claim of the 1878 patent does not include the pin, but only the fastening devices, irrespective of the method of applying them to the trunk itself. It is for "a trunk catch or fastening, consisting of the plate, O, having thereon the lug or shoulder, L, the plate, G, and the snap-loop, J, substantially; as and for the purposes specified." The plate, G, as shown in the specification, is arranged so as to be affixed to the trunk, and has on it "a box or recess, H, for containing the spring, I, and through which box or recess passes the cross-bar of the loop, J, having thereon a cam or eccentric, K, resting on the spring, I." That in the complainant's patent the recess and plate are separate castings, riveted together, while in the defendants' goods the same box-bearing plate is produced in a single casting, is immaterial. The same result is accomplished, and in the same way. No doubt the patent sued on is a narrow one, and on final hearing it may appear that

there was not sufficient patentable invention in substituting the snap-loop engaging with a shoulder for the dowel engaging with a hole in a tang to warrant the granting of a patent; but on the case made here, of such long-continued public acquiescence, it is to be assumed that it was a meritorious improvement, which defendants should not be allowed to infringe, although they may, by substituting one casting for two, have themselves made an improvement in the method of producing the completed plate. Infringement of the Sessions patent is too plain for discussion, if that patent is valid, and, for the reasons above indicated, it must be assumed to be so at this stage of the case.

Complainant may take injunction under claim 2 of the Taylor patent of 1878, and the Sessions patent of 1882, with a clause reserving right to sell any and all goods made by complainant himself.

MACK v. LEVY *et al.*

(Circuit Court, S. D. New York. March 21, 1892.)

PATENTS FOR INVENTIONS—INFRINGEMENT—OPERA-GLASS HOLDERS.

It is doubtful whether letters patent No. 268,112, issued November 28, 1882, for an improved opera-glass holder, consisting of a detachable handle, provided with a fastening device consisting of a piston hook and notch on the end, brought together by a spring operated by longitudinal action, are infringed by a fastening device consisting of two jaws, one pronged or bifurcated, and the other with a uniform surface made to hold the bar of the opera-glass, substantially by lateral pressure, by means of a piston screw.

In Equity. Under a bill filed by William Mack, an injunction was granted May 20, 1890, restraining Levy, Dreyfus & Co. from infringing a patent by making several forms of opera-glass holders denominated "A," "B," etc., but excepting "C," in which the hook and notch of the patent do not exist, but consist of a detachable screw loop, the open ends of which were screwed together, (see 43 Fed. Rep. 69.) Motion to attach them for contempt in manufacturing a holder consisting of two jaws, etc. Denied.

H. A. West, for plaintiff.

James A. Hudson, for defendants.

SHIPMAN, District Judge. This is a motion for attachment for contempt by reason of the alleged violation of the injunction order of this court against the infringement of letters patent No. 268,112, dated November 28, 1882, to William Mack, for an opera-glass holder. The opinion of the court in the original case gives a description of the invention and the construction of the patent. 43 Fed. Rep. 69. The invention of the plaintiff is popular with the public, if the number of imitations is a fair criterion of its success. The defendants' opera-glass holder, at the sale of which the present motion is directed, consists of a detachable handle, made in telescopic sections, the end section being provided with

the fastening device. This consists of a piston screw, which causes the two jaws of a holder, one of them pronged or bifurcated, and the other of uniform surface, to approach or recede from each other laterally. Between the jaws of this holder the cross-bar of the opera-glass is placed and held. The ends of the bifurcated jaw are provided with projections which the plaintiff regards as hooks. The defendant, in reply to the charge of infringement, says that the two jaws of the fastening device are brought together laterally, whereas, in the patented device, the hook is made to approach a fixed lower jaw (called a "slot" in the patent) by longitudinal action. The hook is pulled down by the spring, and the edges of the bar are tightly grasped between the hook and the slot. If the patented device is limited, by the terms of the patent, to a longitudinal action, there is no infringement, for the new device must operate laterally, and it grasps the sides of the bar by lateral pressure. The mere fact that the means by which the two jaws are caused to hold the bar, is in the one case a spring, and in the other a screw, which operates laterally, is not important. As was said in the preceding opinion, the means by which the hook and slot are fastened together are not of the essence of the invention, and it is not necessary that a spring should be used, for other like means are properly within a portion of the claims of the patent. The piston hook and slot are the important parts of the invention. But there must be a hook, which acts substantially as a hook in holding the bar in place, or its equivalent. I do not think that it will be claimed that, if the bar is grasped and held solely by the lateral pressure of the jaws, these jaws are an equivalent for the hook and slot of this patent. And therefore, if the two jaws of the new device act as a holder, solely or substantially by lateral pressure, there is no infringement. And here is the vital question in the case, and the importance of the fact of lateral pressure. Is the holding of the bar effected substantially by that method, and not by any hooking device, and are the projections merely supplementary in aid of the lateral pressure, but not worthy of reliance as a grasping device? I have taken some pains to look into this part of the case, which is easily capable of examination. When the cross-bar is wider than the jaw, it is held by mere lateral pressure, and the projections are useless as holding devices. When the bar is of the same width as the jaw, the projections are helpful in preventing tilting, and, to a certain extent, aid in holding the bar, but the chief reliance is and must be upon lateral pressure. When the bar is narrower than the jaw, the projections stop a tilting or sidewise motion of the bar, but they do not act as hooks to grasp it. I am thus constrained to think that in this device the grasping and holding are substantially effected by lateral pressure, and that the projections do not perform the function of hooks to grasp and hold the bar of the opera-glass. There is, certainly, so much reasonable doubt in the case that a motion of attachment should not be granted. The motion is denied.

OVERMAN WHEEL CO. v. ELLIOTT HICKORY CYCLE CO.

(Circuit Court, D. Massachusetts. March 24, 1892.)

PATENTS FOR INVENTIONS—INFRINGEMENT—PLEADING.

Under Rev. St. § 4886, providing for the issuing of a patent where, *inter alia*, the invention has not been patented or described in any foreign country before the date of the invention, a bill for infringement of a patent is demurrable which does not allege such facts.

In Equity. Suit by the Overman Wheel Company against the Elliott Hickory Cycle Company for infringement of a patent. Heard on demurrer to the bill. Demurrer sustained.

Chamberlin, White & Mills, for complainant.

William A. Redding, for defendant.

COLT, Circuit Judge. Upon inspection of the patent granted to A. H. Overman, April 14, 1885, numbered 315,537, for improvements in rubber tires for wheels, I am not prepared to say that it is invalid for want of patentable novelty. Taking this view, it seems to me it would serve no good purpose to enter into a discussion of the patent at this stage of the proceedings. The first three grounds of demurrer are therefore overruled.

The fourth special ground for demurrer is that the bill does not aver that the alleged invention shown and described in said letters patent had not been patented nor described in any printed publication in this or any foreign country before the date of said alleged invention. An allegation of this character appears to be necessary, under the provisions of the statute, and the courts have so held. Rev. St. § 4886; *Consolidated Brake Shoe Co. v. Detroit Steel & Spring Co.*, 47 Fed. Rep. 894; *Coop v. Institute*, Id. 899. Upon this ground I shall sustain the demurrer, with costs, with leave to the complainant to amend its bill within 10 days.

Demurrer sustained.

NORTON *et al.* v. JENSEN *et al.*

(Circuit Court of Appeals, Ninth Circuit. March 10, 1892.)

1. PATENTS FOR INVENTIONS—EXPERT EVIDENCE.

While the opinions of experts in patent cases are entitled to weight, as the judgment of persons skilled in the particular matter under investigation, yet they are not binding upon the court, and will be rejected if they do not appear reasonable and satisfactory.

2. SAME—CONSTRUCTION OF PATENTS.

It is the duty of courts to construe a patent by a reference to the language of its claims, and an examination of the specifications and drawings accompanying the same.

3. SAME—ORIGINAL INVENTORS—INFRINGEMENT.

Original inventors have the right to treat as infringers all persons who make devices or machines operating on the same principle and performing the same functions by analogous means, or equivalent combinations, even though the infringing machine may be an improvement of the original, and patentable as such.

4. SAME.

If the patentee's ideas are found in the construction and arrangement of the subsequent device, no matter what may be its form, shape, or appearance, the parties making or using it are deemed appropriators of the patented invention, and are infringers. An infringement takes place whenever a party avails himself of the invention of the patentee, without such a variation as constitutes a new discovery.

5. SAME—COMBINATION CLAIM—EQUIVALENTS.

When a combination patent covers a new arrangement of old elements, producing a new and useful result, the same may be protected by invoking the doctrine of equivalents, as against the substitution for any particular element of a different device known at the date of the patent as a means of performing similar work; and the fact that the substitute performs some additional functions does not prevent it from being an infringement.

6. SAME—INFRINGEMENT.

There cannot be any infringement of a combination claim unless every element of the combination, or a mechanical equivalent of an omitted element, is used.

7. PATENTS FOR INVENTIONS—CONSTRUCTION OF CLAIMS—PRIMARY INVENTION—CAN-HEADING MACHINES.

Letters patent No. 267,014, issued November 7, 1882, to Edwin Norton, for a "machine for putting on the ends of fruit and other cans," cover an invention of a primary character, and its claims are entitled to a broad and liberal construction; and the fact that a subsequent machine is an improvement thereon in some respects will not prevent infringement, if it operates on the same principle and performs the same functions by analogous means or equivalent combinations.

8. SAME—INFRINGEMENTS—DIFFERENCES OF CONSTRUCTION.

Claim 1 of said patent claims, in a can-heading machine, "the combination of a device for sizing the exterior diameter of the can body to conform to the interior diameter of the can head, and holding the same so sized while the head is applied, said sizing and holding device having its end enlarged to fit the exterior diameter of the can head, so as to leave an annular space between it and the can body for the reception of the flange of the can head with a device for forcing the can head into said annular space, and thereby applying the can head outside the can body, substantially as specified." In the specifications the patentee says that he does not limit his invention to the particular mechanism employed, and suggests variations involving the same principles. *Held*, that the claim is infringed by the "Jensen machine," which is made under letters patent No. 376,804, and which operates on the same principle, though it is so arranged that only one end is capped at a time, the can head is delivered sidewise, and the can body endwise, to the mold, and the can body is moved towards the can head, while in the Norton patent both ends are capped, the can head is delivered endwise, the can-body sidewise, and the can head is moved towards the can body.

9. SAME—COMBINATION CLAIM—EQUIVALENTS.

Claim 2 of the Norton patent covers a combination of the foregoing devices, with "a chute or device for delivering the can bodies to the machine," and "a chute or device for delivering the can heads to the machine." In these chutes the parts are delivered by force of gravity. *Held*, that these elements were infringed by the Jensen machine, though the parts did not deliver themselves, but were moved along by a traveling belt and a reciprocating feeder, since these, being well-known devices, served merely as substitutes or equivalents of the chutes.

10. SAME.

In letters patent No. 274,368, issued March 20, 1883, to Norton & Hodgson, claim 6 covers "the combination of the can body, clamping device or mold, with a chute for the can heads, a reciprocating head or piston at the base of said chute for automatically feeding the can heads to the mouth of the mold, and applying the same to the can body, and a spring pin or device for holding the can head in position at the mouth of the mold." *Held*, that this claim was infringed by the Jensen machine, there being evidence showing that the spring-pin device, sometimes used therein, operated in substantially the same way to hold the can head in position at the mouth of the mold, and was combined with the mold, piston, and can-head chute.

11. SAME.

Claim 7 of the same patent covers "the combination of the delivery chute wheel having half molds upon its periphery, reciprocating half mold, chute for the can heads, piston for applying the same to the can bodies, and discharging chute substantially as specified." *Held*, that this claim is infringed by the Jensen machine, since the evidence shows that the reciprocating and revolving bar and fingers of the latter are merely an equivalent of the can-body feeding wheel, and that in both machines there is a reciprocating half mold mounted on the frame of the machine.

12. SAME—EXTENT OF CLAIM.

Letters patent No. 294,065, issued February 26, 1884, to Norton & Hodgson, is for an improvement on the can-heading machine, as before described, and in claim 14 covers a combination therewith of "mechanism for heading and compressing into a seam the flanges uniting the can head and body, substantially as specified." *Held* that, as this patent shows the first combined can-heading and crimping machine, the claim is entitled to a liberal construction, and is therefore infringed by the Jensen machine, although the latter employs a rotary crimper, while the former use a squeezing jaw crimper, both being well-known devices.

13. SAME.

Letters patent No. 322,060, issued July 14, 1885, to Edmund Jordan, which covers an improvement on the original Norton machine, consisting mainly in the method of mounting the mold, and of delivering the cans and can heads to it, is also infringed by the Jensen machine.

14. SAME—INVENTION—SUCCESSFUL MACHINE.

Letters patent No. 307,197, issued October 28, 1884, to Edmund Jordan, for a can-heading machine, having "a segmental clamp-chuck," is not infringed by the Jensen machine, which has many features of likeness, as the evidence shows that the Jordan machine is too slow and cumbersome in its operation to be a practical machine for heading cans of the size required for putting up fruits, vegetables, meats, fish, etc., and that the Jensen machine will do such work successfully and at reasonable cost. *HAWLEY*, District Judge, dissenting.

15. SAME.

Letters patent No. 307,491, issued November 4, 1884, to Norton & Hodgson, covers substantially the same machine as that described in patent 274,363, to the same inventors, with the additional feature that it is so arranged as to hold the can at an incline instead of horizontally, so as to operate upon filled cans. *Held*, that this arrangement, and the necessary adjustment of the feeding device, scarcely involved inventive genius; and, it appearing that the machine is only partially successful, while the Jensen machine, in operating on filled cans, is completely successful, there is no infringement. *HAWLEY*, District Judge, dissenting.

Appeal from the Circuit Court of the District of Oregon.

Bill by Edwin Norton and Oliver W. Norton against Mathias Jensen and John Fox for infringement of a patent. Decree for complainants. Defendants appeal. Modified and affirmed.

C. W. Fulton and Wheaton, Killoch & Kierce, for appellants.

John W. Munday and Edmund Adcock, for appellees.

Before *HANFORD, HAWLEY, and MORROW*, District Judges.

HAWLEY, District Judge. This is a suit in equity for the infringement of certain letters patent. The circuit court entered a decree adjudging that the defendants have infringed claims 1 and 2 of letters patent No. 267,014, dated November 7, 1882, granted to Edwin Norton, for a "machine for putting on the ends of fruit and other cans;" claims 6 and 7 of letters patent No. 274,363, dated March 20, 1883, granted to Edwin Norton and John G. Hodgson, for a "can-ending machine;" claim 14 of letters patent No. 294,065, dated February 26, 1884, granted to E. Norton and J. G. Hodgson, for a "can-ending and seaming machine;" claim 1 of letters patent No. 307,197, dated October 28, 1884, granted to Edmund Jordan for a "can-ending machine;" claims 1, 2, 3, 8, and 9 of letters patent No. 307,491, dated November 4, 1884, granted to Edwin Norton and John G. Hodgson, for a "can-ending machine;" and claims 1, 2, 6, 7, 11, 12, and 13 of letters patent No. 322,060, dated July 14, 1885, granted to Edmund Jordan, for a "heading-machine." The inventions specified in these letters patent were designed to produce cans having tight exterior fitting heads, and relate to the particular operation in the manufacture of sheet-metal cans which

consists in putting the exterior tight-fitting heads on the cylindrical portion of the can. It is admitted that no machine exactly like the drawings in letters patent No. 267,014 has ever been constructed, but machines have been built embodying the essential principles outlined in this patent. The other letters patent are for various improvements to the primary patent.

Appellants claim that the state of the art at the time of Norton's first invention is represented by letters patent No. 235,700, dated December 21, 1880, granted to George H. Pierce, for "mechanism for placing and soldering heads and cans." This machine seems to have been constructed for an entirely different character of work from that performed by any of appellees' patented machines, and to be essentially different in its mechanism and modes of operation. The patent specifies a mechanism for making cans, the body of which is flared outwardly at their ends, in order to enable a loose inside fitting head to be dropped or placed on and within such outwardly flared body, and then soldered in place. But there is another reason why the Pierce patent has no particular bearing upon any of the inventions or machines in controversy. The testimony clearly shows that Norton's original invention was prior in point of time to Pierce's application for letters patent. Norton testifies that he never saw or heard of Pierce's patent until after he considered his invention, and built and used experimentally his first experimental can-heading machine, which was made and used by him for the purpose of experiment alone as early as July 15, 1880; that his invention of the machine, as claimed in claims 1 and 2 of letters patent No. 267,014, was, in fact, made prior in time to the date of the Pierce patent, and to the date of filing of the application for the Pierce patent; that, after making his experimental machine, he, in the early part of 1881, made a complete set of working drawings for the patterns of a machine like the drawings of patent No. 267,014; that before his machine was completed Mr. Hodgson and himself had made further improvements, as shown in letters patent No. 274,863, and that for this reason the first complete and working automatic machine was made like the drawings and specifications of said patent, instead of like the drawings in the patent No. 267,014. The first complete machine was made and put in public use in 1882. Norton's invention must therefore be considered as being of a primary character, standing at the head of the art, as the first machine ever invented for applying tight exterior fitting can heads to can bodies automatically, and appellees are entitled to a broad and liberal construction of the claims of their patent.

"Where an invention is one of a primary character, and the mechanical functions performed by the machine are, as a whole, entirely new, all subsequent machines which employ substantially the same means to accomplish the same result are infringements, although the subsequent machine may contain improvements in the separate mechanisms which go to make up the machine." *Machine Co. v. Lancaster*, 129 U. S. 273, 9 Sup. Ct. Rep. 299. Appellants contend that Jensen's invention was brought about by the necessities of the salmon canning industry; that his ma-

chine is specifically adapted to putting the final heads on cans filled with fish or other substance; that it is the only machine for heading cans that can practically be used for this purpose; that the Norton machines cannot be successfully used to accomplish this result; that the Jensen machine carries the can and heads it in a vertical position; that its claim to superiority over all other heading-machines is the peculiarity of its construction, so as to head hand-made cans, which are used almost exclusively in the salmon canning business; that appellees have not been injured by the Jensen machine, because it has simply met a want that Norton's machine did not, and could not, supply. It appears from the testimony that Jensen, prior to the construction of his machine, visited Norton's factory in San Francisco, and saw and examined his machines. There is some controversy in the testimony as to whether or not appellee's machines will operate successfully upon hand-made cans. Mr. Norton testifies that the automatic can-heading machine manufactured under his patents "will work successfully upon hand-made cans," that he worked them exclusively upon hand-made cans for nearly two years prior to building his automatic can-body machines, and that they worked "with perfect success." The fact that Jensen's machine, as constructed, is an improvement, in some respects, upon appellees' machines, must be admitted; but this does not relieve it of the character of an infringing machine. Norton being the original inventor, he, and those claiming under him, would have the right to treat as infringers all persons who make devices or machines "operating on the same principle and performing the same functions by analogous means or equivalent combinations, even though the infringing machine may be an improvement of the original, and patentable as such." *McCormick v. Talcott*, 20 How. 405. See, also, *Wells v. Gill*, 1 Ban. & A. 77; *Kendrick v. Emonson*, 2 Ban. & A. 208; *Turrell v. Spaeth*, 3 Ban. & A. 458; *Colt v. Arms Co.*, 1 Fish. Pat. Cas. 108; *Winans v. Railroad Co.*, 4 Fish. Pat. Cas. 2; *Whipple v. Manufacturing Co.*, Id. 29; *Fruit Co. v. Curran*, 7 Sawy. 270, 8 Fed. Rep. 150.

The real question to be determined is whether or not the Jensen machine—letters patent No. 376,804, dated January 24, 1888, granted to Mathias Jensen for a "can-crimper and capper"—contains the several inventions and improvements covered by the several claims of appellees' patents, as heretofore enumerated, and thereby infringes the same. Before proceeding to review the several claims in the respective patents which the decree finds to have been infringed, it is proper to notice some of the general differences which it is claimed exist between the elements and methods of construction in appellees' machines from the Jensen machine.

First, as to the mold found in all the patents. It is claimed by appellants that the Jensen mold is vitally different from the mold of the other patents; that it is not only different in form, but that its mode of operation, as well as construction, is different, and that it acts upon entirely different principles. On the other hand, the contention of appellees is that the mold found in all the patents, though different in

construction, is substantially identical in principle; that the mode of operation is the same; and that the differences existing in the Jensen mold from appellee's machines are of the most formal and immaterial character. Upon the oral argument of this case, models of the respective molds—as well as of other portions of the machinery—were brought into court, by means of which the respective counsel were enabled to fully and clearly illustrate and explain their views as to the construction, purpose, operation, and effect of the different molds. The conclusions to be arrived at in this case depend, to a great extent, upon the proper solution of this question, and necessarily involve the careful consideration and weighing of the voluminous evidence offered by the respective parties, which, in this case, in several of its features, presents many questions of much embarrassment and difficulty. The testimony upon both sides is principally that of experts skilled in the science and operation of machinery which they were called upon to explain, and in their testimony they not only state the facts concerning the difference in the construction of the respective machines, but give their opinions whether or not there is any difference in the operation of the machines, or in the effects produced thereby. Expert testimony is admissible to explain the several drawings, models, and machines that are exhibited upon the trial, their operation, purpose, and effect, and the differences which exist in the various devices involved in their construction. The opinion of an expert is, in certain cases, admissible in evidence, but it is not conclusive upon the courts. It is to be considered as the judgment and opinion of a person who has had extensive practice, education, and knowledge in relation to the particular subject upon which his testimony is given. If the reasons given by the expert witness are deemed reasonable and satisfactory, the court may adopt them, but, if they are unsatisfactory, the court will discard the testimony, and act upon its own knowledge and judgment. It is always the duty of the courts to construe the patents by a reference to the language of the claims and an examination of the specifications and drawings accompanying the same. It satisfactorily appears from the evidence that Norton discovered that, by rounding and sizing the can body by external pressure and by centering and guiding the can head accurately in line with the can body, the entire circumference of the can body could be entered simultaneously into the can head by forcing its two parts squarely together. His invention, which embodied this mode of operation, consisted in a device designated as a mold, which was adapted, as stated by appellees' counsel, to receive and encircle the can body and can head, to size and true up the can body, and to register and guide the head and body together when thus held and guided by the mold. The mold was constructed of two diameters, having a difference between them of the thickness of the tin; the smaller one corresponding to the interior diameter of the can-head flange to the exterior diameter of the can body; the larger one corresponding to that of the exterior of the can-head flange. The function of the larger diameter is to give room for the annular flange of the can head outside of the can body in the mold, and to center the can head ac-

curately in line with the can body, as the head and body are forced together by the piston. The function of the smaller diameter is to size and round the can body by external pressure. The can head and the can body are both simultaneously contained in this mold, and are brought together by a square linear movement, by means of a piston, so that the tight-fitting exterior head is applied with precision, all sides at once, the entire circumference passing to place simultaneously. The mold is then opened to discharge the headed can by a lateral separation of its segments or parts.

The first claim of letters patent No. 267,014 reads as follows:

"(1) In a machine for applying to can bodies heads fitting outside the same, the combination of a device for sizing the exterior diameter of the can body to conform to the interior diameter of the can head, and holding the same so sized while the head is applied, said sizing and holding device having its end enlarged to fit the exterior diameter of the can head, so as to leave an annular space between it and the can body for the reception of the flange of the can head, with a device for forcing the can head into said annular space, and thereby applying the can head outside the can body, substantially as specified."

The Jensen mold, though different in form, possesses all the general features of the Norton mold, which we have mentioned, and is in all respects substantially the same in principle as the Norton mold. The mode of operation is certainly the same. True, the Jensen machine puts on only one head at a time, and the plunger or piston in his machine is placed in such a manner as to move the can body towards the can head, instead of the can head towards the can body, as is the case in the Norton machine. Jensen cut a slot or notch in the end of his mold, so that the can head could be slipped in sideways, instead of at the end of the mold. In the Norton machine the can body is delivered into the mold laterally or sideways, and the can head endwise with the mold, while Jensen, having cut the notch in the end of the mold for the purpose of delivering the can head in laterally or sideways, delivers the can body to the mold endwise.

There are other minor differences in relation to the molds that were discussed by counsel, which we deem it unnecessary to here refer to in detail. It is sufficient to state that after a careful examination of all the testimony, the specifications and drawings, and an inspection of the molds, our conclusion is that the differences pointed out between the respective molds are mostly formal, and do not present any substantial difference in the principle of the operation of the respective machines. The patentee in his specifications refers to the fact that changes may be made in the form without departing from the essential characteristics of his invention:

"I have shown duplicate chutes for the can caps and pistons at each end of the molds. It will be understood that the invention may be used to cap one end at a time, or both ends, as desired. Nor do I wish to be limited to arms, C, arranged in pairs, nor to the precise manner of opening the molds, nor to the precise operating mechanism therefor, because these features may obviously be varied in many respects. * * * I do not wish to limit myself
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to any particular form of construction of can mold, or means of operating said mold to clamp or release the can, nor to any particular devices for forcing the can end upon the can body when secured in said mold, as all these features or devices may be greatly varied without departing from the principle or essential characteristic of my invention. It may also be observed that the molds may be mounted upon a reciprocating slide, or an endless belt or other device, instead of the revolving wheel shown in the drawings."

No one can avoid infringement simply by means of ingenious diversities of form and proportion, presenting simply the appearance of something unlike the patented machine. It is well settled that a copy of the principle or mode of operation described in the prior patent is an infringement of it. If the patentee's ideas are found in the construction and arrangement of the subsequent device, no matter what may be its form, shape, or appearance, the parties making or using it are deemed appropriators of the patented invention, and are infringers. An infringement takes place whenever a party avails himself of the invention of the patentee without such a variation as constitutes a new discovery.

Judge NELSON in *Blanchard v. Beers*, 2 Blatchf. 416, said that—

"The sure test, and one the jury should be guided by in all cases of this kind, is whether or not the defendant's machine, whatever may be its form or mechanical construction, has incorporated within it the principle, or the combination, or the novel ideas which constitute the improvement to be found in the plaintiff's machine. If it does, then, no matter what may be its mechanical construction or its form, it is an infringement, an appropriation of the ideas of another, simply in a different form."

The same learned judge in *Tatham v. Le Roy*, 2 Blatchf. 486, said:

"Formal changes are nothing,—mere mechanical changes are nothing; all these may be made outside of the description to be found in the patent, and yet the machine, after it has been thus changed in its construction, is still the machine of the patentee, because it contains his invention, the fruits of his mind, and embodies the discovery which he has brought into existence and put into practical operation."

See, also, *Winans v. Denmead*, 15 How. 343; *Potter v. Schenck*, 1 Biss. 518.

Claim 2 of the Norton patent No. 267,014 reads as follows:

"In a machine for applying to can bodies heads fitting outside the same, the combination of a chute or device for delivering the can bodies to the machine, with a movable device for clamping the can body and sizing its exterior diameter to conform to the interior diameter of the can head, said clamping and sizing device having its end or mouth enlarged to leave an annular space between the same and the can body clamped therein for the reception of the flange of the head, a chute or device for delivering the can heads to the machine, and a device for forcing the can head into said annular space at the end of said clamping and sizing device, substantially as specified."

The elements contained in this claim, in addition to claim 1, are a chute or device for delivering the can heads to the machine, and a device for forcing the can head into the annular space at the end of the clamping and sizing device. These elements are not limited either by the claim or the specifications of the patent to a can-head feed chute, but cover any equivalent or form of feed device that is suitable for conveying

the can head to the machine. In the Norton machine the arrangement is such that the can bodies will move along by their own gravity. The Jensen machine contains a chute or device for delivering the can bodies to the machine arranged in such a manner that the can bodies will not propel themselves by their own gravity, but it contains a supplemental device for moving the can bodies along the same. The essential fact is the existence of the chute or device in the Jensen patent for delivering the can bodies to the machine. This can-head pusher found in the Jensen machine is simply an addition to the can-head feed chute of the Norton patent.

As Norton was the first inventor to produce a machine having the combination with the can mold, having a recess or enlarged diameter at its end, and the piston with a can-body feed device, and a can-head feed device, he is certainly entitled to claim it in its entirety. The witness Dayton testifies that the Jensen machine employs the same means, to-wit:

"A chute for delivering the can heads and a strictly equivalent means for delivering the can bodies. The traveling belt and a rotary or reciprocating feeder, both of which are used by Jensen to carry in the can bodies, have long been well known for such purposes, and seem to have been selected by Jensen from a wide range of familiar mechanisms adapted to set on the can while standing in an upright position. The addition of the feed fingers at the lower end of the can-head chute in the Jensen machine, for pushing the can heads into place with respect to the clamp mold, was also within the range of well-known mechanical means for such purposes."

Claims 6 and 7 of the Norton & Hodgson patent No. 274,363, for a new and useful improvement in can-ending machines, read as follows:

"(6) The combination of the can-body clamping device or mold with a chute for the can heads, a reciprocating head or piston at the base of said chute for automatically feeding the can heads to the mouth of the mold and applying the same to the can body, and a spring pin or device for holding the can head in a position at the mouth of the mold, substantially as specified. (7) The combination of the delivery chute wheel having half molds upon its periphery, reciprocating half mold, chute for the can heads, piston for applying the same to the can bodies, and discharging chute, substantially as specified."

The spring device mentioned in claim 6 constitutes an important element in the machine. There is some controversy with reference to its use in the Jensen machine. It is not described in the specifications or drawings of the Jensen patent, and Jensen, in his testimony, denies that he now uses it or any equivalent device. Norton testifies that it was in the Jensen machine which he examined. Jensen admits that it was placed in a few of his machines, but claims that when used it was for an entirely different purpose from that in the Norton & Hodgson machine. The action of the circuit court in finding an infringement of claim 6 is justified by the testimony of appellees' witnesses to the effect that the spring pin or device in appellees' machine and in the Jensen machine, when used, performs substantially the same functions, and operates to hold the can head in position at the mouth of the mold,

and is combined in both machines with the mold, piston, and can-head chute. The action of the court in finding an infringement of claim 7 is justified by testimony showing that the reciprocating and revolving bar, F, having the fingers, H, as shown in Fig. 3 of the Jensen patent, is an equivalent for the can-body feeding wheel of the Norton & Hodgson patent. The testimony shows that in both machines there is a reciprocating half mold mounted on the frame of the machine.

Appellants contend that, inasmuch as the claims of this patent are for improvements upon combination claims, the patentees should be restricted to the particular form of their improvements, and that they are not entitled to invoke the doctrine of equivalents. This same contention is relied upon as an answer to the charge of infringement to most of the claims in all of the subsequent patents. Mr. Justice CLIFFORD, in delivering the opinion of the court in *Imhaeuser v. Buerk*, 101 U. S. 655, clearly states the principles of law upon this subject, as follows:

"Equivalents may be claimed by a patentee of an invention consisting of a combination of old elements or ingredients, as well as of any other valid patented improvement, provided the arrangement of the parts composing the invention is new, and will produce a new and useful result. Such a patentee may doubtless invoke the doctrine of equivalents, as against an infringer of the patent; but the term 'equivalent,' as applied to such an invention, is special in its signification, and somewhat different from what is meant when the term is applied to an invention consisting of a new device or an entirely new machine."

In explanation of the term "equivalent," after citing illustrations, he says:

"Patentees of an invention consisting merely of a combination of old ingredients are entitled to equivalents, by which is meant that the patent in respect to each of the respective ingredients comprising the invention covers every other ingredient which, in the same arrangement of the parts, will perform the same function; if it was well known as a proper substitute for the one described in the specification at the date of the patent. Hence it follows that a party who merely substitutes another old ingredient for one of the ingredients of the patented combination is an infringer if the substitute performs the same function as the ingredient for which it is so substituted, and it appears that it was well known at the date of the patent that it was adaptable to that use."

The mechanical substitute "may perform some other functions, but this does not prevent it from being an infringement." *Norton v. Can Co.*, 45 Fed. Rep. 638.

In *Carter v. Baker*, 1 Sawy. 516, Judge SAWYER defines an "equivalent" in the following language:

"When, in mechanics, one device does a particular thing, or accomplishes a particular result, every other device known and used in mechanics, which skillful and experienced workmen know will produce the same result, or do the same particular thing, is a known mechanical substitute for the first device mentioned for doing that thing or accomplishing that result, although the first device may never before have been detached from its work, and the second one put in its place. It is sufficient to constitute known mechanical substitutes that, when a skillful mechanic sees one device doing a particular

thing, he knows the other devices, whose use he is acquainted with, will do the same thing."

. See, also, *Seymour v. Osborne*, 11 Wall. 556; *Machine Co. v. Murphy*, 97 U. S. 125; *Wicke v. Ostrum*, 103 U. S. 469.

Keeping in view these principles of law, and also bearing in mind that there can be no infringement of a combination claim unless every element, or a mechanical equivalent of an omitted element, is used, we proceed to a consideration of the claims in the subsequent patents.

Claim 14 of the Norton & Hodgson patent No. 294,065, for a new and useful improvement in can-ending and seaming machines, reads as follows:

"(14) The combination, with a can-body clamping mold, of a chute or device for delivering the can bodies thereto, a chute or device for delivering the can heads at the mouth of said mold, mechanism for applying the can head to the can body, and mechanism for bending and compressing into a seam the flanges uniting the can head and body, substantially as specified."

This patent shows the first combined can-heading and crimping machine which operated to automatically apply the can heads to the can bodies and to crimp the same. The patentees are, therefore, certainly entitled to claim the combination of the devices which enabled them to accomplish these purposes, as set forth in the claim under consideration. The can-heading device in this patent is substantially the same as in appellees' other patented machines, with the mechanical addition providing for crimping the heads while the can is still held in the clamping mold. The can-body chute is also substantially the same as in the other patents. The drawings accompanying this patent have the squeezing jaw form of crimper. The Jensen machine employs the rotary form, and for this reason, among others, it is claimed that it does not infringe claim 14; but the testimony of both parties shows that both forms of crimpers are old and well known, and could readily be used one for the other. As the substituted device in the Jensen machine is the well-known mechanical equivalent of the device used in this patent, the combination remains the same under the law, and the use of the substituted device must be treated as an infringement of the prior machine.

Claim 1 of the Jordan patent No. 307,197, for an improvement in can-ending machines for automatically putting the ends of sheet-metal cans onto the bodies, reads as follows:

"(1) In a machine for automatically putting the ends of sheet-metal cans on the bodies, a segmental clamp-chuck, and mounted, to be capable of performing the following operations: *First*, to receive and retain a can end; *second*, to grasp and hold the body of the can in a proper position; *third*, to force the end of the can on the body of the same; *fourth*, to release the end and body of the can when these operations are completed, combined with suitable means for actuating the same to effect these operations."

Appellants earnestly argue that this claim has not been infringed by them. They contend that, whatever views may be entertained as to the claims of certain other patents, this claim for the segmental clamp-

chuck or mold must be limited to the particular form of the improvement in the machine as shown in the drawings accompanying the patent; that appellees cannot, under this claim, invoke the doctrine of equivalents; that the machine itself has never been used, and is impracticable; that the underlying principle of the Jensen machine is, in every respect, essentially different from this patent, and does not, in any respect, accomplish its work by the same mode of operation; that the elements of each machine are essentially different, and the mode of operation clearly distinct. A majority of the members of this court are of opinion that this claim has not been infringed, for the reasons given by them in a separate opinion. I shall therefore, with reference to this claim, only express my individual views.

The contention of appellants with reference to the limitation of this claim is directed, to some extent, to the particular method of mounting the mold as shown and described in the Jordan patent, by which the mold is made to swing first to one side and then to the other, so that the can heads and can bodies may be delivered into it. This particular feature of the Jordan patent, as to the vertically moving and horizontally swinging manner of mounting the mold, is covered by claims 2 and 3 of the Jordan patent, which are not claimed to have been infringed by the Jensen machine. The essential improvement of the Jordan patent covered by claim 1 is in the construction of the mold itself. This claim, it will be observed, is not limited to any particular method of mounting the mold. The claim is for "a segmental clamp-chuck, and mounted, to be capable of performing the following operation," etc. By an examination of the specifications, it will also be seen that the patentee did not limit himself to the particular method of mounting the mold, as shown in the drawings accompanying the patent:

"At present, my invention relates to and is employed in a machine, the features of which are fully shown in the accompanying drawings, and described in this specification, but is adapted to and can be operated in a press or machine of any suitable construction."

Under the rules already announced, it is clear to my mind that the patentee is entitled to the doctrine of equivalents. Norton testified that he had one of the Jordan machines in one of his factories fitted up for several sizes of cans; that it was not at present running, but that it had run successfully, and was a successful and operating machine. This testimony, in my opinion, disposes of the objections raised as to the alleged impracticability of the machine.

What is the proper construction to be given to the patents under consideration? Do the molds of each machine, notwithstanding their difference in construction, perform substantially the same function, in substantially the same way, to obtain the same result, or do they perform different functions, or operate in a different way, producing substantially a different result? In *Machine Co. v. Murphy*, *supra*, as well as in the other cases heretofore quoted from, or referred to, the supreme court of the United States very clearly lays down the rule by which all courts should be governed in determining questions of this character. It is there de-

clared that in all cases, except where form is of the essence of the invention, it is not—

"Safe to give much heed to the fact that the corresponding device in two machines, organized to accomplish the same result, is different in shape or form the one from the other, as it is necessary in every such investigation to look at the mode of operation or the way the device works, and at the result, as well as at the means by which the result is attained. Inquiries of this kind are often attended with difficulty, but if special attention is given to such portions of a given device as really does the work, so as not to give undue importance to other parts of the same which are only used as a convenient mode of constructing the entire device, the difficulty attending the investigation will be greatly diminished, if not entirely overcome. *Cahoon v. Ring*, 1 Cliff. 620. Authorities concur that the substantial equivalent of a thing, in the sense of the patent law, is the same as the thing itself; so that if two devices do the same work in substantially the same way, and accomplish substantially the same result, they are the same, even though different in name, form, or shape. *Curt. Pat. 310.*"

Jensen, after speaking in relation to the difference in the mounting of the respective molds, which has been already noticed, testifies that the can mold in his machine also differs from the segmental clamp-chuck in the Jordan machine, in this: that it is so constructed that it has one passage for receiving the can head, and another passage for receiving the can body, so that the can head may be entered therein, while the can body is shaped and rounded, guided and forced, into the can head with one and the same stroke, without any performance whatever with the can mold, as all these operations take place while the can mold is closed and at rest, and that his machine differs from the combination in claim 1 of the Jordan patent, in having omitted the segmental clamp-chuck with but one passage. These differences, in addition to others previously noticed, are relied upon to establish the fact that there has been no infringement of this claim.

The testimony upon the part of appellees is very lengthy, and in some respects materially in conflict with the testimony of Jensen. From an examination of all the testimony bearing upon the question under consideration, and the principles of law applicable thereto, my conclusion is that Jensen obtained the idea and copied the feature of feeding or inserting the can head in the recessed mouth of the mold before the can body is inserted in the mold, and of forcing the body endwise or longitudinally into the mold, after the mold has been closed to support the can head in the recess of the mold, from the Jordan patent. That he likewise copied the feature of beveling or tapering the lower mouth of the mold so as to facilitate the endwise insertion of the can body in its sizing or clamping mold. That these features of the machine are covered by the claim under consideration, and that the element of this claim is found in the Jensen machine. That, although the clamp-chuck in the Jordan patent is divided into six parts or segments, and the mold in the Jensen machine is only divided into two parts, the molds in both machines open and close substantially in the same manner and for substantially the same purpose. That the purpose of the Jensen mold,

as well as the segmental clamp-chuck in the Jordan patent, is—*First*, to hold and retain the can head in the recess of the mold; *second*, to grasp and size up the can body; *third*, to force the can body longitudinally into the mold, and apply the head to it; and, *fourth*, to release the end and body of the can. That the Jensen mold is specially adapted to accomplish these purposes, and is combined with suitable mechanism for operating it, so as to bring about the results above mentioned; and that, notwithstanding the differences in the mode of construction, the dissimilar contrivances and devices for actuating the parts in the two machines, and the improvements in the Jensen machine, as testified to by the respective witnesses, and pointed out by counsel in the oral argument, it contains the invention of Jordan as set forth in claim 1, and therefore, under the principles of the law as hereinbefore announced, infringes the same.

Claims 1, 2, 3, 8, and 9 of the Norton & Hodgson patent No. 307,491, for a new and useful improvement in can-ending machines, read as follows:

"(1) Combination of an inclined clamp or mold for holding the can, with a reciprocating piston or device for applying the head or cover thereto while held in such inclined position, substantially as specified. (2) The combination of an inclined clamp or mold for holding the can with a plate or support for the bottom of the can to rest against, and a reciprocating piston or device for forcing the head upon the can, substantially as specified. (3) The combination of an inclined clamp or mold with a plate or support at the lower end of said mold, an inclined chute for delivering the can heads at the mouths of said mold, and a reciprocating piston for applying said heads to the can, substantially as specified. (8) The combination of an inclined device for holding the can with an inclined chute for delivering the cans thereto in an inclined position, and a device for applying the cover or head to the can while held in such inclined position, substantially as specified. (9) The combination of an inclined device for holding the can with an inclined chute for delivering the cans thereto in an inclined position, and a device for applying a cover or head to the can while held in such inclined position, and a spirally twisted or curved discharge chute to receive the can in an inclined position, and deliver it in a horizontal position to the carrier, substantially as specified."

The machine described in this patent is substantially the same as the machine in patent No. 274,363, with the exception that it is so arranged as to hold the can at an incline instead of horizontally, for the purpose of operating on filled cans. It will be noticed that each of the claims refers to the incline. This patent, with these improvements, stands at the head of the art, as providing for the first machine to automatically put the final head upon a filled can. The essentials of a machine to accomplish this purpose are—*First*, some means for taking the can into the machine and into the mold in such an upright position as that the contents of the can will be retained; *second*, a mold for applying the head to the can while in this position; and, *third*, some suitable means for discharging the can after it is headed, which will cause it to turn down into the proper position to roll through the solder bath, with the head applied undermost. These elements are

found in both machines. The only point seriously urged against the infringement of the several claims in this patent is that the Jensen machine holds the can at an angle of 90 deg., while in the machine described in this patent the can is held at a less angle. With reference to this patent, a majority of the members are of opinion that the claims thereof have not been infringed. My individual views, briefly expressed, are that, if the inclination is sufficient to prevent the spilling of the contents of the can, it does not make any essential difference in what particular angle it is employed. If the angle employed in the Norton and Hodgson machine safely accomplishes the result of preventing the spilling of the contents of the can,—and the testimony of appellees' witnesses is that it does,—then it seems to me clear that appellants cannot avoid infringement upon the ground that their machine operated at a greater angle.

Claims 1, 2, 6, 7, 11, 12, and 13 in the Jordan patent No. 322,060, for a new and useful invention in heading machines for automatically applying the heads on the bodies of sheet-metal cans, read as follows:

"(1) In a can-heading machine, the combination, with two reciprocating part molds, of a reciprocating device for conveying the can body to a position between said part molds, and holding it there while said molds move forward to clamp the can body, substantially as specified. (2) The combination, with two part molds, of a reciprocating device for covering the can body to a position between said part molds, and holding it there until clamped thereby, substantially as specified. (6) The combination, with a pair of molds, for clamping the can body, of a plunger head and a slide to adjust the can head opposite the mold, substantially as specified. (7) The combination, with a pair of can-body clamping molds, of a plunger head, a reciprocating slide to move the can head opposite the mold, and a chute for delivering the can heads to said slide, substantially as specified. (11) The combination, with a pair of can-body clamping molds, of a chute for the can heads, a slide for moving the can head opposite said molds, and a lever and can for operating said slide, substantially as specified. (12) The combination, with two part molds, of a can-head chute, a slide to move the can head opposite the mold, a lever and can for operating said slide, a plunger and plunger head, and a can and lever for operating said plunger, substantially as specified. (13) The combination, with two part molds, of a reciprocating conveyor to convey to and hold the can body between said molds, and a can and lever for reciprocating said conveyor, substantially as specified."

This patent is simply for an improvement upon the original Norton machine. The mold is substantially the same in both patents, the principal difference between the patents being in the manner of mounting the mold, and in feeding the bodies and heads of the cans to the mold. If we are correct in the conclusions reached as to the infringement of the other patents, it necessarily follows that these claims have been infringed, and it would serve no useful purpose to again discuss the points, and reiterate the reasons for our conclusion. In my opinion, the decree of the circuit court should be affirmed.

HANFORD, District Judge, (*concurring.*) The opinion in this case, written by Judge HAWLEY, is concurred in by Judge MORROW and my-

self, and adopted as the opinion of the court as to the principal invention of Mr. Norton, of a "machine for putting on the ends of fruit and other cans," and the several improvements and combinations of the parts of said machine with additional devices for doing all the work of bringing together cylindrical can bodies, and the disks or caps for closing the ends thereof, and joining them by a series of harmonious automatic movements, covered by the several patents issued to E. Norton, Norton & Hodgson, and Edmund Jordan, respectively, and numbered 267,014, 274,363, 294,065, and 322,060. We are of the opinion, however, that for some kinds of work the machine contrived by the appellant Jensen is an improvement upon any machine previously constructed, and a very useful invention; and that it is not an infringement of any rights of the appellees under the patent issued to Edmund Jordan, No. 307,197, or the Norton & Hodgson patent No. 307,491. While we are willing to protect the complainants to the full extent of their lawful claims under the patent laws, we have not failed to notice that, by his own testimony, Mr. Norton has manifested a disposition to restrict the use of his patented machinery to the heading of cans manufactured by a particular corporation, thereby imposing a grievous burden upon important industrial enterprises, from which they cannot escape unless other machinery can be lawfully employed. For this reason we are not inclined to enlarge their rights by any strained construction of the law, nor by presuming in their favor facts not clearly proven by legal evidence. We hold that the Jordan "can-ending machine" patent No. 307,197, by reason of being cumbersome and slow in its operations, is not a practicable machine for putting heads on tin cans of the size required for use in putting up fruits, vegetables, meats, fish, and similar materials for individual and family use; and therefore it cannot be infringed by the use of a different machine, which will do such work well, at a reasonable cost. It is true that Mr. Norton has testified that a Jordan machine set up in his factory has been operated successfully. But this is only the conclusion of an interested witness. It states no particulars as to the time during which the successful operation of the machine continued, nor the number of cans, whether one or a dozen or more, that were successfully operated upon; and he does not say whether or not the expense attending the successful operation was or was not the cause of discontinuing the same; and, besides this, same witness admits that this machine is too slow in its operation to be profitably employed in heading cans of the size required in the largest numbers. The most that he claims for it is that it is a splendid working machine for putting covers on gallon or other large cans, a class of work for which, so far as the evidence discloses the facts, the Jensen machine has not been used. Mr. Jordan is not the inventor of the mold or discoverer of the principle of the segmental clamp described in the specifications for his patent. His invention consists of a new use of these appliances in combination with others to produce certain results. This is a sufficient reason for limiting the patent to the particular use mentioned in the specifications. The "can-ending machine" described in patent No. 307,491

is simply the machine covered by the patents Nos. 267,014, 274,363, and 322,060, tilted up, by being bedded upon a table the top of which is an inclined plane of about 45 deg. from an horizontal, combined with a spirally twisted discharge chute, so constructed as to receive cans in the inclined position in which they are held by the clamp when the heads are applied, and deliver the same in an horizontal position. The object of setting the machine in such inclined position is to make it operate upon filled cans. It is obvious that to move and operate upon well-filled cans, especially of liquid or semi-liquid substances, the cans must be in true vertical positions, and the movement must be so free from jarring or concussion as to not disturb the contents; whereas one of the essentials of the "can-ending machine" is a carrier or feeding chute so constructed as to bring the cans into such a position that, by force of gravity, they will drop into the half molds upon the periphery of the intermittently revolving wheel. The machine will not operate upon filled cans in an upright position without some additional device or substitute for gravity to force the cans into the revolving half molds, for the clamp or mold has no attraction for the cans or means of seizing them without the aid of an extraneous force. The contrivance of setting the can-ending machine in an inclined position, and the adjustment of the feed and discharge chutes to work with it in that position, can scarcely be considered to involve the exercise of inventive genius, or anything more than ordinary mechanical skill; and being, at best, but partially successful in the accomplishments of its object, we cannot, under the law as we understand it, hold that any rights of the patentees have been infringed by the Jensen machine, which the evidence shows to be in its operation upon filled cans a complete success. The patent laws were not designed for the benefit of the man who attempts to originate a useful thing, but rather to reward the one who first achieves success in the production of it. It would be a perversion of the law to hold a machine which can do certain kinds of work to be an infringement of a patent for a different machine, which cannot do the same work. The decree of the circuit court should be so modified as to declare that the patents Nos. 307,197 and 307,491 are not infringed by use of the Jensen machine, and in all other respects affirmed, and it is so ordered.

Costs of the appeal are awarded to the appellants.

KINSMAN v. CHINA MUT. INS. CO.

(District Court, D. Massachusetts. December 7, 1891.)

MARINE INSURANCE—INSURABLE INTEREST—TOTAL LOSS.

Where it appeared that libellant had an insurable interest in a vessel by reason of advances exceeding the amount of the policy sued on, and that the vessel had sustained damage from perils of the sea, and could not be made seaworthy except at an expense exceeding her value when repaired, thus constituting a total loss, within the meaning of the policy, *held*, that libellant was entitled to recover against the insurance company the amount of the policy.

In Admiralty. Libel to recover on policy of marine insurance.

Eugene P. Carver, for libellant.

John D. Bryant, for respondent.

NELSON, District Judge. The libellant, as managing owner, had, at the date of the policy of insurance, an insurable interest in the barque *Eliza White*, by reason of his advances made on account of the vessel. The protest of the master and mate and the surveyor's certificates are competent evidence in the case, and, with the testimony of *Darling*, are sufficient to prove that the injury suffered by the *Eliza White* from perils of the sea, previous to her arrival at *Nassau*, a port of distress, were so great that she could not be repaired so as to make her a seaworthy vessel, except at an expense exceeding her value when repaired, and this constituted a case of actual total loss, within the meaning of the policy of insurance. The testimony of the libellant is sufficient to prove that his advances exceeded \$1,000, the amount insured by the policy, and that the defendant had notice of the loss in September, 1883, and waived all further proof of the loss. Decree for the libellant for \$1,000, and interest from December 1, 1883, and costs.

THE FROGNER.

GULLICKSEN v. CHICORA FERTILIZER Co. et al.

(District Court, D. South Carolina. February 23, 1892.)

FREIGHT—CARGO "INTAKEN"—AMOUNT—INTENT OF PARTIES.

Where a charter-party provides for a certain rate of freight on "about 1,500 tons" of iron ore "intaken,"—the original word "delivered," in the charter-party, being stricken out, and the word "intaken" written in,—and the master, at the port of loading, being without opportunity of weighing, demanded 1,575 tons, which amount was promised him, and a bill of lading made out therefor, and assurance given the master that he had that amount, and the ship, after a safe voyage without incident, delivered only 1,500 tons, no question of short delivery being raised, but only the question whether freight should be paid on 1,575 tons or on the amount delivered, *held*, that the parties had agreed at the port of loading as to the number of tons on which freight should be paid, viz., 1,575 tons.

In Admiralty. Libel to recover balance of freight.

Bryan & Bryan, for libellant.

J. N. Nathans, for respondents.

SIMONTON, District Judge. Respondents are the purchaser from H. G. Mayer & Co. of a cargo of pyrites, and the agent of Mayer & Co., who also is guarantor of the freight. Mayer & Co. entered into a charter-party with the owners of the steam-ship *Frogner*, under which she took in at Pomaron, on the coast of Portugal, the cargo of sulphur ore, or pyrites, sold to the Chicora Company. The charter-party provided for a cargo of about 1,500 tons of pyrites, not exceeding what she can reasonably stow and carry, to be discharged on Ashley river, Charleston, S. C., on being paid freight at the rate "per ton of 20 cwt. intaken 16 (sixteen) shillings." The original charter-party had the word "delivered" in print. It was stricken out, and the word "intaken" written in its stead. The freight is payable on unloading and right delivery of cargo. The master could sign bills of lading, if required, at any rate of freight, but without prejudice to charter-party. The steam-ship loaded partly in port, and finished loading at sea. The ore was weighed only at the mines, some 40 miles away, was carried by rail, and dumped into the ship, a part from the quay and a part from lighters. The master demanded a cargo of 1,575 tons. This was promised to him. Before cargo was all delivered, a bill of lading for 1,575 tons was prepared by charterer, and presented to the master for his signature, and he signed it. Afterwards the agent of the charterer at Villareal stated to the master that he had shipped 1,575 tons. After a safe voyage without incident the steam-ship reached this port, and delivered cargo. Its delivery weight was 1,500 938-2240 tons. No question of short delivery is made. The only controversy is, shall freight be paid on 1,575 tons, or on the number of tons delivered? Is the freight to be paid upon the number of tons attributed to her at the port of lading, or are we bound to conclude that, as only 1,500 938-2240 tons have been delivered, and there is no question of short delivery, this was the amount "intaken," and not 1,575 tons? If the number of tons delivered is conclusive evidence of the number of tons intaken, the careful erasure from the charter-party of the printed word "delivered," and the insertion of the written word "intaken," was an idle ceremony. This would assume and give to respondents the full benefit of the assumption that the weight of the cargo is fixed by a definite, certain, inflexible, and unchangeable standard; that there can be no error or fluctuation, loss of quantity, or diminution in weight; and that the exact number of tons which went in at Pomaron would come out here. The evidence discloses the fact that the weight of the intaken cargo and the output at the port of delivery seldom, if ever, agree. The contract of sale produced in this case provides for 20 per cent. of smalls; that is, the fine powder by abrasion of the particles of ore. This shows that lumps of pyrites disintegrate, and that the amount of disintegration may reach 20 per cent. A part of the evidence was a bottle of sample ore sent with cargo, and kept sealed. The bottom of this bottle is filled

with a fine powder,—*debris* of the ore. The adoption of the rule suggested by respondent prevents the vessel from asserting this. The master demanded 1,575 tons. He was assured that he had this number, both at the place of loading and at Villareal de San Antonio, a port of call provided in the charter-party. The bill of lading prepared by the agent of the charterer called for 1,575 tons. It is manifest, therefore, that this is the amount attributed to cargo by both parties at the port of lading. The freight was to be regulated by the number of tons intaken, and to be fixed at the port of lading. In effect, it fixed the amount of freight which the one party agreed to pay, and which the other party expected to receive, as the compliance with and the result of his demand. The manner in which the ship was loaded from a train of cars, partly at the quay and by lighters at sea, precluded the master from weighing it himself. The charterer was the purchaser of this cargo, and expected to sell it again. The ship could reasonably trust that he would not overstate the cargo he was getting from the mines. When he made his demand, the master calculated upon 1,575 tons, at 16 shillings per ton. By their assurances the agents of the charterer prevented him from securing his expectations. In my opinion, both parties agreed to assume that 1,575 tons was the weight of the cargo intaken, and adopted that as the number on which freight should be estimated. See *Spaight v. Farnworth*, 5 Q. B. Div. 119. Let a decree be entered in accordance with this opinion.

THE SANTA ANNA MARIA.

FORACE v. SALINAS.

(District Court, D. South Carolina. February 27, 1892.)

GENERAL AVERAGE—JETTISON—EVIDENCE OF EXAGGERATION—STRICT PROOF.

An Italian bark, through collision, sprung a leak and thereafter jettisoned some of her spare furniture, as well as part of the cargo. On an adjustment in general average a certain sum was charged against the cargo, and the owners thereof objected that the jettison was unnecessary. This suit was brought to recover the amount charged against the cargo in the adjustment. The evidence indicated that there was great exaggeration, both in the alleged condition of the bark after the accident, and in the number and value of the articles jettisoned. *Held*, that libellant must make out his case by a preponderance of credible evidence, and, in view of the impression of exaggeration given by the evidence, such articles as were not clearly proved to have been jettisoned should be excluded from the general average adjustment, the others being allowed.

In Admiralty. Suit to enforce adjustment of general average.

J. N. Nathan, for libellant.

J. P. K. Bryan and *D. B. Gilliland*, for respondent.

SIMONTON, District Judge. The *Santa Anna Maria*, an Italian bark, was on her voyage from Girgenti to the port of Charleston. She had a

full cargo of sulphur,—570 tons. When she reached this port the master filed his protest, reporting jettison of part of his cargo, 41.481 tons, and of a chain, cable, anchor, water-casks, sails, awnings, hawsers, lines, and cordage, property of the ship. An adjustment of general average was made by Mr. Johnson, a professional adjuster, based on the statements of the protest and of the log. The net sum charged against cargo under this adjustment is \$477.20. The cargo had been delivered under the general average agreement. The owner of the cargo makes no complaint as to the mode of the adjustment. He denies the facts upon which it was based.

The adjustment is not conclusive. The facts are open to inquiry. *The Alpin*, 23 Fed. Rep. 819; *The Niagara*, 21 How. 9. The libellant's testimony is this: The bark left Girgenti, 22d April, 1891. She met no severe weather, and no unusual incident, until the night of 26th of July, 1891. About 11:30 P. M., the night being dark and rainy and the wind fresh, she came into collision with some dark object, unknown, at a point upon her bow just about, perhaps a little below, the water-line. She disengaged herself immediately, and passed on. Her rate of speed was six knots. Very soon the sound of water was heard, entering the ship, but from the thickness of the frame at the bow the exact place of the leak could not be ascertained. It would have been a difficult and tedious task to cut into the frame in order to find the spot. The pumps were manned at once by four men. At 2 P. M., the water still gaining on her, sails were shortened. Two casks of water at the bow, holding three-quarters of a ton, were broken open. The starboard anchor chain, and more chain, with the kedge, were thrown overboard. The water still gaining, a consultation was held, and the conclusion reached to jettison cargo. The bark had four hatchways,—a small one near the bow, another just abaft the foremast, the main and mizzen hatch. They concluded to begin at this second hatch. In order to get at this hatch, it was necessary to remove certain articles—spare sails, awnings, rope, and hawsers—piled up on it. These were all removed, and for the purpose of speedy removal were thrown overboard. When the hatch was cleared, they got at cargo, and threw overboard 15 to 20 tons of sulphur. They then went to the main hatch and threw over the rest,—in all, 41.481 tons. This lightened the ship. The water was gotten under control, the leak ceased, and by 2 P. M. the next day the ship was dry. She came into this port on 31st July. No survey of the vessel for the purpose of ascertaining the nature and extent of the injury to her hull was ever had, nor was she repaired, except by a mate, who was a sort of carpenter; and at what cost does not appear. The hatchway was 4 feet square. In order to get at it, they had to remove, from on top of it, 1 foresail, measuring 220 yards; 2 stay-sails, 200 yards; 1 spanker, 110 yards; 4 awnings, 200 yards each; 1 top-gallant sail, 130 yards; 1 top-sail, 160 yards; 2 5-inch hemp hawsers, 120 fathoms each; 1 hemp tow-line, 7 inches, 100 fathoms. The sulphur lay on the skin of the ship, 1½ feet from the keel. When the pumps were sounded, at first, she had in her 2 feet of water above the skin, which continued to increase

until cargo was jettisoned, about 11 A. M. the next day. This is the ship's statement.

The Italian law requires the master to have, among other things, an inventory of ship's equipment, spare sails, etc., called "*inventario di bordo*." Code Commerce, § 643, subd. 19, p. 202. Without this, general average for such articles cannot be claimed. Lown. Gen. Av. p. 445. The question was asked, whether this ship had such an inventory. As the testimony was all taken through an interpreter, it is impossible to say whether the witness understood the question. He said that the inventory was in the log of the day of the occurrence, and that the master had a list of articles on the ship. At all events, it was not produced. The sulphur was discharged on her arrival in port. It came out in lumps and in powder, as sulphur always does, with no marks of water. Considering this statement, it is impossible to resist the impression that there was great exaggeration, both in the alleged condition of the bark, and in the number and value of the articles jettisoned. The collision, which, it is claimed, threatened immediate disaster, left no marks of injury, either to hull or cargo, which could be discovered on arrival at port. The reckless jettison of articles of great use and value, before touching the cargo, worth very much less; adopting this mode of getting at cargo, although the main hatchway was at once accessible, and the whole hold was without compartments; the enormous amount of sails, awning, hawsers, and rope piled up on the surface of the hatch, only four feet by four; the great disadvantage in getting at the truth, arising from the intervention of an interpreter between seafaring men and the counsel, thus preventing anything resembling searching cross-examination; the failure to produce the *inventario di bordo*,—all of these considerations deepen the impression. It is the duty of the libellant to make out his case by the preponderance of credible evidence. The testimony does not enable the court to reach the conclusion that the articles specified were jettisoned from the hatch next forward of the main hatch, nor can it be ascertained what articles from this hatch really were jettisoned, if indeed any were. All these must be excluded from the general average adjustment. It is not inappropriate to quote here the language of Lowndes on General Average, (4th Ed. § 22, p. 92.)

"Many ships are lumbered with all kinds of useless articles on deck, which increase the risk, and are sure to be thrown overboard on the first approach of danger. To guard against the abuse of this practice the rule in England, as in Germany and most other states, is that jettison of ship's materials off the upper deck is not treated as general average, unless it be of such articles as are necessary for the navigation of the ship, and therefore are carried on deck in conformity with the custom of the trade. Boats, studding-sails and their gear, spare spars, anchors, are examples of articles properly carried on deck. Water-casks, provisions, spare sails, cables, ought not to be. Hawsers, in coasting trades or for short voyages, may properly be on deck, though for a long voyage they should be got below as soon as they are dry."

The other articles jettisoned will be allowed. Let the average adjustment be corrected in accordance with this opinion.

NORTHERN PAC. R. CO. v. AMATO.

*(Circuit Court of Appeals, Second Circuit. January 18, 1892.)***1. CIRCUIT COURT OF APPEALS—WRITS OF ERROR.**

Under the act establishing the circuit court of appeals, (26 St. p. 826, c. 517,) which provides, in section 11, that all existing provisions of law, "regulating the system and methods of review through appeals and writs of error," shall be applicable to such review in the circuit court of appeals, a writ of error returnable to the circuit court of appeals may be issued from the clerk's office of the circuit court in which the action was tried.

2. SAME—JURISDICTIONAL AMOUNT.

As Rev. St. U. S. § 691, as amended by Act Feb. 16, 1875, limiting the jurisdiction of the supreme court to cases involving \$5,000 or over, was expressly repealed by section 14 of the circuit court of appeals act, there was no ground for contending that such limitation applies to the jurisdiction of the circuit court of appeals.

3. SAME—DATE OF CREATION.

The act creating the circuit court of appeals took effect from the date of its passage, and the court had jurisdiction to review, by writ of error, a judgment entered thereafter, and before the third Tuesday in June following, which was merely the day for the first meeting of the court, as fixed by the joint resolution passed on the same day with the act. *In re Claasen*, 11 Sup. Ct. Rep. 785, 140 U. S. 200, followed.

4. SAME—PENDING SUITS.

The circuit court of appeals has jurisdiction to review causes pending in the circuit courts at the time of its creation, even though such causes, being for less than \$5,000, were not before reviewable in any court. Making the cause reviewable is not impairing the jurisdiction of the court, within the meaning of the clause of the joint resolution which declares that the act shall not in any wise impair the jurisdiction of any federal court in pending causes. *In re Claasen*, 11 Sup. Ct. Rep. 785, 140 U. S. 200, followed.

5. BILL OF EXCEPTIONS—TIME OF SETTLING AND FILING—CIRCUIT COURT RULES.

While rules 67 and 69 of the circuit court for the southern district of New York require exceptions in common-law cases to be drawn up and served before judgment, they do not require the exceptions to be settled and filed before that time.

6. MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE.

Whether it was contributory negligence for a railroad laborer, returning from his work at night across a slippery railroad bridge, to walk "at his ease," without keeping a lookout for trains, in view of his boss' assurance that there would be no trains for two hours, is a question for the jury.

Error to the Circuit Court of the United States for the Southern District of New York.

Action by Dominick Amato against the Northern Pacific Railroad Company for damages for personal injuries. The cause was brought originally in the supreme court of New York for New York county, and was subsequently removed by defendant to the United States circuit court for the southern district of New York. Verdict and judgment for plaintiff in the sum of \$4,000, and a motion for a new trial denied. 46 Fed. Rep. 561. Defendant brings error. Affirmed.

On writ of error from the supreme court, affirmed, 12 Sup. Ct. Rep. 740.

STATEMENT BY LACOMBE, CIRCUIT JUDGE.

In November, 1888, Amato, the defendant in error, who was a laborer on the railroad of the plaintiff in error, was run over, and his leg cut off, by one of the company's locomotives. He had been at work, with a gang of 56, near the west end of the railroad bridge, at Bismarck, in North Dakota. They lived near the east end of the bridge, and it was the custom of the company to take the men home from their work on a

car drawn by a locomotive, about half past 5 o'clock each afternoon. On the day of the accident, however, the boss told them there would be no train to take them across, and that they would have to walk. He further told them that no engine would come over the bridge until about 7 or half past 7. They all started to walk across, but Amato, in consequence of a pain in his side, could not keep up with the others, and fell behind, walking by himself. There was but one track on the bridge, and on that track he walked. There was not room to walk at the side of the track without crawling from one trestle to another. An engine came on the bridge from the east, meeting him about midway across. From the place where he met the engine to the east end was about 700 feet, and the track straight. There was room on the bridge to allow him to step aside and let the engine pass, if he had seen it coming. He did not see it until it was "on top of him." Then he tried to get out of the way, but slipped on the track, which was slightly frozen, fell, and caught his leg under the wheel of the engine, which passed over it, cutting it off. The action was commenced in February, 1890, and was tried in the circuit court of the United States for the southern district of New York, April 17, 1891, resulting in a verdict for \$4,000 in favor of the plaintiff below. Judgment was entered May 28, 1891, and the bill of exceptions was signed July 16, 1891. A writ of error from this court was issued from the clerk's office of the circuit court on July 27, 1891.

Henry Stanton, for plaintiff in error.

Roger Foster, for defendant in error.

Before WALLACE and LACOMBE, Circuit Judges.

LACOMBE, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The defendant in error contends that the writ of error is void, because it was issued from the circuit court, and not from the circuit court of appeals. Such contention is unsound. The act of March 3, 1891, establishing the circuit courts of appeals, (26 St. p. 826, c. 517,) provides in its eleventh section that "all provisions of law now in force [when the act was passed] regulating the methods and system of review, through appeals or writs of error, shall regulate the methods and system of appeals and writs of error provided for in this act in respect of the circuit court of appeals." At the time the act was passed it was provided, by section 1004 of the Revised Statutes, that "writs of error returnable to the supreme court may be issued as well by the clerks of the circuit courts, under the seals thereof, as by the clerk of the supreme court." By the eleventh section (above quoted) this regulation touching the method of review by writ of error was extended to cases returnable to the new courts of review.

It is also urged on behalf of the defendant in error that no writ of error lies in review of this judgment, inasmuch as the matter in dispute, exclusive of costs, is less than \$5,000. Reference is made to the eleventh section of the act establishing the circuit courts of appeals, (above quoted,) and to the provisions of section 691 of the Revised Statutes, as amended

by section 3 of the act of February 16, 1875, (18 St. pp. 315, 316, c. 77,) limiting the jurisdiction of the supreme court to cases involving that amount. The difficulty with this argument is that the very act which created the new courts expressly repealed section 691 of the Revised Statutes, and also section 3 of the later act of February 16, 1875, limiting the jurisdiction to cases involving \$5,000. Act March 3, 1891, § 14. At the time the new act was passed, these provisions as to the amount in controversy ceased to exist, and were therefore not transferred to the new courts as "provisions of law [then] in force."

Defendant in error further contends that this court has no jurisdiction to review, by writ or error, a judgment which was entered before the day prescribed in the joint resolution of March 3, 1891, (Joint Resolution No. 17, March 3, 1891; 26 St. p. 1115,) for the organization of this court, and that this action is not affected by the act of March 3, 1891, having been begun before its passage, and therefore within the saving clause of the joint resolution, which provides that "said act shall not * * * in any wise * * * impair the jurisdiction of any court of the United States in any case now pending before it." It is argued that the jurisdiction of the circuit court would be impaired if, in a case where its judgments were formerly absolute, they may now be reversed by writ of error. This point, however, has been disposed of by the supreme court in *Re Claasen*, 140 U. S. 200, 11 Sup. Ct. Rep. 735, where a writ of error was allowed under the new act to review a final judgment rendered March 18, 1891, in a criminal action pending before the passage of the act, and which judgment was not (except for such act) reviewable by writ or error, the court holding that the act of March 3, 1891, went into immediate operation, so as to permit a writ of error in such a case. The new courts were created by the act of March 3, 1891, § 2, which took effect upon its passage, not by the joint resolution, which merely provided for their first meeting day.

Defendant in error further contends that the bill of exceptions cannot be considered, because it was allowed too late, judgment having been entered May 28, 1891, and the bill of exceptions allowed July 16, 1891; and refers to circuit court rules 67 and 69, (for the southern district of New York.) These rules provide, in substance, as follows: (a) Exceptions shall be drawn up and served before judgment is rendered and entered, unless the time shall be enlarged by a judge; (b) amendments thereto are to be served within four days after service of the exceptions, unless the time shall be so enlarged; (c) four days are allowed for the parties to agree, unless the time shall be so enlarged; (d) if they cannot agree, four days' notice of settlement may be given by either party, unless the time be so enlarged; and (e) the judge shall thereupon correct and settle the same, within what time the rules do not prescribe. There is nothing in these rules requiring the exceptions to be settled and filed before judgment, and, for all that appears in the record before us, the proposed exceptions were drawn up and served before judgment, as the rules require.

The plaintiff in error insists that the trial judge erred in not taking the case from the jury, and directing a verdict for the company, because, as it contends, the undisputed testimony showed that Amato was guilty of culpable negligence, which brought about the accident. He testified that "he was walking at his ease, not thinking of anything," and did not see the engine when it came on the straight part of the bridge; but also stated that he "never thought of it, for the reason that the boss told him there was nothing to come across." We are of the opinion that it was fairly a question for the jury to determine whether or not it was negligence on his part not to keep a lookout for a coming engine, in view of the boss' assurance that there was none to come. The case is quite within the decisions in *Bradley v. Railroad Co.*, 62 N. Y. 99, and *Oldenburg v. Railroad Co.*, 124 N. Y. 414, 26 N. E. Rep. 1021.

The judgment of the circuit court is affirmed, with costs of this appeal.

GILBERT *et al.* v. NEW ZEALAND INS. Co.

(Circuit Court, D. Oregon. March 21, 1892.)

1. INHABITANT.

That the term "inhabitant," as used in the first section of the judiciary act, includes a foreign corporation, engaged in business in the district in which it is sued, according to the laws thereof.

2. FOREIGN CORPORATION.

A foreign corporation, engaged in business in any state in this Union, who, in pursuance of the laws thereof, appoints an attorney, with power to receive service of process in any suit against it, thereby consents in advance to be sued thereon.

At Law.

Mr. Lewis L. McArthur and *Mr. Tilmon Ford*, for plaintiffs.

Mr. Joseph Simon, for defendant.

DEADY, District Judge. This action is brought by the plaintiffs, citizens of Oregon, against the defendants, a corporation organized under the laws of New Zealand, and alleged to be an "inhabitant" of the state of Oregon, to recover an alleged loss by fire of \$3,500, against which it had insured the plaintiffs.

The first complaint merely stated that the defendant was a New Zealand corporation, and plaintiffs were citizens of Oregon; and on this it was contended that the parties were "citizens of different states," within the meaning of those words in section 1 of the judiciary act, (Supp. Rev. St. p. 612,) and therefore the court had jurisdiction.

On demurrer to the complaint, the court held these words did not include an alien subject or corporation, but were confined to citizens of the "states" of this Union.

The plaintiffs had leave to amend, and now allege that the defendant in 1888 engaged in the fire insurance business in Oregon, and, pursuant to the laws thereof concerning foreign insurance companies, depos-

ited with the treasurer thereof the sum of \$50,000, and filed with the insurance commissioner its power of attorney, whereby it duly authorized a proper person to accept service of process in any proceeding in any court of the United States therein, and thereupon received a license from said state to engage in such business, and established and has ever since maintained a place of business therein, and is now an inhabitant thereof, doing business therein as a fire insurance company, according to the laws of Oregon.

A demurrer was interposed to the amended complaint on the ground that the defendant, being a foreign corporation, is not an "inhabitant" of this state, and cannot be sued therein without its consent.

On the argument counsel for the demurrer cited *Hohorst v. Packet Co.*, 38 Fed. Rep. 273; *Booth v. Manufacturing Co.*, 40 Fed. Rep. 1; *Purcell v. Mortgage Co.*, 42 Fed. Rep. 465; while counsel for the plaintiffs cited *Zambrino v. Railway Co.*, 38 Fed. Rep. 449; *Riddle v. Railroad Co.*, 39 Fed. Rep. 290; *Miller v. Mining Co.*, 45 Fed. Rep. 347.

The last case was decided in this court, in which I held, in the language of the syllabus:

"A foreign corporation may be an 'inhabitant' of a district or county other than that of which it is a citizen or subject, or where it was organized, within the meaning and purpose of the term, as used in section 1 of the judiciary act."

At that time I had before me and considered the first three of the above-cited cases, which hold otherwise, but was not persuaded by them.

Since then I have not seen nor heard anything to change my opinion, but much to strengthen and confirm it, in an opinion delivered by Mr. Justice HARLAN in the case of *U. S. v. Railway Co.*, 49 Fed. Rep. 297.

The case arose in the northern district of California, and was heard under section 617 of the Revised Statutes. In the course of his opinion Mr. Justice HARLAN said that no "case in the supreme court of the United States directly decides that a corporation may not, in addition to its primary legal habitation or home in the state of its creation, acquire a habitation in or become an inhabitant of another state for purpose of business and of jurisdiction *in personam*;" and holds that the defendant—a corporation created under the laws of Kentucky, but doing business in California pursuant to the laws thereof—is, for the time being, an "inhabitant" of said state, within the meaning and purpose of the clause of section 1 of the judiciary act, which provides that "no civil suit shall be brought before either of said courts [circuit] against any person by any original process or proceeding in any other district than that whereof he is an inhabitant."

In *Bank v. Deveaux*, 5 Cranch, 88, it is stated by Mr. Chief Justice MARSHALL that the word "inhabitant," in the statute of Hen. VIII., concerning bridges and highways, which provides that the same shall be made and repaired by the "inhabitants of the city, shire, or riding," was held to include a corporation that had lands within said city, shire, or riding, although it might reside elsewhere.

The defendant is an inhabitant of this district within the meaning of the statute.

But this action will lie in this court, on the ground of the consent of the defendant.

Section 1 of the judiciary act gives this court jurisdiction of such actions as this, generally, in which there is a controversy between citizens of a state and foreign citizens or subjects; and the clause concerning inhabitancy only restricts the right of the plaintiff to sue the defendant in the district of which the latter is an inhabitant.

But the defendant may waive this privilege, and consent to be sued in a district of which he is not an inhabitant. *Ex parte Schollenberger*, 96 U. S. 377; *Railway v. McBride*, 141 U. S. 130, 11 Sup. Ct. Rep. 982.

A foreign corporation, such as this defendant is, before doing business in this state, is required by the laws thereof to execute a power of attorney, and file a copy of the same with the insurance commission, and cause it to be recorded in the clerk's office of each county where it has a resident agent; appoint some citizen of the state its attorney thereby, empowering him to accept service of all writs and process necessary to give complete jurisdiction of such corporation to any of the courts of this state or of the United States courts therein; and shall constitute such attorney the authorized agent of such corporation, upon whom lawful and valid service may be made of all writs and process in any action, suit, or proceeding commenced by or against such corporation in any of the courts mentioned in this section, and necessary to give such court complete jurisdiction thereof. Hill's Code 1887, §§ 3276, 3277, 3573.

And now it appears by the return of the marshal on the summons in this case that he served the same on the duly-authorized attorney of the defendant, as appears by the power of attorney recorded in this county.

This is all that is necessary to give this court complete jurisdiction of the defendant in this action; and to this it consented in advance, when it executed, filed, and recorded this power of attorney. In effect it said to every one with whom it did business: "Although I am an alien, and not liable to be sued in this district without my consent, I hereby consent to be served with process therein, so as to give any court in which I may be sued complete jurisdiction of the action."

The case falls within the ruling in *Railway Co. v. Harris*, 12 Wall. 81, in which Mr. Justice SWAYNE, speaking of a corporation, said:

"It cannot migrate, but it may exercise its authority in a foreign territory upon such conditions as may be prescribed by the law of the place. One of these conditions may be that it shall consent to be sued there."

Of course, I must not be understood to say that a corporation can, by its consent, give this court jurisdiction of a controversy which congress has not, as where the matter in dispute does not exceed the value of \$2,000.

The demurrer is overruled on two grounds: (1) The defendant, under the circumstances, is an inhabitant of the district; and (2) if this be otherwise, it has consented to be sued herein.

HENDERSON *et al.* v. GOODE *et al.*, (HOME INS. CO. *et al.*, Interveners.)

(Circuit Court, E. D. Louisiana. April 9, 1892.)

1. MORTGAGE PRIVILEGES—PRIORITIES—EXECUTORY PROCESS.

Even if a mortgage, given to secure the purchase price of property in Louisiana, has become perempted, the vendor's privilege survives, and the assumption thereof by a new purchaser continues the same against him and upon the property, outranking even that of the second vendor; and, if such assumption is executed before a notary and two witnesses, executory process will issue under Code Pr. arts. 732, 733.

2. FEDERAL COURTS—JURISDICTION—CITIZENSHIP.

When the United States court has jurisdiction over the cause and the *res*, other parties, whose citizenship would not have allowed them to institute the suit, may intervene to assert their rights in the *res*, but they cannot have original process.

In Equity. Bill by William Henderson and others against Lenore W. Goode and others to enjoin executory process.

Henry L. Lazarus and *Horace E. Upton*, for complainants.

Hugh C. Cage, for Mrs. Goode.

Carroll & Carroll, for Crescent Insurance Company, intervener.

Browne & Choate, for Home Insurance Company, intervener.

W. S. Benedict, for Julius Schwabacher, intervener.

BILLINGS, District Judge. This is a bill in equity to enjoin an executory process. The defendant Mrs. Goode obtained an order of seizure and sale under Code Pr. art. 732. The Home Insurance Company, the Crescent Insurance Company, and J. M. Schwabacher have intervened, each claiming rights as mortgagee; and the two first interveners asked and obtained additional executory process. The facts necessary to an understanding of the issues are as follows: In 1881 the defendant Mrs. Goode sold and conveyed to Bisland the "Aragon Plantation." For a portion of the price he executed to her a mortgage upon the same for \$17,074.60. This mortgage was properly inscribed in 1881, but has never been reinscribed. In 1885, Bisland sold and conveyed to Calder, who, in the notarial act of transfer, assumed \$16,675.12 of the purchase price remaining due from Bisland to Mrs. Goode. This notarial act was, in 1885, recorded in both the conveyancing and mortgage offices of the proper parish. Calder has gone into insolvency, and the complainants are his syndics. The complainants, as ground for the injunction asked, urge that the original mortgage from Bisland to Mrs. Goode, not having been reinscribed, has become perempted, and cannot be the basis of an executory process. But this is a process based upon the assumption by Calder of a portion of the original purchase price. Even if this mortgage to secure this price had become perempted, the privilege of Mrs. Goode, as vendor, still survived against the property, and was assumed by Calder before a notary, and in the presence of two witnesses. The Code of Practice authorizes executory process wherever a mortgage privilege exists in favor of the creditor, which is evidenced by a notarial act executed before a notary and in the presence of two witnesses. Articles 732, 733. This proof exists in this case. The case of *Dejean v. Herbert*,

31 La. Ann. 729, is authority. There the act showed no mortgage, but did show that the purchase price was due which carried the vendor's privilege. Here the act shows, in connection with the original mortgage, a mortgage claimed to be perempted, but an admittedly existing and assumed privilege. That such an assumption continues, as against the new purchaser and upon the property sold, a vendor's privilege, which outranks that even of the second vendor, is abundantly settled by the decisions of our supreme court, and was not questioned in the argument. As concerns Mrs. Goode, the citizenship of herself and Calder is such that the court has jurisdiction over the cause and the *res*,—the mortgaged premises. This is true of Schwabacher, who is a citizen of Missouri. So far as the Home Insurance Company and the Crescent Insurance Company are concerned, they are citizens of this state, and, therefore, of the same state as Calder; but they are citizens of another state than that of Mrs. Goode. They could not have instituted the suit in the United States circuit court, nor can they have original process. But, the court being in possession of a *res*, in a proceeding over which it had jurisdiction, they have properly intervened to assert their rights in the *res*. In this respect they are like people claiming in an admiralty court liens which spring from state statutes. They cannot bring the *res* into the court, but may assert their privileges after it has been brought there by those having admiralty liens. The injunction is refused so far as relates to Mrs. Goode, Schwabacher, and the marshal, and is allowed so far as relates to the independent executory process of the Home and Crescent Insurance Companies, leaving them full right to enforce whatever rights they have as interveners in this case.

RICHARDSON v. WALTON *et al.*

(Circuit Court, D. Delaware. January 28, 1892.)

1. CANCELLATION OF CONTRACT—FRAUD—EVIDENCE.

A bill to set aside a contract dissolving a partnership alleged that, while plaintiff was confined to his house by illness, his two copartners insisted upon a settlement, and as a basis therefor presented a statement, in which the year's profits were estimated, at \$50,000. The actual profits were over \$100,000; and plaintiff's book-keeper testified that before the settlement he had made a statement, on request of one of the defendants, showing profits of about that amount. It appeared, however, that shortly after the settlement he made a statement showing profits of \$80,000, and defendants both testified that the statement showing \$100,000 profits was made at a still later date; that no statement was made before the settlement, and that the estimate was *bona fide*. *Held*, that the charge of fraud was not made out.

2. SAME—FALSE STATEMENTS NOT RELIED ON.

Plaintiff possessed an intimate knowledge of the firm's affairs, and testified that when the estimate was presented he felt satisfied that it was much too low, but that he accepted it because of his critical physical condition, and upon the advice of his physician to give up business. *Held* that, even if the estimate was knowingly false, he was entitled to no relief, as he was not in fact deceived.

3. SAME—MISCONDUCT OF PLAINTIFF.

Where a partner raised money on the firm paper to purchase a rival concern for his own benefit, enticed away valued employees, and, under threats of liquidation

by legal proceedings, sought to enforce a sale to himself, he has no equity which will support a bill to set aside a contract of dissolution, made at the instance of his copartners upon discovering his wrongful use of the firm's credit.

4. SAME—LACHES.

Where a bill to set aside an alleged fraudulent contract states that the facts concerning the fraud were communicated to the plaintiff nearly three years prior thereto, and it appears that in the mean time, at intervals of every three months, he had accepted payment on a series of notes given under the contract, the delay is fatal to his right to equitable relief.

In Equity.

Anthony Higgins and S. S. Hollingsworth, for complainant.

George Gray and Benjamin Nields, for defendants.

ACHESON, Circuit Judge. In the year 1869 the plaintiff, Charles Richardson, and the defendants, Ephraim T. Walton and Francis N. Buck, entered into copartnership in the business of manufacturing superphosphate at Wilmington, Del., under the firm name of Walton, Whann & Co. By their written agreement the term of the partnership was limited to five years, but, without any formal or express renewal or extension thereof, they continued in the business until July 13, 1885, when they executed articles of dissolution, whereby the plaintiff sold and agreed to convey to the defendants all his interest in the partnership business and property (except in certain scheduled claims and accounts) for the sum or price of \$123,436.74, payable as follows: \$23,436.74 in cash; \$60,000 in the defendants' 12 promissory notes, all dated July 6, 1885, each for \$5,000, and payable, with interest, the first in three months, and the others respectively at the end of each consecutive three months thereafter; and the balance or sum of \$40,000 on July 6, 1890, with interest, payable semi-annually, secured by a bond and mortgage upon real estate. Accordingly the defendants, about the date of the articles of dissolution, paid and delivered to the plaintiff the hand-money and the specified securities, and he executed a conveyance to them. The defendants paid all their promissory notes as they matured, and also the semi-annual interest installments upon the mortgage, down to the filing of the bill in this case, on October 12, 1888.

The substantial purpose of the bill is to put a valuation upon the firm assets beyond the accepted value in the settlement, and to compel the defendants to pay the plaintiff a larger sum for his interest in the firm than the agreed price. The first and principal prayer is as follows:

"(1) That the said articles of dissolution be declared to have been procured by fraud and duress, and that the same be reformed in accordance with the real value of the firm's assets at the time of said dissolution."

The bill charges in substance that in the month of June, 1885, while the plaintiff was ill, and confined to his house, unable personally to attend to business, and at a time when he was "threatened with financial ruin if he was unable to arrange for meeting" commercial paper on which he was indorser, the defendants pressed upon him the dissolution of the copartnership; that in the negotiations which followed between the plaintiff, acting through his counsel, W. C. Spruance, Esq., and the defend-

ants, the latter presented a statement in writing as a basis for settlement, which showed the "estimated profits for current year" to be \$50,000, and the value of the plaintiff's interest in the firm to be \$123,486.74. The next two paragraphs of the bill we think it best to quote at length:

"(13) That, while your orator believed that the basis of settlement, the original of which is in the handwriting of the respondent Buck, was incorrect, and that your orator's share of the business, instead of being worth a little more than \$123,000, was worth many thousand dollars more, yet your orator, in entering into the articles of dissolution hereafter referred to, relied on the correctness of the estimate of profits, and the correctness of the balance-sheet of July 1, 1884, which was taken as the basis for the estimate upon which the articles of dissolution were based; and moreover, your orator's physician assured him that his only chance of life was an absolute rest, and that any sudden shock might result in instant death. That under these circumstances your orator agreed to this settlement, and executed the articles of dissolution, a copy of which is hereto annexed as part hereof. (14) That your orator is informed and believes, and avers that the respondents knew, as early as the 16th of June, 1885, that the books showed that the estimate of profits to July 1, 1885, should be at least double the figures stated by them, viz., \$50,000, in the basis of settlement; that he believes and avers that they knew that the alleged depreciation in the value of the real estate, to-wit, \$103,000, was more than the real depreciation."

The next (15) paragraph charges that the balance-sheet of 1884, which which was used to show what credit the plaintiff was entitled to on July 1, 1884, was a false balance-sheet, and known to the defendants to be so. But neither this charge, nor the one relating to the matter of depreciation in the real estate, was seriously pressed at the argument; and certainly the evidence does not sustain either of these charges. We therefore dismiss them without further comment.

The charge deserving serious consideration under the proofs is the one relating to the defendants' alleged knowledge, acquired as early as June 16, 1885, as to what the profits for the then current business year were, and the withholding of that information from the plaintiff, whereby he was deceived and injured. This charge rests mainly, and, so far as direct evidence goes, exclusively, upon the testimony of William M. Francis, who was the accountant of the firm. He testifies that on June 11, 1885, he was asked by the defendant Buck to make up a statement showing the profits for the year ending July 1st, and that he did so, and on June 16th handed to Buck the statement, which showed the profits to be about \$100,000. On the other hand, Buck denies that he made such request, and he testifies that no statement of profits was furnished him by Francis on June 16th, or at any time until in the month of July after the execution of the articles of dissolution; and that he acted in the settlement with the plaintiff without any specific information or certain knowledge as to what the profits were or would prove to be when the books should be settled up after the close of the year's business; and that he would have sold his interest upon the estimate of profits which entered into the settlement. Walton testifies to the like effect. To determine the weight to which the evidence on this point is fairly entitled and the effect to be given to it, it is necessary to advert to certain facts

and circumstances which led up to the dissolution of the copartnership, and were closely connected, in point of time and otherwise, with the transaction. But we will not particularly refer to the voluminous proofs touching partnership affairs, and some differences between the partners of earlier and remote dates, for we do not regard those matters as materially affecting the issue. It is shown that in the month of March, 1885, without informing his copartners, the defendants, of his intention so to do, the plaintiff purchased on his own private account the capital stock of the Wando Phosphate Company, whose works were located at Charleston, S. C.,—a company engaged in the same business as Walton, Whann & Co., and supplying fertilizers to the same region of country. Those works, if owned by Walton, Whann & Co., and operated in conjunction with the Wilmington works, would have been a great advantage to the firm; but, owned by the plaintiff, and run on his individual account, the Wando works—especially by reason of their nearness to the southern customers of the firm—were likely to come into dangerous rivalry with the firm. It appears that by letter dated Philadelphia, March 21, 1885, and addressed to William M. Francis, who was then at Macon, Ga., upon business of Walton, Whann & Co., the plaintiff advised Francis of his Wando purchase; stated that he would be in Charleston on the 25th of the month, and invited Francis to join him there, “to have a talk with me about future business, from Charleston.” The letter thus ends: “All the above is in the strictest confidence. W., W. & Co. as yet know nothing of it.” On April 7, 1885, the plaintiff wrote to Francis for immediate information as to the amount of the season’s sales by Walton, Whann & Co. at their Macon office; and at the foot of the letter we find this injunction: “Let this be confidential.” There is evidence that this confidential correspondence between the plaintiff and Francis was kept up through most of the month of April. Before his purchase of the Wando stock, the plaintiff took into his confidence in respect thereto George A. Le Maistre, the superintendent of the manufacturing department of Walton, Whann & Co., and Albanis L. Anderson, their general manager at Baltimore, and supervisor of sales of their products over a large portion of the southern country; and it is indisputably shown that the plaintiff had a secret arrangement—although, perhaps, not yet entirely definite in all details—with these two persons, who were old and invaluable employes of Walton, Whann & Co., that they should go into the service of the Wando company, and have an interest therein. Under date of March 23, 1885, the plaintiff wrote a letter to Le Maistre in which these expressions occur:

“I see my way clear to get on in my opening to W. and B. without a row. My reason for withdrawing my individual paper, etc., will be enough to urge to them for cutting down business, etc. I shall report the Wando purchase. Shall not name you or Anderson in connection with it. * * * I feel confident (reasonably so) that my plan for handling them is a good one.”

Writing to Anderson under date of March 31st, the plaintiff, after mentioning the absence of the defendants upon the occasion of his visit to Wilmington that day, added:

"All this was very fortunate for me, as I had no interference in getting the figures that I wanted, which I did to my satisfaction. * * * I expect to make my figures to-morrow, and to make my proposition to them before the end of the week."

Le Maistre and Anderson testify that it was part of the plaintiff's plan, as disclosed by him to them, to acquire the interest of the defendants in Walton, Whann & Co., and to run the two concerns under one management; but, if he could not buy from the defendants, then to put the Wilmington concern into the hands of a receiver, and the firm into liquidation. There is abundant corroborative and convincing evidence that the plaintiff had determined upon that line of action. In the course of his testimony he himself states: "I was advised that the partnership was a partnership at will, and I had a right to put it into liquidation on any day I chose." George W. Bush testifies that about the last of March, 1885, in an interview with him, the plaintiff said "he was going to buy out the business of Walton, Whann & Co.; that he had secured the services of the superintendent, the sales-agent, and the book-keeper; and that he expected to buy the business of Walton, Whann & Co.,—buy out the concern. * * * He said he would compel them to sell, or that he would apply for a receiver." S. F. Osborn, who was a traveling salesman of the firm, testifies that in March or April, 1885, the plaintiff told him that he was going to buy out Walton and Buck, and in reply to the remark of the witness that he hoped he would have no difficulty, the plaintiff replied "he had them in such a position that they could not do anything; they would have to accede to his terms." Several other witnesses testify that the plaintiff, about the same time, made the like statements to them. On April 2d the plaintiff met the defendants, told them of his purchase of the Wando works, and insisted upon the dissolution of the firm of Walton, Whann & Co. The plaintiff states that he suggested either that the defendants should buy him out, or that he should purchase their interests; but this the defendants deny, and they say that the alternative he presented was a sale of their interests to him or liquidation.

It is proved that in the year 1885 the plaintiff, without the consent or knowledge of the defendants, or either of them, had had discounted, or had used for his own personal benefit, a large amount of commercial paper of the firm,—notes made by the firm, and notes of their sales-agents to the order of the firm, and indorsed with the firm name by the plaintiff,—aggregating more than \$100,000. The plaintiff alleges that at no one time had he so in use an amount of firm paper in excess of the surplus he had in the firm beyond the capital he was bound to keep therein. This is controverted, and we are not satisfied that the plaintiff's allegation is correct. But, however this may be, the more important fact appears that in his purchase of the Wando stock, which cost \$116,000, the plaintiff used \$22,000 raised by the discount of notes of Walton, Whann & Co., and on a pledge of the stock itself raised \$85,000. The first intimation the defendants had that the plaintiff had made an unauthorized use of firm paper for his own private ends came

to them on April 6, 1885, in a telegram from the National Bank of the Republic at Philadelphia, announcing a want of funds to meet a note for \$5,000, bearing the firm's indorsement. The plaintiff had overlooked the date of the maturity of this note, and thus had failed to make timely provision for it. On June 3d the plaintiff furnished to the defendants, in response to their demand, a list of notes so used by him; but the defendants testify that they soon discovered that the list was incomplete. On June 6th Walton made a formal demand on the plaintiff that he turn over to the firm the Wando stock. About this time the plaintiff took sick. His symptoms were alarming, and he was confined to his house for some weeks. But his mental faculties were in full vigor always, and he was keenly alive to his own pecuniary interests. It should here be stated that the plaintiff had taken an active part in the business of the firm, and his general knowledge of its affairs was not less than that of his copartners. Moreover, there is proof that he had recently sought and acquired particular information touching the condition of the firm and the value of its assets. On June 16th the defendants addressed a letter to the plaintiff, in which they said:

"Because of transactions of yours in violation of the proper relations which should exist between partners in business, a knowledge of which, as you are aware, has but lately been brought to our notice, we have determined to bring to an end our present copartnership relations."

—And to that end they requested an interview. No such personal interview took place, but in all the subsequent negotiations the plaintiff had the advice and active assistance of able, experienced, and vigilant counsel.

In the first proposition of purchase made by the defendants the profits for the current business year were estimated at \$42,000, which was the plaintiff's own estimate in April; but in the course of the further negotiations the estimate of profits was raised to \$50,000, the estimated depreciation in the real estate was increased, and the defendants finally abandoned their claim to the Wando stock, to which theretofore they had tenaciously adhered. These terms were all eventually agreed on and incorporated in the articles of dissolution. It is proper here to mention that for several months succeeding the dissolution Mr. Francis remained with the defendants, but left them in November, 1885, and then went into the service of the Wando Phosphate Company, in whose employ he has remained. It is stated in the bill of complaint that in November, 1885, Mr. Francis communicated to the plaintiff that "the estimate of profits made the basis of the articles of dissolution was false, and that the respondents knew it was false at the time they presented it." As has been already intimated, as respects the alleged fraudulent conduct of the defendants in secretly acquiring information concerning the year's profits which they suppressed in their dealings with the plaintiff, the only direct evidence is that of Mr. Francis on the one hand and that of the two defendants on the other. This testimony is flatly contradictory. The plaintiff with confidence relies, as corroborative of the testimony of Francis, upon certain letters, calling for immediate and

special information, dated June 11, 1885, written by Francis himself, but signed with the firm name by Buck, addressed to the branch offices of the firm at Baltimore, Jacksonville, Fla., and Macon, Ga. The defendants' explanation of the occasion of these letters is that they were in a state of great alarm when they learned the large amount of the outstanding unauthorized issue of firm paper, and were anxious to know speedily what the amount of the firm's quick assets was, and that they set Francis at work to ascertain this, and not to make up a statement of profits for the current business year. They both testify positively that the first statement of profits that Francis exhibited to them showed the profits to be \$60,375.98, and that this was made up after the dissolution agreement was executed. They produce, as confirmatory of their testimony, this paper, which confessedly is in Mr. Francis' handwriting, and was made by him about the middle of July. There is also in evidence another statement in the handwriting of Francis, and made by him a few days after the one just mentioned, which shows the profits to be \$101,277.91, which figures are correct. These two papers, the plaintiff insists, are only apparently and not really discrepant, the differences (as is alleged) being merely a matter of book-keeping, as one or other of two methods of making closing entries is adopted. But, if this be so, the weighty fact yet remains that about the middle of July Mr. Francis made up a statement which plainly showed, and to the common apprehension would be understood as meaning, that the year's profits were \$60,375.98 only, and both defendants swear that that was the first statement of profits he exhibited to them. Furthermore, the testimony of Mr. Bailey, who was an assistant to Mr. Francis in June, 1885, as to the then unposted state of the reports from the branch offices, and as to what Francis was then engaged at, etc., taken in connection with the two July statements, tends at least to excite doubt as to the accuracy of Mr. Francis' recollection as to the time when he made up his first statement of profits. The burden of proof is upon the plaintiff. The bill charges fraud, and a reformation of the articles of dissolution is sought. To entitle the plaintiff to relief the proofs should be free from all doubt, and convincing. But they do not appear so to be to us. Taking the proofs as a whole, this much can be safely said: that the evidence is not so clear and satisfactory as to justify a decree sustaining the charge.

But, if a different conclusion upon the facts were admissible, still, in our judgment, the plaintiff would not be entitled to the relief he seeks, for several reasons. In the first place, his secret purchase, on his own account, of competitive works; his unauthorized use of the notes of Walton, Whann & Co. in effecting the purchase; his underhand arrangement with old and valued employes of the firm, whereby their services were to be withdrawn from the firm and transferred to his rival establishment; and—having thus acquired these advantages—his attempt to coerce his copartners into selling their interests to him under threat of liquidation by legal proceedings,—were acts so faithless and unfair to the defendants as to deprive the plaintiff of any standing in a court of

equity in this controversy. It is here notable that the plaintiff does not even now offer to make reparation by bringing into the settlement the Wando stock, or propose to open the question of right thereto, but, holding on to all the benefits he has already derived from the settlement, he asks that the accepted estimate of profits be raised to augment the value of his interest.

Again, as we have seen, the plaintiff in his bill states that when he entered into the settlement he believed that its basis was incorrect, and that his interest in the firm was "worth many thousand dollars more." But his own testimony goes far beyond this admission. Being under examination in chief in his own behalf, he testified thus:

"*Question.* Was your familiarity with the value of the assets of the firm at this time sufficient to enable you to judge of the accuracy of this statement? *Answer.* Oh, yes. *Q.* How accurate was it? *A.* I was satisfied that it was in round numbers \$80,000 less to me than it should be, although I knew it was possible it might be \$25,000 more than that short of what it should be."

He then proceeded to particularize wherein he then judged the statement to be erroneous, namely, in "the deductions on real estate, guaranty of current sales, the estimate of profits for the year, and the deduction for doubtful accounts." Being asked why he accepted the basis of settlement if he felt it gave him \$80,000 less than he was entitled to, he answered that it was because of his critical physical condition, and the advice of his physician to give up business. It is then perfectly clear that the plaintiff did not rely upon the correctness of the basis of settlement presented to him. Taking him at his own word, he was not deceived at all. He had sufficient knowledge of the real value of his interest in the firm, and the alleged fraudulent statement of profits was not the determining cause of his entering into the settlement. Upon what principle, then, can the plaintiff be relieved from the consequences of his deliberate act? The party complaining of misrepresentation must have been ignorant of the true state of facts, and must have given credit to the misrepresentation, and have been actually misled thereby to his hurt. 1 Bigelow, *Frauds*, 521; *Slaughter's Adm'r v. Gerson*, 13 Wall. 379. The motive which the plaintiff states induced him to make a settlement involving a known pecuniary loss, not having arisen out of anything for which the defendants are responsible, can afford no ground for avoiding the settlement.

But finally, the bill of complaint states that as early as November, 1885, Francis communicated to the plaintiff not only that the estimate of profits which was the basis of settlement was false, but that the defendants knew it was false at the time they presented it. Yet the bill was not filed until October 12, 1888. Nothing has been shown to excuse this delay. During this long period the plaintiff uttered no word of complaint, gave no sign of dissatisfaction. Without challenging the settlement he went on accepting under it, at the end of each consecutive three months, \$5,000, until all the 12 promissory notes given by the defendants were paid. By this acquiescence after full knowledge—by thus receiving and enjoying the fruits of the contract—the plain-

tiff has precluded himself from equitable relief. *Kerr, Frauds*, 301. If he meant to rescind or reform the settlement upon the ground of fraud he was bound to move promptly, and his delay of nearly three years was fatal. *Grymes v. Sanders*, 93 U. S. 62; *Societe Fonciere v. Milliken*, 135 U. S. 304, 10 Sup. Ct. Rep. 823. It has been repeatedly declared that there must be conscience, good faith, and reasonable diligence to call into action the powers of a court of equity. *McKnight v. Taylor*, 1 How. 161; *Creath's Adm'r v. Sims*, 5 How. 192. But these things are lacking in the plaintiff's case. It follows, then, from what has been said, that, so far as concerns the main issue,—the one we have discussed,—the bill of complaint must be dismissed, with costs to the defendants.

The articles of dissolution provide that the defendants shall collect the scheduled claims, etc., excepted out of the contract of sale, and from time to time, on request, account to the plaintiff for his share; and the bill charges failure and refusal by the defendants to do so. The answer denies this allegation, but admits that there is a balance of \$699.30 in their hands belonging to the plaintiff, which they are willing and ready to pay over to him. This part of the case rests upon the bill and answer. We have had some doubt whether we should dismiss the whole bill without prejudice to the plaintiff's right to sue at law for the amount coming to him out of these claims, or retain the bill with a view to a decree that shall cover every matter in dispute. But we have at length concluded to pursue the latter course. Perhaps the parties can agree upon the balance due to the plaintiff from these collections. But if they cannot do so, we will appoint a master to ascertain the amount, reserving the question of the costs of the reference until the coming in of his report.

WALES, District Judge, concurs.

BARBOUR v. LYDDY.

(Circuit Court, D. New Jersey. March 25, 1892.)

EASEMENTS—CREATION BY DEED—BOUNDING BY "STREET."

A person owning a farm bordering on the sea, and intersected by a road running parallel with the shore, divided the same into lots running back from the sea to and beyond the road, and prepared a map thereof, upon which lot 18 was marked as a street. Soon afterwards he conveyed a lot adjoining thereto, describing lot 18 as a "street 50 feet wide, to be kept open and used as a street for the benefit of those purchasing lots." Held, that there immediately passed to the grantee, as appurtenant to his lot, a right of access to lot 18, and of passage to and fro over its whole length and breadth, together with an easement of light, air, and prospect, and that no person subsequently deriving title from the grantor had a right to erect a bath-house upon said lot above the line of high water.

In Equity. Suit by S. Rebecca Barbour against Mary A. Lyddy to enjoin interference with an easement. Granted.

Applegate & Hope, for complainant.

Babbitt & Lawrence and J. D. Bodle, for defendant.

GREEN, J. In 1864, Benjamin Wooley was seised in fee of a certain farm lying immediately south of Long Branch, in Monmouth county, in this state, which on the easterly side bounded upon the Atlantic ocean, and was intersected longitudinally by a public road or street running parallel with, and about six or seven hundred feet westerly from, the shore-line. Wisely foreseeing that this farm was so situated that it would be in demand for villa and cottage sites, Mr. Wooley had the whole of it laid out into lots 100 feet in width, extending upon the easterly side of Ocean avenue (then generally called "Seabrook Avenue") from the avenue to high-water mark at the ocean, and upon the westerly side extending from the avenue to lands belonging to J. W. Wallack. These lots were duly numbered and plotted upon a map, which, however, was not made a matter of record. Upon this map lot No. 18 was laid out as a street 50 feet in width, extending from Seabrook (Ocean) avenue to the sea. It was called "Adams Avenue." In October, 1864, Wooley and wife, by their indenture, duly executed and acknowledged, granted, bargained, sold, aliened, released, conveyed, and confirmed to Edward Adams, in fee-simple, a parcel of land, so plotted as stated, and described as follows: "All that lot or parcel of land situate, lying, and being in Deal, near Long Branch, on the east side of Seabrook avenue, leading from Benjamin Wooley's house to Green pond, and begins in the south-west corner of the lot hereby conveyed, in corner of a street fifty feet wide, to be kept open and used only as a street for the benefit of those purchasing lots, and is called 'Adams Avenue;' which said south-west corner is fifty feet distant, on the east side of Seabrook avenue, northerly from the north-west corner of a lot now belonging to Annie D. Wallack, formerly the Wadsworth lot;" and thence the description proceeds, by metes and bounds and courses, to describe the lot conveyed, which was 100 feet in width, and extended from Ocean avenue easterly to high-water mark at the sea, by and between the street named "Adams Avenue" on the south, and other lands of the said Wooley on the north. By various mesne conveyances, the easterly half of this lot has been conveyed to, and is now owned by and in the possession of, the complainant.

Soon after the conveyance made by Wooley to Adams, Wooley died, having first made, in due form of law, his last will and testament, wherein, among other things, he directed his executors to make sale of certain of his real estate of which he died seised; and the said executors did thereafter, after probate of said will and in execution of this power, make sale and conveyance of certain real estate, which belonged to their testator, to one L. B. Brown. In the lands so sold and conveyed was included the lot known as "Lot No. 18," 50 feet in width, extending from Seabrook avenue to the ocean, and which was, in fact, the street or passage-way or road referred to in the deed from Wooley to Adams, and called in that deed "Adams Avenue." The deed of the executors was in the

usual form, without covenants, and conveyed simply to L. B. Brown the right, title, interest, and estate which Wooley had in the lands, which was the subject of the conveyance, at the time of his death. Immediately after the making of this conveyance, Brown caused to be prepared and to be filed in the office of the clerk of Monmouth county a map showing the lands so conveyed to him by the executors of Wooley, deceased, on which said map the lot called "Adams Street" is marked "Lot No. 18." The defendant claims title to her lots, which are designated on the Brown map as lots 9 and 12, through various mesne conveyances from Brown. In the deeds by which the several conveyances were respectively made from Brown to his immediate grantee, and from these grantees to their grantees, and so on until the deeds of conveyance to the defendant, are these words, following immediately after the description of the premises conveyed:

"Together with the right of way to the Atlantic ocean from said Seabrook avenue over and upon a lot fifty feet wide, laid down on said [Brown] map as No. 18, and also the right to erect a bath-house not exceeding eight feet by six feet upon the shore of said ocean, in front of said fifty feet, but not upon the bluff or bank, and the right to bathe in said ocean in front of said lot No. 18; said right of way, right of building, and right of bathing to be appurtenant to the lot of land hereby conveyed, and to be conveyed herewith, by the party of the second part, his heirs and assigns, and not otherwise."

By virtue of this grant, the defendant has erected above high-water mark at the ocean, and within the limits of Adams avenue, a building used as a bath and summer-house combined, which rises some distance above the top of the bluff, and is somewhat larger than the dimensions specified for bath-houses in the deed. This erection the complainant insists is an unauthorized and unlawful structure, which the defendant has placed within the limits of Adams avenue, in derogation of her rights, and which injuriously affects her property, and the easements appurtenant thereto, and the object of her bill of complaint is to effect the removal of such building from its present location, and enjoin its further maintenance or its re-erection within any part of Adams avenue.

The sole question, then, is, what right did the complainant acquire with respect to Adams avenue by the conveyance from Wooley to her grantor? and has the defendant acquired any rights superior to those of the complainant by the conveyance to her from Brown? Wooley, at the date of his conveyance to Adams, (through whom the complainant claims title,) was the owner in fee of all the lands in question. It cannot be disputed that an owner of land may make such disposition of it, or impose such servitudes upon it, as he may deem most beneficial to his own interest. As has been said: "He may found thereon a city or a village, or a manufacturing community, at his own free will, and he may adopt just such measures concerning his land, not inconsistent with the laws of the land, as to his best judgment may seem expedient." Thus, a land-owner may impress upon his private property, by private contract, rights in the strictest sense of the word, but enjoyable by others, analogous, for instance, to the ordinary public rights of highway, and yet

confine these rights to the owners and representatives of the land forming the subject of the contract; and not only may he impress upon his land such conditions and restrictions, but, at the same time, he may invest the purchaser of a parcel of those lands with rights in his remaining lands of which he cannot be afterwards divested, except by his own consent. Thus, where the owner of land makes a map of it, showing streets upon it, and sells and conveys lots abutting upon, and calling for such streets, but such streets were never used or accepted by the public, the purchasers of lots nevertheless acquire the same rights in the streets so called for, as against the original owner, and as against other purchasers, as they would if the streets were in fact public streets.

In the case at bar it appears that the original owner of the land caused to be made a plan or map of his farm, divided into lots, of about a hundred feet in width, and upon that plan marked down lot No. 18 as a street 50 feet wide. The first conveyance of land, after the plotting of them by Wooley, was to Adams, as has been stated; and in the deed of conveyance to Adams the grantor recognized this street so laid down upon his map, and declared that it was to be forever a street 50 feet wide, to be kept open and used only as a street for the benefit of those purchasing lots from him. Until there was some acceptance by the public of this street, it did not take to itself the character of a public highway; it remained limited in its use to those who were to become thereafter purchasers of Wooley's lots. Nevertheless he who first purchased a lot from Wooley, as well as the last purchaser, acquired by conveyance certain rights in and in reference to the street called for by such deed and map, which immediately became appurtenant to the lots so conveyed, and are entirely distinct from, and are in addition to, the right of the grantee, as a part of the public, to use the street, after it shall have been opened for use, and accepted by the public as a public highway. It nowhere appears that this street, Adams' avenue, has ever been accepted by the public, and it is not a highway in that sense. Nevertheless the right which Adams acquired by the conveyance to him of the lot bounded upon this private way or street is co-extensive with the right that he would have had if the street had been before then formally dedicated and accepted as a public highway; or, if that proposition be too strongly stated, at any rate the right which he did acquire was that the private way should be preserved in all respects as if it were a public street. From which it follows that the rights which are born of such conveyance, and are appurtenant to a lot conveyed under these circumstances, are—*First*, a right of access from the abutting property, and a passage, to and fro over the street in its whole length and breadth; and, *secondly*, the right of light, air, prospect, and ventilation. This doctrine was clearly laid down in the case of *Barnett v. Johnson*, 15 N. J. Eq. 481, and *Story v. Railroad Co.*, 90 N. Y. 122, in which last case the court say that an owner whose land abuts upon a highway necessarily enjoys certain advantages from the existence of an open street adjoining his property which belongs to him by reason of its location, and are

not enjoyed by the general public, such as the right of free access to his premises, and the free admission and circulation of light and air to and through his property. The same principle is stated in Washburn on Easements.

Applying this principle to the conveyance made by Wooley to Adams, it is apparent that the grantor impressed upon the land known as "Adams Avenue" a servitude in favor of the abutting land conveyed to Adams; and by virtue of that conveyance, and by operation of law, certain easements, such as have been mentioned, became appurtenant to the lot which was so conveyed. When the executors of Wooley conveyed to Brown, they conveyed only such right, title, estate, and interest in the land as Wooley had at the time of his death. In conveying, therefore, to Brown lot No. 18, which is Adams' avenue, that lot was conveyed subject necessarily to the servitude of all the easements which had become appurtenant to the lot conveyed by Wooley to Adams, and created by such conveyance. By that conveyance to Adams, Wooley had deprived himself of the power to make a conveyance in fee-simple, free from the servitude of these easements, and without condition or restriction, of lot No. 18, which, upon his map, he had plotted as Adams' avenue, and, of course, his executors could convey no greater estate than he himself could, nor in any less restricted manner. As between Wooley and Adams, and their respective heirs and assigns, it was fixed by that first conveyance that the Adams' lot should have, as appurtenant easements, right of air, ventilation, prospect, access, and a right of way from Ocean avenue to the sea over the full length and breadth of Adams' avenue, as laid out, 50 feet in width. Whatever conveyance, therefore, was made thereafter by the executors of Wooley was made necessarily subject to these limitations and restrictions. Nor could Brown, in his subsequent conveyances, grant to those who purchased lots from him any privilege or right or easement inconsistent with the full, complete, and thorough enjoyment of the easements which, by his grantor's own act, had become appurtenant to the Adams lot. So far as the grant of access to the ocean from Ocean avenue over Adams avenue to the purchaser of the lots, originally Wooley's and then Brown's, is concerned, Brown had a perfect right to make it; but when he went further in his grant, and authorized his grantee to erect bathing-houses, no matter how small, anywhere within the limits of Adams avenue, he attempted to grant what he did not possess, and to do that which he had no power to do. Wooley had devoted Adams avenue to a special use, namely, access to the sea. Brown accepted the conveyance of Adams avenue with that use impressed upon it. The only right in Adams avenue which Brown then could grant was a right of passage. That was all that he had, as the grantee of Wooley, and all that he could convey to others. It follows, therefore, that when, in his deed of conveyance for lots formerly a part of the Wooley estate, he sought to enlarge his own rights, and to invest his grantees with such enlarged rights by granting to them the power of erecting bathing-houses within the limits of Adams avenue,

which would necessarily interfere with the enjoyment of the easements already appurtenant to the Adams lot, he did that which was entirely beyond his legal ability and hence wholly ineffectual.

It was claimed on the part of the defendants that the right of access to the shore over Adams avenue should be construed to mean the right of bathing in the ocean. It is not necessary to determine whether this is a fair and allowable construction of the words used by Wooley in the opening of Adams avenue to the use of his grantee. It is very plain that, admitting that access to the ocean over Adams avenue was for the purpose of bathing, it does not follow that those who lawfully use Adams avenue to reach the ocean for that purpose, had a right to erect within its limits bathing-houses which would effectually interfere with, if they did not destroy it as a way. It seems very clear, therefore, that the alleged grant from Brown to the defendant of a right to erect bathing-houses within the limits of Adams avenue cannot justify her in such erection; it was an effort on the part of Brown to convey a right of which he himself was not possessed. The defendant's deed, therefore, does not in any way afford justification for her actions in this matter.

It is very apparent from the testimony, I think, that the bath-house which has been erected by the defendant encroaches very seriously upon the limits of Adams avenue. That avenue extends, beyond all question, to high-water mark at the ocean; and it is admitted that the bath-house of the defendant, which is a large structure 25 feet long and 13½ feet wide, and rising 14 feet above the level of the top of the bluff, is mainly situated within the limits of the avenue above high-water mark. It has been placed there in derogation of the rights of the complainant, who is entitled, as grantee of Adams, to all the easements appurtenant to the Adams lot, and to all the rights in, over, and upon Adams avenue, as granted by Wooley to Adams. The structure of the defendant necessarily seriously interferes with the full enjoyment of all these easements. It is wholly unauthorized; it is an obstruction to the free passage over Adams avenue; and, as the proofs show, is plainly an injury, irreparable, if the structure is permitted to stand, to the lands of the complainant. The practical effect of the action of the defendant in erecting it is to cause the resulting limitation of way, of prospect, of enjoyment, to become *quasi* appurtenant to the complainant's land, to the serious interference with, if not the certain extinguishment of, those very easements which should be and are in law rightfully appurtenant thereto. The case, as stated by the complainant in her bill, has been satisfactorily made out, and she is entitled to a decree as prayed for, with costs.

BLACKBURN et al. v. WOODING.

(Circuit Court, D. Washington, W. D. March 30, 1892.)

SPECIFIC PERFORMANCE—FRAUD—EQUITABLE RELIEF.

Plaintiff owned a half interest in certain land, the other half belonging to his children as heirs to the community interest of his deceased wife under the community law of Washington. Having married again, plaintiff contracted to sell the whole tract for \$6,000, without disclosing his marital relations, or the interest of his children, the purchaser being ignorant of both. Plaintiff subsequently informed the purchaser that he was unable to perform his contract, because the land was community property, and his wife refused to convey her share without an increased compensation. An agreement was then made between the three that the husband should convey his interest for \$3,000, and the wife hers for a large sum in addition. Plaintiff gave his deed, and received payment, but the purchaser refused to perform his agreement with the wife on the ground that she had no title. He had in fact learned the true state of affairs before making the agreement, and never intended to carry it out with respect to her. *Held* that, as he had received good title to a half interest for a proportionate abatement of the original price, and as all parties were guilty of deceit, equity would afford relief to none.

In Equity. Suit by Barbee T. Blackburn and Sadie M. Blackburn against Charles T. Wooding. Decree dismissing the bill.

Galusha Parsons, for complainants.

O. V. Linn and *B. F. Dennison*, for defendant.

HANFORD, District Judge. The material facts to be considered in rendering a decision in this case are as follows: The complainant Barbee T. Blackburn contracted with the defendant to sell and convey to him for the price of \$6,000 certain lands situated in Chehalis county, in this state, the title to which, as shown by the public records, was at the time in said complainant; the same having been by him in the year 1882 purchased from the United States. At the time of the purchase said complainant was the husband of M. W. Blackburn, who died after the issuance of the patents for the land, leaving minor children entitled to inherit her portion of the community property of herself and husband, situated in this state. After the death of his first wife said complainant was married to his co-plaintiff, Sadie M. Blackburn, and the marriage relation between them existed at the time of the making of said contract. When the contract was made the defendant was not personally acquainted with the complainants, and did not know of the existence of any marriage relation affecting the title of Barbee T. Blackburn to said land, or of any interest in said property in the minor heirs of said deceased wife. After the making of said contract, Barbee T. Blackburn, through an agent, represented to the defendant that he was unable to perform his contract fully, for the reason that the property was community property, and that his wife, Sadie M. Blackburn, had not consented to the contract, and that she refused to execute a conveyance of the land without the payment of a larger sum therefor than the price fixed by said contract. He then offered to convey all his interest in the property for one-half of said price. Thereupon, through negotiations conducted on behalf of Barbee T. Blackburn by his said agent, and in behalf of his wife, Sadie M. Blackburn, through another person, acting as her agent,

and the defendant acting also through an agent, a verbal understanding was arrived at to the effect that Barbee T. Blackburn should execute and deliver to the defendant a warranty deed to the property for the consideration of \$3,000, and Sadie M. Blackburn should give a quitclaim deed of the property to said defendant for an additional sum of \$11,489, and said defendant was to pay to the agents of the two complainants the total sum of \$14,489. With the expectation that the arrangement, as understood and verbally agreed to as aforesaid, would be fully carried out, Barbee T. Blackburn, through his said agent, executed and delivered a warranty deed to the defendant, and received from the defendant \$3,000. Immediately after obtaining possession of said deed, the defendant's agent caused the same to be filed for record, refused to proceed any further in execution of the verbal agreement, and at once notified said agents of the complainants that he had no intention of paying the additional \$11,489, and did not want the quitclaim deed from Sadie M. Blackburn, for the reason that she had no interest in the property. The complainants did not inform the defendant at any time of the facts in relation to the marriage of Barbee T. Blackburn to M. W. Blackburn, or of her death, or of the community interest which she had during her life-time in the property, or of the fact that there were minor children of Barbee T. Blackburn entitled to an interest in said property. By the representations made, and the withholding of information of material facts, the complainants intended that the defendant should act under the erroneous belief that the property was the community property of the complainants, and that together they could convey a complete title. The defendant, however, through other sources obtained true information, and was fully informed of the facts affecting the title, and of the inability of complainants to convey the property at the time of obtaining the deed from Barbee T. Blackburn, and intentionally induced him to deliver said deed by falsely pretending that he would pay the additional sum for a quitclaim deed from Sadie M. Blackburn.

The laws of this state in force at the time of the purchase of the lands by Barbee T. Blackburn vested the title in him and his then living wife as community property, and it could not be sold or conveyed during her life-time, nor could any interest therein be sold or conveyed without both husband and wife being joined in the contract of sale or deed of conveyance. Upon the death of the wife the community estate was by operation of law so changed as to become at once vested in the surviving husband and the children of the marriage as tenants in common. The husband could thereafter sell and convey his undivided one-half of the property, but the interest of the children as owners of an undivided one-half could not be affected by any contract or deed of their father. Any agreement made for the conveyance of the property from Sadie M. Blackburn was and is void for want of consideration, as she had no interest in the property. Her deed purporting to convey the land or any interest therein could have no effect except to deceive and defraud persons ignorant of the date of her marriage. Such being the condition of the title and the rights of the parties respecting the same, the transactions

in effect amount to an attempt on the part of the complainants to deceive and defraud the defendant, and a counter-attempt on the part of the defendant to deceive them, with the result that the former have received \$3,000 of the defendant's money, which the defendant paid intentionally and voluntarily, intending that they should receive it and retain it; and the defendant has obtained possession of and retains a deed to the property from Barbee T. Blackburn, with covenants for title, which, although it purports to convey the entire property, is a valid conveyance of only an undivided one-half thereof; and by the conveyance of said undivided one-half interest to the defendant, Barbee T. Blackburn has in part executed a contract which he voluntarily made with the defendant, and in doing so he has exhausted his power to perform said contract, so that it remains partially unperformed and broken. There has been an abatement of the contract price, corresponding to the difference in value of the property conveyed by the deed and property which the vendor by said contract assumed to sell and promised to convey. The liability of the complainant upon the covenants of his deed is no greater than upon his broken contract. I consider that there will be no failure of justice if a court of equity simply leaves all the parties in the situation in which they have placed themselves. Let there be a decree dismissing this suit, with costs to the defendant.

RICHMOND & D. R. Co. v. BLAKE *et al.*

(Circuit Court, D. South Carolina. March 26, 1892.)

1. ILLEGAL TAXATION—INJUNCTION—TENDER—PAYMENT NUNC PRO TUNC.

A bill by a railroad company against several county treasurers, to enjoin the collection of an unlawful assessment, admitted that a certain amount was due, averred that it had tendered the same at the proper time, and that the treasurers refused to receive it, and offered to pay the money into court. Thereupon the several treasurers entered their appearance, and moved for an order requiring the company to pay *nunc pro tunc* the sums before tendered. Held that, as the order would be binding upon the parties and privies against all the world, the company could not object on the ground that the payment might jeopardize some of its rights, or that some advantage might be taken of it elsewhere.

2. SAME.

The company could not object that the action of the treasurers might not be binding on the state, which was not a party, since the company itself had sought to have the assessment declared invalid without making the state a party to the bill, and since the court would have no right to hold the money until the state submitted to its jurisdiction, as this would be taking advantage of her necessities to coerce her.

In Equity. Bill by the Richmond & Danville Railroad Company against Blake and others, county treasurers, to enjoin the collection of taxes. Heard on a motion requiring complainant to pay certain moneys admitted to be due. Granted.

Mitchell & Smith, Smythe & Lee, Fitz Simons & Moffett, J. T. Barron, Brawley & Barnwell, and Cothran, Wells, Ansel & Cothran, for complainants.

J. L. McLaurin, Atty. Gen. of South Carolina, *Lord & Burke*, and *Ira B. Jones*, for defendants.

SIMONTON, District Judge. The bill is filed against certain persons filling the office of county treasurer in the several counties named therein, and certain other persons, sheriffs of the said counties, respectively. The prayer is for a perpetual injunction against them from proceeding, by levy or otherwise, from collecting a tax based upon an unlawful assessment. The bill admits that there is a certain sum lawfully due, avers that this sum has been lawfully tendered to each one of the defendants, who are treasurers, at the proper place, within the proper time, and in lawful money, and that such tender has been declined. It craves leave to pay the money into court. Upon the filing of the bill, a rule to show cause was issued against the defendants, requiring them to show cause on the first day of the ensuing term, (4th April next.) In the mean time, the restraining order was entered. Attorneys representing the defendants came into court, and entered a motion that the complainant be ordered again to tender the money previously tendered. No appearance of any kind had been entered, and no defense or plea filed in their behalf. As a matter of practice, it is well to say that, under these circumstances, the motion could not have been entertained. The defendants were not in court, had not submitted themselves to its jurisdiction, and could not be heard by counsel. An unqualified appearance has now been entered. The motion has been modified, so as to be, in effect, that the complainant *nunc pro tunc* pay to the several treasurers the sum of money tendered to each on the 19th or 20th February last; such payment to have the same force and effect as if made and received on the day of said tender. The case has been heard upon the bill and its exhibits, and on affidavits offered by the defendants.

It is a matter of extreme delicacy to interfere with the means by which moneys are raised for the revenue of the state. In the language of the supreme court in *Dows v. City of Chicago*, 11 Wall. 108:

"It is upon taxation that the several states chiefly rely to obtain the means of carrying on their respective governments. It is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible."

While, therefore, in many cases, the courts must interfere when there is danger of injustice or a violation of the law, (*Pelton v. Bank*, 101 U. S. 148; *Cummings v. Bank*, Id. 153,) every precaution is taken to limit the interference within the narrowest necessary limits, and to prevent any delay which can be avoided, (*Dows v. City of Chicago*, *supra*.) The court takes care that only so much of the tax is enjoined as is claimed to be illegal. It requires as a condition precedent that the amount of tax admitted be paid or tendered. "It is the established rule of this court that no one can be permitted to go into a court of equity to enjoin the collection of a tax until he has shown himself entitled to the aid of the court by paying so much of the tax assessed against him as it can plainly be seen he ought to pay. Before he asks exact and scrupulous justice,

he must first do equity, by paying so much as it is clear he ought to pay, and delay only the remainder." *Bank v. Kimball*, 103 U. S. 732; *State Railroad Tax Cases*, 92 U. S. 575. The complainant fulfilled this condition, and tendered the sums admitted. The tender having been refused, and only because it was refused, the leave is asked to pay them into court. The learned counsel who led for the complainant objects to the motion of the defendant, from fear that some right of the complainant may be put in jeopardy, or that an advantage may be taken elsewhere of this act. It will be observed that the order to pay the money into court was the alternative of its receipt by the county treasurers. It is made necessary simply because of their refusal to receive it on the day it was offered. As a tender, it is a continuous act. If the prayer of the defendants be allowed, and they be permitted to do now what they should have done on the day of the tender, the receipt of the money must relate back to that day, and it must operate precisely in the same way, and to the same extent, as it would have operated then. Even were this not the case, the court has before it all the parties on both sides of the cause. Its order and decree, unless reversed by a superior court, will bind them; and their privies as against the world. It is urged that, as the money will eventually become—may now be—the money of the state of South Carolina, no action on the part of or against these defendants can preclude the state. This may be true. But a final decree upon the legality of this assessment is sought in this case, these defendants being the only parties. If such final decree can be made so to operate as to make such assessment wholly void, surely an order or decree made upon this interlocutory motion, all the parties being within the jurisdiction of and submitting themselves to the court, would have an equally controlling effect. The court cannot hold this fund, admitted to be payable to the defendants, until the state shall come in and submit to its jurisdiction. This would be the use of the extreme necessity of the state to coerce her. If there be any danger or fear in this cause, it arises from the peculiar character of our federal system, and cannot be avoided. The money now in question will become a part of the revenues of the state. It is now due to the state by the several defendant treasurers, charged to them. To discharge themselves, they must pay it over when received to the state, and *pro tanto* discharge the complainant. Both parties have expressed their desire that the admitted sums go into the treasury of the state. Complainant shows this by its tender, the defendants by their motion. As we have seen, no delay which can be avoided is permissible. Precaution must be taken that no rights are compromised. Depositing the money in the registry, and drawing it out immediately, would be circuitous and idle. But the defendants have refused a legal tender, made to them at much expense and with great trouble. They cannot expect the same formalities again. Indeed, their motion necessarily dispenses with these. They have come here to retrace their steps, and must obtain their request here.

It is ordered, adjudged, and decreed that the complainant deposit with the clerk of this court, within 10 days from the date of this order, a cer-

tified check, drawn upon a solvent bank, payable to each county treasurer defendant herein, the check to such treasurer being for the same sum of money heretofore tendered to him by complainant as the sum admitted to be due; that the said clerk deliver to each of said defendants, or to his attorney in this cause, the check so drawn; that upon delivery of such check, the bank upon which it is drawn remaining solvent, it shall be received and accepted as of the day of the original tender, with the same force, effect, and operation, to every intent, purpose, and inference whatsoever as if the money was actually received on that day.

All questions as to the costs of this receipt and delivery are reserved.

GREEN *et al.* v. CHICAGO, S. & C. R. Co. *et al.*

(Circuit Court of Appeals, Sixth Circuit. January 13, 1892.)

1. APPEAL—AFFIRMANCE—MANDATE—ALLOWANCE OF INTEREST.

When a judgment for money which does not award interest is affirmed without reference to the question of interest, such a decree is to be taken by the lower court as a declaration that no interest is to be allowed.

2. SAME—SUPREME COURT RULE.

Rule 23, Sup. Ct. U. S., providing for the allowance of interest on affirmed judgments, is for the guidance of the supreme court only, and does not authorize an inferior court to add an award of interest to a decree affirming its own judgment; the function of the inferior court in such cases is ministerial, rather than judicial.

In Equity.

Norris & Norris, for appellant.

T. J. O'Brien, for appellees.

Before JACKSON, Circuit Judge, and SAGE and SWAN, District Judges.

JACKSON, Circuit Judge. In the matter of the appeal of Henry Day from the order of the circuit court of the United States for the western district of Michigan, southern division, upon the petition of Daniel E. Sickles and Benjamin F. Stevens in the above-entitled cause. Under foreclosure proceedings in the above-entitled cause, a fund was brought into court for distribution among holders of the bonds of the defendant railroad company. In the distribution of said fund, Henry Day, assignee of Benjamin Richardson, by mistake was paid and received more than he was properly entitled to by the sum of \$2,173.91. By decree entered in the cause on October 8, 1883, said mistake was corrected, and said Day was ordered to refund said overpayment, which was adjudged to belong to several claimants in certain proportions and amounts. From this order, and the decree of distribution relating to other matters not necessary to be noticed, Day appealed to the supreme court. This appeal was taken in November, 1883, and Day filed an approved *superedeas* bond, as required in the allowance thereof. On January 13, 1890,

the supreme court affirmed the decree of the circuit court, (10 Sup. Ct. Rep. 280,) and ordered that said Henry Day, within 15 days after service upon him or his solicitor of a copy of the decree, should pay into court the sum of \$2,173.91 as having been overpaid to him, and the cause was remanded to the circuit court, under the usual mandate that "you therefore are hereby commanded that such execution and proceedings be had in said cause as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding." Said mandate, affirming the decree and directing the circuit court to proceed with its execution, was filed in said court in July, 1890. Thereafter, on March 12, 1891, said Day paid over to the clerk of said circuit court the amount so decreed against him, (\$2,173.91,) but declined and refused to pay interest on the same. Thereupon Benjamin F. Stevens and Daniel E. Sickles, two of the several claimants interested in the principal of the amount so refunded by Day, on April 15, 1891, presented their petition in the cause, reciting the foregoing history of the proceedings, and praying that said Day might be required to pay into court the interest on said sum of \$2,173.91, for distribution, in pursuance of the terms of the decree. To this petition Day appeared by his solicitors, and interposed an *ore tenus* demurrer or objection to the same and to relief sought.

The question presented by the petition was heard by the district judge, (Hon. H. F. SEVERENS,) holding the circuit court, who held that said Day was liable for and should pay interest on said sum of \$2,173.91, so adjudged against him, from the 28th day of November, 1883, up to March 12, 1891, when the principal was paid according to the rates of interest authorized by the statutes of Michigan during that period. The amount of such interest was \$1,048.19, and this sum said Day was ordered to pay into court within 10 days from the date of the order. From this decree of the court, adjudging him liable for \$1,048.19 as interest, and ordering him to pay the same into court, said Day has appealed to this court. He assigns various grounds of error, only one of which, in the view we take of the case and questions involved, need be noticed, and that is that the court below erred in holding him liable for and in requiring him to pay interest on the said sum of \$2,173.91, which he was directed to refund by the decree of October 8, 1883, from the date of perfecting his appeal to the supreme court. It will be observed that neither the decree of October 8, 1883, nor the judgment of the supreme court affirming the same, and remanding the cause for the execution thereof, orders or directs the payment of interest on the amount said Day was required to refund. Had the circuit court, after the cause was returned to it under the mandate of the supreme court, any authority, power, or jurisdiction to entertain the petition of Stevens and Sickles, and to direct or adjudge that Day should pay interest on said sum of \$2,173.91, which he was ordered to repay by the decree of October 8, 1883? We think not, under the authority of *In re Washington & G. R. Co.*, 140 U. S. 91-96, 11 Sup. Ct. Rep. 673, which is conclusive on this question.

It is suggested that such interest was authorized by the twenty-third rule of the supreme court, (3 Sup. Ct. Rep. XIII.,) which provides that—

"In cases where a writ of error is prosecuted to this court, and the judgment of the inferior court is affirmed, the interest shall be calculated and levied from the date of the judgment below until the same is paid, at the same rate that similar judgments bear interest in the courts of the state where such judgment is rendered. * * * The same rule shall be applied to decrees for the payment of money in cases in equity, unless otherwise ordered by this court."

There is nothing in this rule to warrant or sustain the action of the circuit court in the case under consideration. The rule has reference alone to the action of the supreme court on the subject of interest upon the affirmance of judgments and decrees of inferior courts. It was intended to prescribe the general rule and regulation of its own practice in the matter of interest. It is not to be enforced by inferior courts to which mandates of the supreme court are sent, to execute and carry into effect judgments or decrees on which that court has not awarded or directed the allowance or payment of interest. Whether interest shall be allowed on the affirmance of a judgment or decree of the lower court from the date of its rendition is a question for the consideration solely of the supreme court, especially where interest is not awarded as a part of such judgment or decree by the inferior court. Where the judgment or decree of an inferior court does not expressly award or carry interest, and the supreme court merely affirms such judgment or decree, and says nothing on that subject, "it is to be taken as a declaration of this court that, on the record as presented to it, no interest was to be allowed." 140 U. S. 94, 95, 11 Sup. Ct. Rep. 673, 674. In such cases it is the duty of the inferior court to which the mandate of the supreme court is directed to enter judgment or decree strictly in accordance with the judgment, or decree of the supreme court and "not to add to it the allowance of interest." In *Boyce v. Grundy*, 9 Pet. 275, cited with approval in the case of *In re Washington & G. R. Co.*, 140 U. S. 96, 97, 11 Sup. Ct. Rep. 674, it is said: "The decree of the circuit court allowing interest in such a case is to all intents and purposes *quoad hoc* a new decree, extending the former decree." This, under a mandate from the supreme court in cases like the present, the inferior court has no authority to do. Its duty and function are ministerial, rather than judicial, in such cases, inasmuch as it is executing the judgment or decree of a higher court, instead of its own judgment or decree. In *Kimberly v. Arms*, 40 Fed. Rep. 551, the authorities on this subject are cited. They establish that under a mandate from the supreme court the inferior court cannot vary in any way the decree of the former, or give other or further relief, but is limited to the execution of the mandate. Our conclusion therefore is that the decree of the circuit court ordering the appellant, Henry Day, to pay the sum of \$1,048.19, as interest on the amount he was decreed to refund, and which he has repaid into court, was erroneous, and should be reversed, and it is accordingly so ordered and adjudged, with costs.

The case will be remanded to the circuit court, with directions to dismiss the petition of Daniel E. Sickles and Benjamin F. Stevens, on which the decree against Henry Day was made.

DIXON v. ORDER OF RAILWAY CONDUCTORS OF AMERICA.

(Circuit Court, E. D. Wisconsin. April 18, 1892.)

FOREIGN INSURANCE COMPANIES—AGENTS FOR SERVICE OF PROCESS.

Where the regulations of an association having a benefit department require the secretary of each local division to certify to the health of every applicant for insurance, to keep a correct list of the members of the benefit department, to place thereon the name of any member of the insurance department, joining his division by transfer from any other division, and also make it the duty of members to notify him of any changes of residence, such secretary must be considered an insurance "agent" of the association, under Rev. St. Wis. § 2637, subd. 9, and section 1977, declaring who shall be considered agents of a foreign insurance company for the purpose of receiving service of process.

At Law. Action by Mary Dixon against the Order of Railway Conductors of America to recover upon an insurance certificate. Heard on motion to vacate the service of process and dismiss the action. Overruled.

Chas. A. Clark, for the motion.

Wigman & Martin, opposed.

JENKINS, District Judge. This suit was brought in a court of the state of Wisconsin, and removed into this court by the defendant. The plaintiff claims under a certain certificate of insurance, issued in 1885 upon the life of her deceased husband by the "Order of Railway Conductors," then an unincorporated association, subsequently, and in 1887, incorporated under the laws of the state of Iowa, and having its general offices within that state. The summons was served in November, 1890, (1) upon W. P. Daniels, the grand secretary of the order, and a resident of the state of Iowa, while temporarily within the state of Wisconsin, in attendance, as such officer, upon a suit depending in this court against the defendant; (2) upon Charles D. Baker, a resident of Wisconsin, and secretary of a subordinate division of the order, located within that state. The defendant now moves to vacate such service of process, and to dismiss the action, upon the ground that each such service was unauthorized by law.

The statutes of Wisconsin (Rev. St. Wis. § 1953) require every life insurance corporation not organized under the laws of this state, before doing business therein, by written instrument deposited with the commissioner of insurance, to designate an attorney, resident within the state, upon whom process against the company may be served with respect to any cause of action arising out of any business or transaction within the state. Another statute (Rev. St. Wis. § 2637, subd. 9) pro-

vides that service of process upon any insurance corporation not organized under the laws of Wisconsin may be made by delivery thereof to the attorney designated by section 1953, or to any agent in the state of such corporation, within the definition of section 1977. That section (1977) declares that—

“Whoever solicits insurance in behalf of any insurance corporation, * * * or transmits an application for insurance, or a policy of insurance, other than for himself, to or from any such corporation, or who makes any contract for insurance, or collects any premium for insurance, or in any manner acts or assists in doing either, or in transacting any business of like nature for any insurance corporation, or advertises to do any such thing, shall be held to be an agent of such corporation to all intents and purposes, unless it can be shown that he receives no compensation for such services.”

It has been ruled that, with respect to foreign insurance companies and the service of process upon them, and by virtue of Rev. St. Wis. § 2637, subd. 9, any person doing for such company any of the acts specified in section 1977 is an agent of the company, so far as regards the service of process, although he may not receive compensation for his services. *State v. Northwestern E. & L. Ass'n*, 62 Wis. 174, 22 N. W. Rep. 135; *State v. United States Mut. Acc. Ass'n*, 67 Wis. 627, 31 N. W. Rep. 229. The purpose of this legislation is clear: It is to compel every foreign insurance company doing business within the state to be subjected, with respect to such business, to the jurisdiction of the courts of the state. Out of abundant caution, and in anticipation of failure of duty by a foreign insurance company, doing business within the state, to appoint an attorney upon whom service may be made, the law designates as such agent any person who for such company does, or aids or assists in doing, any business of like nature to that of soliciting or contracting for insurance, transmitting applications for policies, or collecting premiums.

The corporation defendant is composed of conductors of railways throughout the United States, associated in divisions or lodges in different parts of the several states. It has a grand division, composed of certain designated elective officers, and of representatives from each subordinate division. The grand division has exclusive jurisdiction over the subordinate divisions, and is invested with executive, legislative, and judicial powers, and with the control of the insurance department. This insurance branch of the corporation is designed to furnish material aid, from a fund obtained upon the assessment plan, to such disabled members, and to the widows and children of such deceased members, as have availed themselves of its benefits. It is, in effect, a mutual insurance company, under the control and direction of the grand division, composed of those members of the order who may choose to participate in its benefits, and insuring its members against death and total disability from accident and disease.

Unquestionably, this defendant has been engaged in the insurance business within the state of Wisconsin. It has some seven divisions within the state. It insures members of the order, residents of that state.

Applications for membership in the insurance branch are by some means—whether by the applicant directly, or through the secretary of the local division—forwarded to the grand secretary, who, if the application be accepted, transmits to the applicant in Wisconsin, either directly or through the secretary of the local division, the proper certificate or policy. That is the transaction of business in this state, within the meaning of the law. *Manufacturing Co. v. Ferguson*, 113 U. S. 727, 734, 5 Sup. Ct. Rep. 739.

The record does not disclose clearly the practice with respect to the agency of the secretaries of subordinate divisions in the transaction of the insurance business of the defendant. The affidavits presented in behalf of the defendant are, in this respect, somewhat ambiguous. Mr. Baker, who was served with the process sought to be vacated, and who is secretary of a local division in Wisconsin, asserts that he has not at any time, as secretary of the division or individually, acted for the defendant, in receiving or forwarding applications for membership, or the fees accompanying such applications, or in any manner pertaining to the insurance department of the order. This is not a denial of the receipt and forwarding of applications and fees. It is merely a statement of his conclusion of law that in so doing he did not act for the defendant. A plain statement of facts with regard to his acts would have possibly thrown light upon the subject. Mr. Daniels, the grand secretary, declares that Mr. Baker has not forwarded any applications for insurance, or the fees therefor, since May, 1890. That may all be true, because, possibly, since that date there had been no applications to forward. It is not denied that before that date he had forwarded applications. The form of the statement would imply that he had. The application of the deceased may, perhaps, have some bearing upon the practice. It has attached to it the certificate of the secretary of the local division of which he was a member, dated April 18, 1885, under the seal of the division, certifying to the correctness of the statement in the application, and declaring that the applicant had "paid to me the prescribed fee of \$2.50." So, also, the printed notices of assessments in use in 1885, signed by the grand secretary, contained the following:

"Secretaries will please see that all members of their divisions who are members of the association are notified of their assessments, as many members change their address without notifying me, and secretaries may know it when I do not."

The practice at that date would seem to have been that the collection of insurance premiums was made by the local secretary. That was, however, before the incorporation of the association. The regulations adopted subsequently to incorporation, and on the 10th day of July, 1888, require the fee to be forwarded with the application, but are silent with respect to any duty of the secretary of the local division with respect to forwarding of applications, or the giving of notice of assessments. The regulation adopted June 10, 1890, imposes the duty upon the secretary of a local division to forward applications. This regulation did not, however, go into effect until January 1, 1891, and after

service of process here. It may be that it merely imposed as a duty a practice obtaining under former regulations. This suggestion derives support from the certificate above referred to, and because it would naturally occur that the practice should obtain of a member dealing with the grand secretary, through the agency of the secretary of the local division to which he belonged. Mr. Daniels insists that the defendant has never had agents within the state of Wisconsin in the conduct of its insurance business. He denies the agency. He is silent as to the practice. He maintains a legal conclusion, without assertion of facts. He does not even state his definition of agency. The statute definition is a broad one. Mr. Daniels may use the term in a restricted sense. The province of a witness is to speak to facts. The conclusion of law rests with the court. The affiant Strobe declares that Mr. Baker stated to him that he was accustomed to forward applications for insurance. Although the matter is somewhat obscure, it may, I think, be rightly inferred from the practice before incorporation, and the positive regulation now in force, that the practice always obtained that the dealings between the members and the company were had through the medium of secretaries of local divisions. This may properly also be inferred from the failure of the defendant to possess the court with the facts. He who undertakes to answer should answer fully. Mere statements of conclusions of law are not availing. Silence, when disclosure of facts peculiarly within one's knowledge is required, is sometimes as convincing as positive assertion.

Irrespective, however, of the question of practice, I am of opinion that the regulations in force at the time of this service constituted the secretary of a local division an agent of the defendant for the purpose of service of process, within the intendment of the Wisconsin statute. Those regulations required applications to be accompanied by a certificate of health by the applicant, made before the local secretary of a division, and that certificate must be verified by a secretary, under seal of his division. Applicants, if accepted, are duly accredited as members from the date of the certification of the application by the local secretary. The secretary of each division was required to keep a correct list of the members of the benefit department in his division. The member was required to notify the local secretary, as well as the secretary of the insurance department, of any change in his address, and the local secretary is required to place upon his insurance roll any member of the insurance department joining his division by transfer from another division. The duties thus imposed upon the local secretaries are manifestly in aid of the defendant in the transaction of its business. The certificate of the local secretary to the application is to assure the defendant, by the assertion of an officer of one of its divisions, that the statements of the applicant are correct. The company selects the person who shall certify to it the truth, and who therein acts, not for the applicant, but for the company. So, also, is the regulation with respect to the list of insured members to be kept by the local secretary. The company, by its rules, is required to give to each member notice of an assessment.

The member cannot be put in default until that notice be served upon him. If service be by mail, it must be properly addressed. It is essential, therefore, to the successful conduct of the business, and to accomplish the benevolent purpose of the association, that the secretary of the insurance department be accurately informed of the residence of each member, with a view to the proper service of notice of assessments, and their collection. The list required to be kept by the local secretary could perform no office, except as an aid to the defendant in its transactions with its members. In these respects the local secretary is in no sense the agent of the assured. The acts required are for the benefit of the assurer, not the assured, and are done by the authority of the company, not of the member. The imposition of such duties upon local secretaries constitutes them agents of the corporation, within the definition of the statute, for the purpose of service of process.

This defendant has taken out no license to do business within this state. It has appointed no attorney, as required by law, to accept service of process. It is doing business within the state unlawfully. It seeks to deprive a citizen of the state, claiming under contract made within the state, of that easy recourse to the judicial tribunals of the state which was designed to be secured to her by the law. The company insists that it may be called to account only in the courts of the state of Iowa with respect to contracts made with citizens of and within other states. As was said in *Railroad Co. v. Gallahue*, 12 Grat. 658:

"It would be a startling proposition if in all such cases citizens of Virginia and others should be denied all remedy in her courts for causes of action arising under contracts and acts entered into or done within her territory, and should be turned over to the courts and laws of a sister state to seek redress."

I am not inclined, by any strained or narrow construction of the beneficent statutes of the state, or of the regulations of the defendant, to adopt a rule working such grievous consequences. Without stopping to consider the validity of the service upon the grand secretary while temporarily within the state, I am of opinion that the service upon the secretary of the subordinate division of the order within the state must be sustained. The motion will be overruled.

UNITED STATES *v.* WARDELL *et al.*

(Circuit Court, E. D. New York. April 6, 1892.)

1. OFFENSES AGAINST ELECTION LAW—INDICTMENT—VAGUENESS.

An indictment under Rev. St. U. S. § 5522, for interfering with a deputy-marshal at a congressional election while "acting and performing the duties required of him, and which he was then and there authorized to perform by the laws of the United States," should be quashed for indefiniteness, although stated in the very words of the statute, since a statement of what duties he was performing is of the substance of the offense and material to its description.

2. SAME.

A indictment will be quashed only when it is very grossly bad.

At Law. Indictment of Sivil Wardell *et al.* for interfering with a United States deputy-marshal in the discharge of his duties at an election for congress. Indictment quashed.

Jesse Johnson, U. S. Atty.

A. H. Wilbur, for respondents.

WHEELER, District Judge. This cause has been heard upon a motion, allowed by discretion, to quash an indictment upon section 5522 of the Revised Statutes, for, at a poll of election for representatives in congress, molesting, interfering with, striking, beating, wounding, and rescuing a person from the lawful custody of a special deputy-marshal while "acting and performing the duties required of him, and which he was then and there authorized to perform by the laws of said United States," and by the provisions of title "The Elective Franchise of the Revised Statutes." Point is made as to how far such a motion will reach. In *The King v. Wheatley*, 1 W. Bl. 273, Lord MANSFIELD said: "If any distinction is made between quashing and arresting judgment, that of quashing is the strongest way; because the indictment must be very grossly bad to have the court quash it at once." *Rex v. Sarmon*, 1 Burrows, 516; *Rex v. Weston*, 1 Strange, 623; STORY, J., *U. S. v. Gooding*, 12 Wheat. 478; *State v. Stewart*, 59 Vt. 273, 9 Atl. Rep. 559. This statute is general, and makes the acts charged punishable only when done to a marshal, "in the performance of any duty required" of him, or which he "may be authorized to perform by a law of the United States." Being in the performance of some of these duties was of the substance of the offense, and very material to its description. Those prescribed in the title referred to, section 2022, as well as elsewhere, are many and various; that the special deputy-marshal was in any manner in the performance of any of them is not in any way alleged but in the words quoted. When an offense is specifically described in a statute an indictment in the words of the statute is sufficient; but, when the statute is more general than is allowable in an indictment, the description must be so much the more specific than the statute. *U. S. v. Carll*, 105 U. S. 611. In *U. S. v. Cruikshank*, 92 U. S. 542, on motion in arrest, the indictment, on the statute against conspiring to prevent or hinder the free exercise and enjoyment of any right or privilege granted or secured by the constitution or laws of the United States, charged an intent to hinder and prevent the free exercise and enjoyment of "every, each, all and singular," such rights. This was held not to be sufficient to charge any offense within the statute. That case seems to govern this. The generality of the allegation of the right or privilege hindered or prevented from there was the same as that of the duties being performed here. So was that of the scheme to defraud in *U. S. v. Hess*, 124 U. S. 483, 8 Sup. Ct. Rep. 571. As this indictment does not charge any offense, it would not only be bad on motion in arrest, but is so on this motion. It may as well be quashed before trial as to have judgment arrested on it after.

Motion granted.

DE LA VERGNE REFRIGERATING MACH. CO. v. FEATHERSTONE & al.*(Circuit Court, N. D. Illinois. February 29, 1892.)***1. PATENTS FOR INVENTIONS—VALIDITY—ISSUE OF PATENT TO DEAD MAN.**

Under Rev. St. U. S. § 4896, which provides that, if an inventor dies before a patent is granted him, the right of applying for and obtaining a patent shall vest in his personal representatives, a patent issued to an inventor after his death, he having died after making application for such patent, is void.

2. SAME—ESTOPPEL IN PAIS.

Where a patent is void because granted to a dead man, representations that the patent is valid, made by a party interested in it, do not estop him from denying its validity, as against a person who does not claim title through him.

In Equity. On demurrer. Bill by the De la Vergne Refrigerating Machine Company against John Featherstone and others to restrain the alleged infringement of a patent. Defendants demur. Demurrer sustained.

Banning, Banning & Payson, for complainant.

Bond, Adams & Pickard, for defendants.

BLODGETT, District Judge. This case is now before the court on a general demurrer to the bill of complaint. The matters set forth in the bill necessary to be considered on this demurrer are that before the 24th of November, 1875, one James Boyle had invented the device covered by the patent, infringement of which is charged in this case, and on the said 24th day of November he filed his application for his patent, and appointed Alexander & Mason his attorneys to solicit and advocate his application; that on the 27th of said month of November, and before the allowance of his patent, the said James Boyle died intestate, leaving a widow, Theresa M. Boyle, and four children; that on December 2, 1875, Mrs. Boyle, the widow, entered into a contract with Thomas L. Rankin, whereby he agreed to complete an ice machine, which was in process of construction at the time of Mr. Boyle's death, and to press the application for a patent, and, in case a patent was obtained, to use his best efforts to introduce the machine, and share the profits with Mrs. Boyle until she should have received \$5,000, when she was to assign the patent and the machines then in use to Rankin; that, under direction of Rankin, Alexander & Mason, the solicitors appointed by Boyle, prosecuted the application for a patent, and, to overcome objections made by the examiner to the said specifications and claims made by Boyle, said solicitors on the 20th of December, 1875, amended the specifications and claims, as the same had been prepared by Boyle, and thereafter, and on the 21st day of March, 1876, the patent No. 175,020 was granted unto James Boyle, his heirs or assigns, for the said invention, for the period of 17 years from the last-mentioned date; that on the 9th day of March, 1876, said Thomas L. Rankin obtained temporary letters of administration on the estate of said James Boyle, and afterwards, and about the 5th day of July, 1876, Theresa M. Boyle, the widow of said James Boyle, was appointed administratrix of the estate

of said James. The bill then states divers dealings with the patent by several persons and corporations, among whom are the Boyle Ice Company and the Consolidated Ice-Machine Company, in which companies the defendant Skinkle was a stockholder and officer, which companies had, by some instruments of writing or agreements, the right to manufacture ice-machines under the said patent for a term of years, but which term had elapsed before the present complainants had acquired what they called the title to said patent, and that the defendants Featherstone had manufactured ice-machines in accordance with the patent, under contracts with said corporations; that defendant Skinkle, while acting as an officer of the Boyle Ice Company and Consolidated Ice Company, had asserted the validity of the patent in divers ways, and especially by an affidavit filed in the patent-office. The contention of the defendants on the demurrer is that the patent was void from the beginning, because the patentee was dead at the time the patent was granted; that there was, in fact, no grantee in the patent.

It is a proposition so axiomatic and elementary as to require no citation of authority, that all the rights and remedies of inventors to the exclusive property in their inventions comes from the statutes. It is the patent issued to the patentee in pursuance of the constitution and laws of the United States which gives him the property right in his invention, and protects him in the use thereof. As was said by Justice GRIER in *Child v. Adams*, 1 Fish. Pat. Cas. 189:

"The power of the commissioner of patents to issue patents, and the effect of them, is carefully defined by the statute. By defining the conditions under which the power it confers shall be exercised, it necessarily excludes all others, except, perhaps, the correction of their own clerical errors." See, also, *Morton v. Eye Infirmary*, 2 Fish. Pat. Cas. 320.

The statutes of the United States recognize only three classes of persons to whom a patent for an invention can issue. These are—*First*, the inventor himself; *second*, the assignee of the inventor, when the assignment is made before the issue of the patent; and, *third*, the executor or administrator of the inventor, if the inventor dies before the patent is granted. Rev. St. U. S. §§ 4886, 4895, 4896. "A patent for an invention is a grant by the state of the exclusive privilege of making, using, and vending, and authorizing others to make, use, and vend, an invention." 2 Kent, Comm. p. 366. In *Galt v. Galloway*, 4 Pet. 332; *McDonald's Heirs v. Smalley*, 6 Pet. 261; *Galloway v. Findley*, 12 Pet. 264, —it was held "that a patent of lands to a dead man and his heirs was void, and conveyed no estate;" and the same principle is affirmed in *Davenport v. Lamb*, 13 Wall. 418. And, upon the principle established in these cases, I am unable to see why a patent for an invention to a dead man is not wholly inoperative. The grant by letters patent to a man and his heirs, or his heirs and assigns, for an invention, conveys an estate of inheritance during the existence of the rights created by the grant. But for the use of the word "heirs" in the statute and the patent, the grant might be construed as wholly personal, and to end with the life of the grantee. On the death of the patentee, the right secured goes,

not to the heirs themselves, but to the personal representatives of the deceased, in trust for the heirs or devisees. *Valve Co. v. New Bedford*, 19 Fed. Rep. 753; *Bradley v. Dull*, Id. 913. In other words, the grant to a living patentee is complete and operative—*First*, to the patentee or grantee named, if living; and, *second*, in the event of his death during the term of the patent, to his personal representatives, executors, or administrators, for the use of his heirs. In this patent there was no grantee; the person named as grantee or patentee was dead at the time of the grant, and therefore there was no person to take the thing granted, and hence the grant never took effect. There is no hardship in this construction of the law; for by section 4896, Rev. St., it is provided that, if a person who has made any new invention or discovery for which a patent may have been granted shall die before a patent is granted, the right of applying for and obtaining a patent shall vest in his executor or administrator, in trust for his heirs, devisees, or assigns, and it also provides for the manner in which they shall prosecute and obtain a patent. Under the provisions of this section, it is plain that, on the death of James Boyle while the proceedings to obtain the patent were incomplete, his administrator should have suggested his death to the patent-office, and taken up the prosecution of the application, and secured the issue of the patent to the administrator. The statute, by its express words, provides for the administrator or executor to prosecute the application in case of the death of the inventor before the patent is granted.

The allegations in the bill that, after the death of Mr. Boyle, his widow made a contract with Rankin, by which he was to prosecute the application for and obtain the patent, do not, as it seems to me, help the case. Mrs. Boyle, at the time she made the alleged contract with Rankin, was not administratrix of her husband's estate, and had no right to act in the premises, and could not clothe Rankin with any authority to act. In fact, she was not appointed administratrix until after the patent-office had allowed the patent, and nothing remained to be done but to pay the final fee. The authority of Alexander & Mason, the solicitors appointed by Mr. Boyle, ended with his death, and all steps taken by them after Mr. Boyle's death to procure the issue of the patent were wholly without authority from any one having any power to act in the matter. The statute having in clear terms provided what shall be done to preserve an inventor's right to a patent in the event of his death before the patent is granted, there seems to me no escape from the conclusion that it is only by following the mode pointed out by the statute that a valid patent can be obtained in such cases. It is not necessary, for the purposes of this case, to decide whether a new application should have been filed by the administrator, or whether the administrator could have stepped into the proceedings on suggesting the death of the applicant, and been allowed to continue the proceedings in the name of the administrator. This, perhaps, would be a matter of practice for the patent-office to decide. But to whom the patent shall issue is a matter of substance, and I am clear that, after the death of the applicant, the patent can only issue to an executor or administrator, as provided by statute.

It is also insisted, in support of the demurrer, that the changes made in the specifications as originally prepared, and which were properly signed and verified by Boyle, so that the patent was not granted on the specifications and claims made by Boyle, also vitiated the entire proceeding, and rendered the patent void, on the authority of *Eagleton Manuf'g Co. v. West, Bradley & Carey Manuf'g Co.*, 111 U. S. 499, 4 Sup. Ct. Rep. 593; and while there is much force in this point, as there can be no doubt that all authority of Alexander & Mason to act for Boyle in the prosecution of the application for the patent ended with the death of Boyle, yet I prefer to place my decision on the more cogent argument that the patent was void *ab initio* because Boyle, the grantee, was dead at the time the patent was issued.

Quite a portion of the bill is taken up with allegations showing, or tending to show, that the defendant Skinkle has dealt with the patent, at some time since its issue, as a valid patent, that he has held it out to the public as valid, and that, in certain proceedings instituted in the patent-office, he made affidavit as to its validity. The bill shows that for a time Skinkle was an officer and stockholder in certain corporations engaged in the manufacture and sale of ice-machines under this patent, but it also shows that whatever interest those companies had in the patent had terminated before the present complainant acquired its title. If this patent was void from the beginning, no conduct on the part of Skinkle, or those associated with him, could give it validity. No rule of estoppel can be called in to aid these complainants, who, by the showing of their bill, did not acquire title from Skinkle, or the corporations with which he is connected, in dealing with this patent as against the public, if it was void from the beginning. That there are cases where parties may, by dealing with a patent, estop themselves from denying its validity, is undoubtedly true; but none of the cases cited go to the extent of holding that any acts of an individual can vitalize and make valid a patent which never had validity, or took effect as a grant. I do not, therefore, see that any force is added to the complainant's case by these allegations. If any person had challenged the validity of this patent in the hands of the Boyle Ice Company or the Consolidated Ice Company, while Skinkle was a member of those companies, no acts of his, supporting or alleging the validity of the patent, would have been in the least material in resisting such challenge. As to the defendants Featherstone, the only allegation of the bill is that they manufactured ice-machines for the Boyle Ice Company and the Consolidated Ice Company while those companies considered themselves entitled by their licenses or other agreements to the use of the patent. They were, at the most, mere employes of the principal infringers, and cannot possibly be held to have either indorsed or validated the patent by their action in manufacturing machines such as are described in the specifications. For these reasons the demurrer is sustained, and the bill dismissed for want of equity.

COMMOSS *v.* SOMERS *et al.*

(Circuit Court, E. D. New York. April 6, 1892.)

1. PATENTS FOR INVENTIONS—EXTENT OF CLAIM—PREPARING PLATES FOR PRINTING.

Letters patent No. 184,759, issued November 28, 1876, to Joseph T. CommoSS, claim "the method of preparing metal plates for direct printing by means of pale boiled oil, Benguela varnish, turpentine, white lead, magnesia, and soap-stone, in about the proportions and in the manner herein substantially set forth and described." *Held*, that the patent covers only the specified method of using this particular composition, and is valid to that extent.

2. SAME—INFRINGEMENT—EVIDENCE—PRESUMPTIONS.

The only evidence as to infringement was the testimony of the plaintiff, as an expert, to the effect that, in his opinion, a certain box, shown in evidence, was printed from a plate treated with a composition containing "varnish, boiled oil, and some colored pigment," "in such proportions and consistency as to produce a smooth surface," without stating that it was dried, or treated with soap-stone and magnesia, according to his method. *Held*, that this was no evidence whatever of infringement, and hence that no presumptions could be indulged against defendant from his failure to show the nature of his composition and method of treatment.

In Equity. Suit by Joseph T. CommoSS against Daniel T. Somers and others for infringement of a patent. Bill dismissed.

Samuel G. Coo, for orator.

Robert H. Duncan, for defendants.

WHEELER, District Judge. This suit is brought upon patent No. 184,759, of November 28, 1876, granted to the orator for an "improvement in processes of preparing metal surfaces for printing upon," so that they may be printed upon direct, and afterwards struck up without injury. The specification describes using a composition of nine pints of pale boiled oil, six of Benguela varnish, and one of turpentine, with 16 pounds of white lead ground in oil, mixed at 125 deg. Fahrenheit, strained through four or more graduated wire screens, applied to the plates, and keeping them at 125 deg. Fahrenheit 48 hours, when they are powdered with two parts of magnesia and one of soap-stone. The claim is for "the method of preparing metal plates for direct printing by means of pale boiled oil, Benguela varnish, turpentine, white lead, magnesia, and soap-stone in about the proportions and in the manner substantially as herein set forth and described." This seems to be a patent for this precise method of using this particular composition. The anticipations relied upon are not shown to have been by this method, nor substantially like it, and the patent appears to be valid.

No infringement is shown except by a metal box, about which the plaintiff testifies as an expert:

"I am confident that the plate from which this box is made was first coated with an elastic smooth body or composition composed of varnish, boiled oil, and some colored pigment, of such proportions and consistency as to produce a smooth surface; and such composition has floated on the surface of such plate so as to dry without brush-marks. After this composition has been dried, the plate has been printed on in a lithographic press, and then formed into the box."

If this pigment was the equivalent of the white lead, and this varnish of Benguela varnish, as they may have been, the turpentine, and magnesia or soap-stone are left out of the composition, and it was accordingly different from that of the patent. The screening is wholly left out of the process, and simple drying of the plates, after the coating, left to take the place of baking 48 hours, at 125 deg. Fahrenheit. Neither the composition nor the process so shown are the same as those of the method of the patent. That they may have been the same, and that the defendants could have shown them to have been different, if they were, and have not, is relied upon to make out that they were. In *Wylde v. Railroad Co.*, 53 N. Y. 156, referred to for support to this argument, there was some evidence tending to show that the defendant was one of those liable; and whether it was or not could be made to appear from written contracts in its possession, and not produced. The court said: "The defendants knowing the truth, and omitting to speak, every inference warranted by the evidence should be indulged against them." Here infringement is denied in the answer, and was to be proved. The orator does not even say that he thought the metal of the box was prepared for printing by his method, but only described a method not his. The omission to produce evidence will not supply evidence wanting on the other side, although it will strengthen that which is slight. That the defendants have used the orator's method does not appear to be proved by any degree of evidence. Therefore the bill must be dismissed for non-infringement. Bill dismissed.

BRACHER v. HAT-SWEAT MANUF'G CO.

(Circuit Court, S. D. New York. April 5, 1892.)

ASSIGNMENT OF PATENTS—CONSTRUCTION OF CONTRACT.

Where a manufacturer owning certain patents, in pursuance of an agreement to form a corporation which is to include the properties of several rivals, and of which he is to become the general manager, assigns his patents to the corporation without reservation or conditions, except that the company is not to assign them to any one else while he continues to hold his allotted proportion of its stock, such assignment cannot be considered as subject to the condition that he shall be retained in his position as manager, and his discharge by the company, whether with or without cause, will not revert in him any interest in the patents.

In Equity. Suit by Thomas W. Bracher against the Hat-Sweat Manufacturing Company. Bill dismissed.

Arthur v. Briesen and *Esek Cowen*, for complainant. *Julien T. Davies* and *John R. Bennett*, for defendant.

COXE, District Judge. Nominally this is an action for the infringement of two letters patent. Its real purpose, however, is to test the validity of an instrument by which the complainant assigned these patents to

the defendant in March, 1882. The complainant charges—*First*. That his signature to this instrument is forged. *Second*. That if the signature is genuine the instrument itself, or the greater part thereof, is fraudulent. *Third*. That if the instrument is genuine in all respects, still, it was improperly used, and did not operate to transfer a valid title to the defendant.

The first of these charges was disposed of at the argument. There is nothing in the record, worthy the name of evidence, to impeach the genuineness of the signature. Among the many witnesses who prove it to be genuine is the complainant himself.

The second charge, while not so overwhelmingly disproved, has little of a substantial nature to rest upon. It is said, conceding that complainant signed the last sheet of the assignment, that the other sheets were added afterwards. The reasoning in support of this charge is as follows: *First*. The last page was press-copied before the signature of complainant was affixed. The second and third pages never were copied at all, and the first page was copied after being recorded in the patent-office. *Second*. On the last two pages there are three brad-holes and on the first two pages two brad-holes. Pages 1 and 2 are not numbered and pages 3 and 4 are numbered. *Third*. The body of the paper and the name of the first subscribing witness is in one ink, the signature of complainant and the signature of the second witness is in another ink. *Fourth*. The previous pages have been spaced to match exactly the last page of the assignment. Other alleged peculiarities are pointed out, but the foregoing are the principal ones. Assuming that all of these propositions are fully established, they absolutely fail to sustain the grave accusations made against the defendant and its agents. Fraud must be proved; it cannot be inferred or maintained by speculation or conjecture. To destroy property rights and strike down private character for the reasons advanced would be alike without precedent and without principle.

But the foregoing propositions are not established. The testimony that the sheets of the assignment were copied at different times was rendered utterly valueless when the writing was subjected to tests made by the very witness who pronounced the instrument ungentine because of these supposed discrepancies. The proposition that the last page was originally part of an assignment of leases, from which it was removed and fraudulently attached to the three preceding pages of the instrument in question, is rendered untenable by an examination of the last page itself. The first sentence on the last page which the complainant must have seen is as follows:

"Of its legal representatives to the full end of the respective terms for which said several *letters patent*, and each of them, are granted."

After this sentence, which unquestionably does not refer to leases and unquestionably does refer to letters patent, appears the assignment of licenses referred to. It is as follows:

"And I do hereby *further* assign, sell, transfer and set over unto the said Hat-Sweat Manufacturing Company any and all interest whatsoever, that I

have or may have in, to and under existing contracts and licenses, in, to and under the said several inventions and letters patent or either of them and amounts due thereon or to accrue by reason thereof."

Other circumstances, characterized as suspicious, have been fully explained. When to all this is added the fact that there was no reason or motive for the commission of crime; that the defendant, as will be seen later on, was entitled to an assignment of the patents in question, and, if the complainant had refused, a court of equity would have compelled him to assign, the last suspicion of wrong-doing disappears and not even the shadow of fraud remains. It thus appears that in March, 1882, the complainant, by an instrument, executed without fraud, duress or mutual mistake, assigned to the defendant the patents which the defendant is charged with infringing.

It might, perhaps, be said that the court need not proceed further, but should dismiss the bill at this point. The theory upon which the action rests, as expressly charged in the bill, is that this assignment was never made or executed by the complainant "in any way, shape or manner whatsoever." This proposition has been completely overthrown. Such being the condition of the pleadings and proofs it is a grave question whether the action in any view can be maintained. Apparently, there is but one answer to the question: Can one who does not hold the legal title to a patent treat as an infringer one who does hold that title? However, as both parties have devoted the greater part of their argument to a consideration of the construction to be placed on the assignment, I proceed to an examination of the question whether that instrument transferred a valid title to the defendant.

Prior to 1881 the hat-sweat industry was in the hands of several rival manufacturers, viz., the complainant, Stetson, Greenwood, Bigelow and the Blanchard Overseam Company. Competition was disadvantageous to all. An effort was, therefore, made to consolidate these conflicting interests. With this object in view an agreement was entered into between the complainant and Mr. John B. Stetson, which, after reciting that the complainant had assigned certain patents to Henry B. Renwick, as trustee for a company about to be formed, provides as follows: Stetson was to organize the company, the patents were to be assigned by Renwick to the new company upon the joint request of the attorneys for the respective parties, 37½ per cent. of the capital stock of the new company was to be delivered to complainant. It was agreed further that the board of directors of the company was to consist of five, two of them to be designated by complainant, who was to be employed as general manager of the manufacturing department. He was to devote his entire time to the business and was to receive a salary of \$6,000 per annum, payable monthly. It was also stipulated that the patents assigned by complainant to the company should not be assigned, sold or transferred by the company, except upon the written consent of complainant, so long as he continued to own two-thirds of the 37½ per cent. of stock. Complainant further agreed that as soon as the company was formed and the 37½ per cent. of stock issued and delivered to him, he would simulta-

neously transfer to the company his entire business, both of manufacturing and selling sweats for hats. The assignment by complainant to Renwick, as trustee for the Hat-Sweat Company about to be formed, was executed at the same time and provided that Renwick should assign the patents therein mentioned "to the said company when formed, or as soon thereafter as he may be requested so to do; the terms and conditions contained in an article of agreement bearing even date herewith (Stetson agreement) having first been fully complied with, otherwise *this* assignment to be void."

The assignment to Renwick as trustee contains also the following clause:

"And I do further covenant and agree that as soon as the said company shall have been duly organized, if requested, I will execute an assignment, assigning and transferring all my right, title and interest in and to the said several letters patent, and each of them, and said application above named, *to the company direct*, together with all claims for past infringement of the said several letters patent, or any of them, likewise any and all existing contracts and licenses under the said several letters patent and amount due thereon."

It will be observed that the assignment in dispute—March, 1882,—is in exact compliance with the foregoing stipulation.

On the 3d day of January, 1882, the complainant signed a full and absolute release, indorsed on the Stetson agreement, acknowledging that Stetson "has faithfully complied with and carried out each and every of the terms and conditions of the said agreement." On the same day the company, by resolution of the board reciting and confirming the Stetson agreement, employed the complainant as general manager at a salary of \$6,000 per annum, payable monthly. Mr. Renwick did not accept the trust. That he had absolutely declined in the spring of 1882 does not appear. Indeed, it seems reasonably clear that both parties expected that he might be induced to accept even long after this period. However this may be, the fact remains that Renwick had nothing to do with the transaction from its inception to its close.

What then was the situation in March, 1882? The Hat-Sweat Company had been organized, all the parties having transferred and assigned their property and patents to the company as agreed. The complainant had received his stock, had been appointed general manager at the agreed salary, had transferred his business, apparently without condition, to the company, and had received over \$8,000 for his plant. In short, every condition precedent had been performed. Everything that Stetson, or the company, adopting his agreement, promised to do as a consideration for the assignment had been done. This is virtually conceded. Why, then, should the complainant not have assigned the patents? Why should he not have kept his agreement? It is admitted that he should have assigned, but it is argued that the assignment should have contained a condition, *in hæc verba*, making it void unless the company, through the remainder of complainant's life, complied with the terms of the Stetson agreement and employed him as general manager. Or,

it is said, the trustee might have inserted in the assignment a covenant on the part of the company that they would comply with the executory terms of the Stetson agreement, or a separate stipulation should have been executed on the part of the company agreeing to carry out the terms of that agreement.

In other words, it is insisted that a valid title to the patents was conditional upon the continued employment of the complainant, and that an assignment which did not convey such a defeasible title was in violation of the trust, null and void, and transferred no title to the defendant. There is nothing in the negotiations from the beginning to the end to indicate that it was ever in the mind of either party that such a condition should be attached to the assignment. A recital in an assignment of a patent of a memorandum of reciprocal obligations, like that contained in the Stetson contract, would have been out of place. The idea never appears to have assumed a tangible shape until, in 1887, the complainant was seeking a plausible theory upon which to attack the defendant. He agreed to assign without condition. He did assign without condition, and a short time afterwards directed the trustee to assign without condition. Can it be possible that the complainant would have sanctioned the unconditional direction of May 23d if he intended that Mr. Renwick should add a condition regarding his employment based upon the Stetson agreement? Would he have used the following language:

"You are hereby requested to assign, transfer and set over unto the Hat-Sweat Manufacturing Company, the property conveyed to you by the assignment from Thomas W. Bracher to Henry B. Renwick and now held in trust by you for them and on behalf of said company. This request is made in accordance with a certain agreement between Thomas W. Bracher and John B. Stetson, dated June, 1881, *each of the terms and conditions contained in said agreement having been fully complied with.*"

I am convinced that such an anomalous assignment was not intended and that the defendant could not have been compelled to accept it. It would have been valueless. No one would have purchased patents conveyed by such a title. The other parties would not have transferred their patents by absolute assignment and permitted the complainant to occupy a relation to the company which would enable him at any time to destroy the company's property and turn its title deeds to ashes. And, finally, the others would never have transferred to the complainant 2,250 shares of stock in exchange for such an infirm and worthless title. It seems incredible that intelligent men could have intended to organize a successful company with the title to its property dependent upon its succeeding should a dispute arise between it and one of its servants over the terms of his employment. After the complainant had received the stipulated consideration it was his duty to do what he had agreed to do and what he had been paid for doing, viz., transfer his patents to the company. If, thereafter, he was improperly discharged he had his remedy at law, which he could at any time assert. It was manifestly the intention of the parties that if there was a breach of any of

the conditions subsequent they should be left respectively to their remedy at law.

Considerable speculation has been indulged in, on the briefs, as to the fate of the Renwick trust, etc. I do not deem it essential to enter into this interesting inquiry, for it must be borne in mind that the question here is not whether the defendant has a perfect title, but whether the complainant has a title which will enable him to sue infringers. Having, for a good consideration, twice assigned all title out of himself it is not easy to see by what mysterious process he acquired it again. The purpose of the Renwick trust was obvious. It was to hold the patents for the benefit of all, pending the formation of the company. The moment the company was formed and the consideration paid the trust-deed was unnecessary. It would have been more orderly, certainly, to have had the trust executed. But the defendant was guilty of no wrong in demanding an assignment direct from the complainant. The latter had been fully paid for the assignment and had agreed to make it.

If the foregoing views are correct the question whether the complainant was rightfully discharged or not is of no materiality to this controversy. All the contemporaneous agreements, everything that was said, written and done by the parties from the beginning to the end of the transaction only tend to strengthen the impression that it was the intention of all concerned that after the transfer of the stock and the employment of the complainant by the defendant, their relations thereafter should be the ordinary ones of employer and employee. If the complainant failed to keep his agreement the defendant could recover damages, but not the stock transferred to him. If, on the other hand, the defendant broke its agreement the complainant could recover damages of the defendant, but not the patents transferred to it. Each party had his remedy at law if the other failed to keep the agreement. The complainant's conduct since his discharge need be referred to only as confirmatory of this construction, and as it tends to throw light upon the actual intent of the parties. After his discharge in September, 1832, he made no sign until this suit was commenced in 1837. Why did he not immediately offer to return his stock and demand his patents? The excuse he gives for thus sleeping upon his rights is wholly inadequate. If the situation was then what he now says he supposed it to be, his inactivity is unaccountable. If a defeasible assignment was on record and the event which reinvested him with the title had occurred, why did he not assert his rights and reclaim his property? Instead of doing so he sold his stock for \$60,000 and still retains the money.

The bill is dismissed.

RIPLEY v. ELSON GLASS CO.

(Circuit Court, S. D. Ohio, E. D. March 12, 1892.)

1. DESIGN PATENTS—ANTICIPATION—GLASS BOTTLES AND JARS.

Design patent No. 17,243, issued April 5, 1887, to Daniel C. Ripley, for footed bottles and jars, consisting of a spherical body, a figured ring-neck, covering a zone of the body, and having a raised pattern on its entire surface, was not anticipated by certain designs having a general resemblance thereto in shape, but lacking the raised ornamentation of the neck.

2. SAME—EVIDENCE—METHOD OF PRODUCING.

Although the suit does not involve the method of producing the result, yet, in considering the question of anticipation, the court may properly take into consideration the fact that the patentee invented the method of making articles of glassware having a "blown" body and a "pressed" neck, thereby rendering possible the raised ornamentation of the neck in the patent.

3. SAME—CONSTRUCTION—INTERPRETATION OF WORDS.

The words of the claim and specifications which refer to the body of the vessel as "globe-shaped" or "spherical" must be taken in their ordinary, rather than their mathematical, signification, and infringement cannot be avoided by merely elongating the body so as to render it an ovoid, rather than a sphere or globe.

4. SAME—TEST OF INFRINGEMENT—GENERAL RESEMBLANCE.

In determining whether a design patent is infringed, the test is whether there is a substantial similarity in appearance; not to the eye of the expert, but to that of the ordinary observer, giving such attention as would ordinarily be given by a purchaser of the article bearing the design.

5. SAME—PENALTY.

Where the infringement of a design patent is deliberate and intentional, the court will impose upon the defendant the penalty of \$250 provided for by Act Feb. 4, 1887.

In Equity. Suit by Daniel C. Ripley against the Elson Glass Company for infringement of a patent. Decree for complainant.

W. Bakewell & Sons and T. B. Kerr, for complainant.

F. L. Dyer and J. D. Elson, for respondent.

JACKSON, Circuit Judge. This suit is brought for the alleged infringement of design patent No. 17,243, issued April 5, 1887, to Daniel C. Ripley, the complainant, "for a new and original design for glass bottles and jars." After referring to Figs. 1 and 2 of the accompanying drawings, the specifications state that—

"The characteristic feature of my design consists of the globe-shaped body, *b*, and figured ring or neck portion, *a*, surmounted on a zone of the spherical body, *b*. The figured portion consists of a raised pattern, covering the whole surface of the ring, *a*; but the heads, *d*, may be omitted, as shown in Figure 2. The body, *b*, has a foot, *c*. A suitable stopper, *e*, is used with some articles, and with others it is not. It therefore is not to be considered necessary to my design, which is applicable to bottles, jars, pitchers, and similar footed articles."

The first claim based thereon is as follows:

"The design for footed bottles and jars, consisting of the spherical body, *b*; the figured ring-neck, *a*, covering a zone of the body, *d*; the ring having a raised pattern on its entire surface, as shown and described."

Infringement is charged only as to this first claim of the patent. The defenses set up by respondent in its answer are: *First*, invalidity of the

patent, because anticipated by certain prior designs; and, *secondly*, non-infringement.

After a careful examination and consideration of the evidence introduced on both sides, which it is not deemed necessary to review or set out in detail, the conclusions reached by the court upon the whole case are the following, viz.:

1. That the defense of invalidity and lack of invention in the patent sued on is not sustained. The sugar-caster shown on plate 9 in defendant's exhibit "Albert Jacquemort's Publication," and the glass pitcher, shown on page 291 of defendant's exhibit "Hamm's Catalogue," chiefly relied on to establish this defense, while resembling to some extent the jar embodying complainant's design, cannot properly be said to anticipate the latter's patent. Defendant's expert witnesses find some general resemblance between said articles and the patent, aside from or without considering the ornamentation of the latter. But it would be giving to complainant's design too narrow a construction to limit and confine it to the exact conformation of jar shown in the drawings accompanying the specifications of the patent, and to ignore the ornamentation of the pressed neck, surmounting the zone of the globe or spherical shaped plain body. The design does not consist in the precise shape of the body of the jar, nor in the body with the neck attached, independent of the ornamentation upon the latter, but is found in the artistic association of all three features, which present agreeable contrasts, and render the article of manufacture attractive to the eye. Thus considered, it would violate all sound principle to disregard the pressed neck ornamentation, intended to promote, and, by its contrast with the plain body of the article, actually promoting, æsthetic effect, so as thereby to open the way to destroy the design by showing that other features were previously in use. It is well settled that the patent is *prima facie* evidence of novelty and validity, which presumption is only to be overcome by clear, positive, and unequivocal proof. *Miller v. Smith*, 5 Fed. Rep. 359; *Thayer v. Hart*, 20 Fed. Rep. 693; *Lehnbeuter v. Holthaus*, 105 U. S. 96. Applying this rule to defendant's exhibits in connection with the other testimony in the case, the court is clearly of the opinion that complainant's patent was not anticipated thereby. On the contrary, the *prima facie* evidence of the novelty of the patent, instead of being overcome, is supported and established beyond any reasonable doubt by the evidence introduced on behalf of complainant. It is distinctly shown that complainant was the first to produce a footed globula, or spherical bodied glass jar, having a neck covered with a raised pattern. Prior to the date of his design, no practicable method of making articles of glass-ware having a "blown" body and "pressed" neck was known. Complainant is shown to have invented the method by which the body of the glass jar or other article of glass could be blown so as to be of a rounded, globular, or spherical shape, and the neck be pressed, thereby exhibiting the ornamentation of raised figures upon the latter, while the two parts—neck and body—united in one integral article. While this suit does not involve the method of producing or accomplishing this result,

it is very properly urged by counsel for complainant that the design should be considered as having originated with the invention of the method for giving it embodiment. But, without going further into details, the entire proof in the case fails to establish the defense of invalidity in the patent sued on.

2. That, the patent being valid, the first claim thereof is clearly infringed by the defendant. This, as a question of fact, is fully established, not only by the testimony in the case, but also by the comparison of the exhibits made by the court. It is shown both by inspection and by the proof that defendant's article of manufacture is substantially the same as that of the complainant. Minor differences are pointed out by the ingenuity of experts, but, notwithstanding such differences, there still remains that substantial identity of appearance in the two designs which, under well-settled rules for testing the question, render defendant an infringer. It is not and cannot be questioned that the first jar manufactured by defendant—like the small jar exhibited—was almost an exact imitation of complainant's design. When defendant ceased, upon notice, to manufacture that article, it sought to accomplish the same result, and avoid the admitted infringement, by merely elongating the body of its jar, so as to make it more of oval than globular or spherical in shape. But it is too plain for discussion that complainant's design is not to be limited or restricted to an exact globe or sphere in the body of the jar, but must be extended to any body that is globular or spherical,—pertaining to a globe or sphere. The defendant's large jar is unquestionably spherical in shape, and it is a mere play upon words—making a distinction without any real difference—to call it an oval or ovoid, and thereby escape the charge of infringement. When complainant's specifications and claim refer to the body of the jar being "globe-shaped" or "spherical," these terms are to be understood, according to their natural and ordinary meaning and signification, as indicating and covering a body not mathematically exact in dimension, but comparatively so. The terms are relative, and, as thus employed, embrace any shaped body that is globular or spherical in character, such as an egg or acorn. To test the two designs by the technical mathematical distinction between an oval or ovoid and a globe or sphere, would be not only to place an improper construction upon the language of the patent, but would involve a total disregard of the well-settled principles laid down by the authorities for determining the question of infringement in such cases. Since the case of *Root v. Ball*, 4 McLean, 177, (decided in 1846,) the rule applied in such cases is that "it is not necessary, in order to constitute infringement, that the thing patented should be adopted in every particular; but, if the design and figures were substantially adopted by the defendant, they have infringed the plaintiff's right. It is an infringement to adopt the design so as to produce substantially the same appearance." And upon the question of substantial identity or similarity in design patents the test to be employed or applied is not the eye of the expert, but that of the ordinary observer, giving such attention as would ordinarily be given by a purchaser of the article bear-

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ing the design. In *Gorham Co. v. White*, 14 Wall. 528, the rule is stated thus:

"We hold, therefore, that, if, in the eye of an ordinary observer, giving such attention as a purchaser usually gives, two designs are substantially the same; if the resemblance is such as to deceive such an observer, inducing him to purchase one supposing it to be the other,—the first one patented is infringed by the other."

The test of infringement in design patents is more analogous to that applied in "trade-mark" cases than to that adopted in respect to patents on mechanism. Testimony of experts is admissible in determining whether two mechanisms are substantially identical; while in design patents, resting almost wholly upon "appearances," the test of sameness is determined by the eye of the ordinary observer, giving such attention as a purchaser usually gives, which is substantially the same principle applied in trade-mark cases. Applying this rule to the present case, the court has, without hesitation or doubt, reached the conclusion that defendant's large jar as now made is an infringement of complainant's patent. The decisions which, in the opinion of the court, fully sustain this conclusion, both on the testimony and inspection of the articles and designs, are the following: *Root v. Ball*, 4 McLean, 177; *Perry v. Starratt*, 3 Ban. & A. 485; *Gorham Co. v. White*, 14 Wall. 511; *Miller v. Smith*, 5 Fed. Rep. 359; *Jennings v. Kibbe*, 10 Fed. Rep. 669; *Wood v. Dolby*, 7 Fed. Rep. 475; *Dryfoos v. Friedman*, 18 Fed. Rep. 825; *Tomkinson v. Manufacturing Co.*, 23 Fed. Rep. 895; *New York Belting & Packing Co. v. New Jersey Car Spring Co.*, 48 Fed. Rep. 556.

3. That defendant's infringement of the first claim of the patent was so deliberate and intentional as to warrant the court, under the act of February 4, 1887, in imposing upon it the payment of the \$250, as prayed for in the bill. It follows from the foregoing conclusion that complainant is entitled to the relief sought by his bill, and a decree in his favor is rendered accordingly. The defendant will be enjoined from further infringement, will be charged with the sum of \$250, will be taxed with the costs of the suit, and the usual reference for an account to ascertain profits made by defendant or damages sustained by complainant will be directed.

CAMPBELL PRINTING-PRESS & MANUF'G CO. v. MANHATTAN RY. CO.

(Circuit Court, S. D. New York. March 9, 1892.)

1. PATENTS FOR INVENTIONS—INFRINGEMENT—ACCOUNTING.

Where infringement is admitted, damage is presumed, and the owner of the patent is entitled to a reference for accounting, without giving specific evidence of damage.

2. SAME—INJUNCTION.

Where, in a suit against a railroad company for infringement, the answer admits the validity of the patent, complainant's title thereto, and the infringement, the company cannot avoid an absolute injunction by averring that the invention is of

trifling value, and offering to submit to a decree for nominal past damages, and to an injunction against the adoption of any more of the patented articles, on condition of the undisturbed use of those already upon its trains.

3. SAME.

On the question as to whether an injunction should issue, it is immaterial that the owner of the patent has never made, used, or sold any of the patented articles, or licensed any one to do so; especially when it appears that he has not done so because defendant and other railroad companies, being unwilling to pay the price asked by him, adopted his invention without leave, expecting to pay a less sum by way of damages for infringement.

4. SAME—HARDSHIP.

Defendant cannot escape the injunction on the ground of hardship to itself or to the public, since the decree may provide for a gradual removal from its cars of the patented article, so as not to cause the withdrawal from service of a large amount of rolling stock at any one time; and for that purpose the amount of rolling stock required and available for its business may be proved by affidavits or the oral examination of its superintendent as master mechanic.

In Equity. Suit by the Campbell Printing-Press & Manufacturing Company against the Manhattan Railway Company for infringement of a patent. Decree for injunction and an accounting.

Chas. De Hart Brower, for complainant.

Davies, Short & Townsend, for defendant.

LACOMBE, Circuit Judge. The complainant is the owner of letters patent No. 401,680, granted April 16, 1889, to Edward S. Boynton for a "new and useful improvement in valves for pneumatic pipes or tubes." The second claim of the patent is:

"(2) In combination with an external pivoted valve, a self-closing device, consisting of a compressive helical spring held within a tubular guide, formed upon or attached to said valve, between one end of said guide and a stop at the pivotal point of the valve, substantially as and for the purposes set forth."

This claim was sustained by Judge COXE in *Campbell Printing-Press & Manuf'g Co. v. Eames Vacuum Co.*, 44 Fed. Rep. 64, and disclaimer as to the first claim was duly entered in the patent-office prior to the bringing of this suit. The bill charges infringement of this second claim, prays injunction and accounting, and expressly waives answer under oath. A preliminary injunction was refused. *Campbell Printing-Press & Manuf'g Co. v. Manhattan Ry. Co.*, 47 Fed. Rep. 663. The case now comes up for final hearing upon bill, answer, and replication. The answer (unverified) admits the grant of the letters patent, and complainant's title thereto, and that they are good and valid as to the second claim thereof. It further admits that since April 16, 1889, (the date of the issue of the patent,) defendant has used couplings embodying the invention covered by the second claim, and that the number so used is 2,678, on 1,017 cars and 322 locomotives, some of said couplings having been applied before April 16, 1889, and others from time to time since. It further avers that the invention is of trifling, if any, pecuniary value; that complainant has never made, used, or sold the patented invention, and has never licensed any one to make, use, or sell the same; that the defendant uses it upon cars constantly employed by it in the transportation of passengers, and that an injunction would be a hardship to defendant, would seriously inconvenience it in its passenger carrying

service, and would be of no benefit to complainant. It offers to submit to a final decree for injunction against the use of any additional infringing couplings. For the past and future undisturbed use of those which it has placed upon its cars, without leave or license of the owner of the patent, and in admitted violation of the rights secured to such owner thereby, it also offers to submit to a judgment for nominal damages.

To the complainant's application for an accounting before a master it is objected that it has not given specific evidence of damages sustained. But under the pleadings it is not necessary for the complainant to give such proof. Infringement is admitted, and from infringement damage and deprivation of profits are presumed. *Wooster v. Muser*, 20 Fed. Rep. 162. To what extent, and whether nominal or substantial, is a matter to be settled on the accounting. Complainant has shown all that is necessary to entitle it to a decree sending the case to a master, when it has shown infringement of a valid patent owned by itself. *Brickill v. Mayor*, 7 Fed. Rep. 479. The decision of Judge Brown in the case at bar (48 Fed. Rep. 344) did not pass upon this point. It only settled a question of practice, holding that a motion at chambers was not proper procedure.

The contention of the defendant that, because it is willing to pay nominal damages for past infringement, an injunction to restrain future infringement should not issue, is unsound. In *Birdsell v. Shalhol*, 112 U. S. 487, 5 Sup. Ct. Rep. 244, the supreme court held that "an infringer does not, by paying damages for making and using a machine in infringement of a patent, acquire any right himself to the future use of the machine. On the contrary he may, in addition to the payment of damages for past infringement, be restrained by injunction from further use, [citing authorities.]" See, also, *Matthews v. Spangenberg*, 15 Fed. Rep. 813; *Bragg v. City of Stockton*, 27 Fed. Rep. 509. The proposition advanced by the defendant is practically this: If an inventor, whose patented improvement in locomotive machinery, although valid, is of but trifling value to a common carrier, himself thinks it valuable, and therefore demands a license fee for its use, higher than such common carriers as would like to use it are willing to pay, they may nevertheless appropriate his invention to their use, may place it on their cars and locomotives without his permission, and may continue to use it till it wears out, without interference, on the ground that to remove it would inconvenience the public; and that for such enforced license they should be made to pay, not the fee the inventor asks, but such sum as a master of the court may think the invention is worth. Baldly stated, the contention is that, when a patentee asks a price for the use of his patent higher than users wish to pay, and refuses to license its use except at such price, it may be confiscated and sold to whoever wants it, at a price to be fixed by a United States circuit court. Whether or not such a qualification of the monopoly secured by letters patent would be desirable legislation is immaterial; it is not now on the statute book, nor is there found controlling authority in its support among the cases cited by the defendant's counsel.

In *Barnard v. Gibson*, 7 How. 657, the parties claimed conflicting interests as assignees of a patent, and there was thus an issue raised in the case which the circuit court had determined adversely to the defendant; but his right to review that decision, by appeal from final decree whenever it might be entered, still remained. The supreme court declared that it was a "hardship" sufficient to have deterred the circuit court from granting an injunction that the case was not ended in that court, so that there might be a final decree for the defendant to appeal from, and perhaps secure a reversal of the finding that complainant's title was good. Here no such issue is raised. Title, validity of the patent, and infringement are established, not by the decision of this court, but by defendant's own admissions on the record, and no appeal could possibly result in a different conclusion. In *Pullman v. Railroad Co.*, 5 Fed. Rep. 72, defendants were strenuously asserting prior use and non-infringement. In *Hoe v. Advertiser Co.*, 14 Fed. Rep. 914, it was apparent that to make a change in the printing-press on which the daily newspaper of the defendant was printed would greatly embarrass the usual course of its business. Moreover, the defendant was contesting the validity of the patent, and, though the circuit court sustained it, there was a possibility of reversal. In *Howe v. Morton*, 1 Fish. Pat. Cas. 601, the validity of the patent was vigorously assailed. In *Stainthorp v. Humiston*, 2 Fish. Pat. Cas. 311, the fact of infringement was contested. In *Morris v. Manufacturing Co.*, 3 Fish. Pat. Cas. 67, the court did not "think that complainant's title was entirely clear." The patent had only six months to run, and injunction would close defendant's mill for that whole period, throwing many hands out of employment. In *Wells v. Gill*, 6 Fish. Pat. Cas. 89, the decree (in another case) which sustained the validity of the patent was before the supreme court on appeal. Judge STRONG, though refusing an injunction, expressly stated that, had that decree been acquiesced in or affirmed by the supreme court, he would have awarded one. All of these cases (except *Barnard v. Gibson*, *supra*) were applications for preliminary injunction, as were also *Colgate v. Telegraph Co.*, 4 Ban. & A. 415, and *New York Grape Sugar Co. v. American Grape Sugar Co.*, 10 Fed. Rep. 837. *Lowell Manuf'g Co. v. Hartford Carpet Co.*, 2 Fish. Pat. Cas. 475, is plainly an authority only under the facts of that particular case, which are stated too briefly in the report to afford much information as to what the court did decide. In *Forbush v. Bradford*, 1 Fish. Pat. Cas. 318, Judge CURTIS refused a temporary injunction, where the same issues had been tried at law between the same parties, such trial resulting in a verdict for the plaintiff; but he did so on the express ground that a bill of exceptions had been taken upon points which involved the validity of the patent, and that, as the bill of exceptions was not frivolous, the litigation as to complainant's title was not in fact terminated, and it was necessary, in weighing the relative hardship of granting or refusing an injunction, to contemplate a decision adverse to complainant's title as a possible result. But the learned judge expressly added that, even though the effect of an injunction would be to stop all the defendant's looms till the patented improvement could be re-

moved, that would not prevent the court from granting an injunction if the right had been finally established at law. In the case at bar, where neither validity, title, nor infringement is questioned, the complainant's right to its monopoly is finally established. In *McCrary v. Canal Co.*, 5 Fed. Rep. 367, injunction was refused where defendants were using complainant's "improvement in coupling and steering canal-boats," on the ground that the "allowance of an injunction would cause much greater injury to the respondent than benefit to the complainant." Defendants were contending that the patent was an invalid reissue. Although the circuit court did not sustain that or the other defenses, the defendants still had their appeal, and it could not be held that all questions of validity, title, and infringement had been finally determined. As no facts are stated in the report of the case, it does not appear what was the respective injury or benefit. In the case at bar the only injury to the defendant is the cost of substituting some other coupling; it expressly repudiated (on the former motion) any benefit from the improvement, insisting that other couplings which it was free to use were better than complainant's. By refusing an injunction, the court practically informs the complainant, and all who may wish to use its couplings, that, because it asks more for the improvement than they are willing to pay, it must nevertheless be content to see them appropriate it at a price to be fixed hereafter by this court. On which side the balance of hardship in this case inclines seems not difficult to determine.

The remarks of Judge GRIER in *Sanders v. Logan*, 2 Fish. Pat. Cas. 167, are purely *obiter*, the bill in that case being dismissed on the ground that prior use was shown. Besides, the learned judge evidently assumed that the license fee, payment of which would be full compensation to the complainant for future as well as past trespasses, was a "fixed sum." Undoubtedly, where there is a given license fee which is paid by others for the use of an improvement in some "mill, manufactory, locomotive, or steam-engine," equity will not lend its aid to enable a patentee, by an injunction, practically against the whole apparatus, to extort a larger sum from some particular infringer who is prepared to pay the "given sum" for the privilege of using the improvement. But that is not this case. There is no "fixed sum," for there have, as yet, been no actual sales of licenses, other railroads (as was stated on the argument) having followed defendant's example, and appropriated the new coupling without payment or permission, expecting, apparently, by that means to be able to compel the complainant to accept much less than he would sell his license for, except under some such constraint, —perhaps a merely nominal sum,—for, although it seems to have kept putting his coupling on its cars, even after it had tested it by use, defendant yet insists that it is a wholly valueless improvement.

The decision of Judge BLODGETT in *Hoe v. Knap*, 27 Fed. Rep. 204, fully sustains the defendant's contention. In that case the owner of the patent was a large manufacturer of printing-presses, which he did not keep in stock, but made to order. The patented device was a small part of the entire machine. As matter of fact, complainant had not up to

that time sold any press embodying the improvement, because none had been ordered. Apparently he thought it for his best business interest to hold the patent, and use it exclusively in presses of his own make, and hence had no regular license fee for its use. Judge BLONGETT, however, at final hearing, refused an injunction against an infringer, holding that, "under a patent which gives a patentee a monopoly, he is bound either to use the patent himself, or allow others to use it, on reasonable terms." No authorities for this proposition, however, are cited in the opinion, nor is such a construction of the statute, which provides that a patentee shall receive a grant of the "exclusive right to make, use, and vend" his invention, supported by argument. Although great weight is always to be given to decisions of the circuit courts, they are not controlling authority when the same question is presented in another circuit. I do not, therefore, feel constrained by this decision to refuse the complainant its injunction, because it asks more for a license than defendant cares to pay.

Defendant also insists that injunction should not issue because the infringing couplings now in use by it are used in the service of the public, and to enjoin would be to work great hardship to the public. In *Bliss v. Brooklyn*, 4 Fish. Pat. Cas. 596, injunction was refused because the hose couplings complained of were necessary for the daily use of the city in the prevention of fires; and there is a long line of authorities to the same effect. There is, however, nothing in the case at bar, beyond the bare assertion of the defendant, to show that an injunction properly regulated as to time may not be obeyed without in any way interfering with the service which defendant renders to the public as a common carrier of passengers. It seems to have experienced no difficulty at all in temporarily withdrawing its locomotives and cars from such service at suitable seasons, for a sufficient length of time to affix the complainant's couplings. Why it may not, in like manner, remove them, does not appear. Complainant may take decree for account and injunction. The terms of the injunction, providing from how many cars and locomotives the infringing couplings shall be removed each week, may be settled on notice; and if defendant will at that time present affidavits showing the character of the work required, the amount of its rolling stock in use and reserve, and its shop facilities, there need be no difficulty about arranging the terms of the decree; or, if it be preferred, defendant, instead of affidavits, may present its superintendent or master mechanic for examination to aid the court in settling the terms.

PAGE WOVEN WIRE FENCE CO. v. LAND.

(Circuit Court, E. D. Michigan. December 16, 1891.)

1. PATENTS FOR INVENTIONS—ORIGINAL INVENTOR—PRESUMPTIONS FROM PATENT.

In a suit for infringement the introduction of the patent is *prima facie* proof that the patentee is the original and first inventor, and the introduction of subsequent letters, under which the alleged infringing device is made, does not overcome this presumption.

2. SAME—JOINT PATENT.

The issuance of a patent to two persons, as joint inventors, constitutes *prima facie* proof that the invention was joint.

3. SAME—INFRINGEMENT—EVIDENCE TO SUPPORT BILL.

The mere fact that defendant has constructed or is constructing, in accordance with a subsequent patent, machines which embody substantially the same devices covered by complainant's patent, and which are claimed to be an infringement, is sufficient to support the bill when the answer admits that, if found successful, defendant intends to sell machines and territory.

4. SAME—EXTENT OF CLAIM—DESCRIPTION—ONE DEVICE WITH SEPARATE FUNCTIONS—WIRE-FENCE MACHINE.

Letters patent No. 414,844, issued November 12, 1889, to John W. Page and Charles M. Lamb, is for an improved machine for weaving wire fences. The essential device is a hollow needle, approximately cylindrical in shape, open along one side, and adapted to straddle the warp-wire and rotate, so as to wind about it the woof-wire, with which it is threaded, forming a knot, at the same time having a slight longitudinal reciprocating motion, to give the knot an elongated forward twist, which, as stated in the specifications, "is desirable because of its extreme security." The inventors state that, owing to the complicated nature of the mechanism, they have deemed it desirable to give a detailed description, but that they do not wish to limit their invention to the details of construction, and that the claims are intended to be construed as broadly as the state of the art will permit. Claim 13 covers "a longitudinally-slotted needle, adapted to hold the woof-wire, and supported, to rotate in its bearings, substantially as and for the purpose set forth." Claim 14 is the same as claim 13, with the addition that the needle is to "be reciprocated longitudinally," for the purpose set forth. *Held*, that claim 13 covers the needle without the reciprocating longitudinal motion to give the knot the preferred "forward twist," and is infringed by a device constructed under letters patent No. 435,042, and issued August 26, 1890, and which is essentially the same as the needle, omitting this reciprocating feature.

5. SAME—CONSTRUCTION OF CLAIMS.

A construction which will make two distinct claims of a patent cover, not different things, but one and the same thing, is to be avoided, if possible; and, where a device performs two distinct operations, a claim may be based upon each without covering the other.

In Equity. Suit by the Page Woven Wire Fence Company against Abel Land for infringement of a patent. Injunction granted.

Dyrenforth & Dyrenforth, for complainant.

Grant Fellows; Salisbury & O'Mealey, and M. F. Chamblin, for defendant.

JACKSON, Circuit Judge. The complainant corporation, or assignee of the entire right, title, and interest in and to letters patent of the United States No. 414,844, granted November 12, 1889, to John W. Page and Charles M. Lamb, for a new and useful improvement in wire-fence machines, brings this suit against the defendant, Abel Land, for infringement thereof. The bill, which was filed September 13, 1890, contains the averments and allegations usual in such cases, and need not be specially noticed. In his answer the defendant denies knowledge of complainant's title to said letters patent, but admits the issuance thereof at the date stated to said Page and Lamb. He denies that said pat-

entees were the original, first, and joint inventors of the patented machine described in said letters, and states that said patentees—

"Surreptitiously and unjustly obtained said letters patent for that which was in fact invented by this defendant and his son, Stephen Land, and who were using reasonable diligence in adopting and perfecting the same, as was well known to said Page and Lamb when they applied for their letters patent."

He admits that he had made one or more machines in accordance with letters patent No. 435,042, granted to himself August 26, 1890, and that he intends to use them, and others like them, for specified business purposes, if found suitable, but he denies that his machines infringe complainant's patent. The assignment of said letters patent to complainant is fully established, and its title thereto was not questioned at the hearing. The defendant offered no proof in support of his denial that Page and Lamb were not the original, first, and joint inventors of the patented machines covered by and described in said letters patent No. 414,844, nor did he make any attempt to establish the claim set up that he and his son were the real inventors thereof. These questions are therefore out of the case, under the well-settled rule that complainant's introduction in evidence of his patent in due form is sufficient to show that he is the original and first inventor of his device or improvement, as the same may be construed and defined by the courts, unless sufficient evidence to overcome that presumption, and to establish the contrary allegation of the answer, is exhibited in the record. In other words, the burden of proof is on the defendant to show that the patentee was not the original and first inventor. *Ransom v. Mayor, etc.*, 1 Fish. Pat. Cas. 252; *Green v. French*, 21 O. G. 1351, 11 Fed. Rep. 591; *Double-day v. Beatty*, 22 O. G. 859, 11 Fed. Rep. 729; *Stone Co. v. Allen*, 14 Fed. Rep. 353; *Agawam Co. v. Jordan*, 7 Wall. 583; *Seymour v. Osborne*, 11 Wall. 538; and *Mitchell v. Tilghman*, 19 Wall. 390, 391. The letters patent subsequently granted to the defendant do not overcome this *prima facie* presumption in favor of the prior patentee. *Dental Vulcanite Co. v. Gardner*, 4 Fish. Pat. Cas. 224, and cases cited. It is also settled that said letters patent to Page and Lamb, as joint inventors, is *prima facie* evidence that the invention therein described was joint. *Hotchkiss v. Greenwood*, 4 McLean, 456.

At the hearing counsel for respondent contended that the proof failed to establish the fact that the defendant at the time the bill was filed had made or caused to be made, and had used for the manufacture of wire fence, one or more machines containing and embodying as a part thereof the inventions and improvements described and claimed in complainant's letters patent. Without reviewing the evidence, we think it is clearly shown by the testimony of the witnesses Harvey and Abbott that prior to the filing of the bill on September 13, 1890, the defendant had constructed, and used the same in the making of wire fencing, one or more machines which it is claimed embodied complainant's invention, and which contained substantially the same devices described in letters patent No. 435,042, issued to him August 26, 1890. It admits of little or no question, under the proof, that prior to the grant of said letters

patent No. 435,042 he was constructing machines in accordance therewith, which he admits in his answer he intends to employ in making enough fence to test, and, if found suitable for the purpose, "to sell territory and machines for the manufacture of wire fence." Under these circumstances, the complainant's bill was not prematurely filed. Even if defendant had not prior thereto actually constructed machines for the manufacture of wire fence embodying the woof-winding mechanism covered by complainant's letters patent, his intention to try machines embodying said invention, and, if found suitable for the purpose, to sell the same for the manufacture of wire fence, would be sufficient to sustain the bill. In such cases, courts of equity recognize and enforce a larger and more remedial process than can be obtained in actions at law. This is clearly stated in *Woodworth v. Stone*, 3 Story, 749, 750, where it is said:

"The case is not that of an action at law for the breach of a patent, to support which it is indispensable to establish a breach before the suit was brought. But in equity the doctrine is otherwise. A bill will lie for an injunction if the patent-right is admitted, or has been established upon well-grounded proof of the apprehended intention of the defendant to follow [infringe] the patent-right. A bill *quia timet* is an ordinary remedial process in equity."

While the bill rests primarily upon the theory of actual prior infringement, still if that was not sustained the court can, under the prayer for general relief, proceed to protect the complainant's right from intended infringement by the exercise of its remedial process in the shape of an injunction, if the case warrants such relief.

The remaining and real controverted question in the case is whether the defendant in the machines constructed or intended to be made by him for the manufacture of wire fencing infringes the complainant's patent, or embodies any of the devices thereof covered by its claims. A full and detailed description of the letters patent sued on is not deemed necessary to the correct determination of this question. The patent in its entire mechanism is exceedingly elaborate and complicated, containing 8 sheets of drawings, with 37 figures, 10 pages of specification and descriptions, and 21 different claims. As stated in the specification, the invention relates to a machine for manufacturing wire fences, and its operation, taken as an entirety—

"Is in the nature of a weaving operation, the wires referred to as constituting the horizontal fence-wires affording the warp in the weaving, and those referred to as the vertical or stay wires affording the woof. The warp-wires are fed from spools in desired number and at required distances apart to the take-up mechanism, which receives the finished article, and is actuated intermittingly to take up lengths thereof, and alternates with a woof-wire winding and stringing device, which as soon as a finished length of fencing has been taken up, is actuated to travel transversely across the warp-wires, stopping at each, and winding around it a woof-wire, with which it is threaded."

This woof-wire winding and stringing device or mechanism and its operation is described at length and in great detail, and it is stated that at the forward end thereof there is—

"A hollow needle, S, (Fig. 28,) of approximately cylindrical shape, and open along one side, having formed or provided around it near its center a pinion, S', divided by a circumferential central groove, S², and so supported in its bearings as to permit to it a rotary and also a slight longitudinal reciprocating motion, and the forward end of the needle is threaded with the woof-wire, just about long enough to reach across the warp-wires when wound around each, and which we prefer to provide in the form of a coil, S³, (Fig. 29.)"

The operation of this needle when set in motion is first to fall upon or straddle and surround the first warp-wire at the right-hand side of the machine, and then to rotate about and reciprocate longitudinally along that wire, thereby winding around it the woof-wire, with which it is threaded, and forming a knot in the shape of an elongated forward twist, as represented in Fig. 30, which form of knot, as stated in the specification, "is desirable owing to its extreme security." The woof-winding device rises and shifts automatically from one warp-wire to another, and the threaded needle straddles and winds the woof-wire three times around each warp-wire throughout the series, when the device returns automatically to the place of beginning, to repeat the operation upon a new section of fence. The needle, S, at the forward end of the woof-wire winding and stringing mechanism, performs two separate and distinct functions or operations. By its rotary action it operates to wind the woof-wire, with which it is threaded, around each warp-wire, so as to make the tie or knot required for the desired mesh of the fence, and by its slight longitudinal reciprocating motion it operates to make such knot in the shape of an elongated twist; that form of knot being considered by the patentees most desirable for security.

After describing at great length the drawings and devices of their machine, the patentees state that—

"The extremely complicated nature of the mechanism constituting our machines, as illustrated, and of the operations of the various parts, has rendered necessary, we think, or at least advisable, the foregoing detailed description. We wish, however, to have it clearly understood that we do not consider our invention to lie in mere details of the construction, many of which may be, as we and others skilled in the art to which our machine relates might readily suggest, altered and simplified, and some even entirely omitted. The appended claims are therefore intended to be construed as broadly as the state of the art will permit for a machine involving generally any construction which, when broadly considered, is analogous to ours for its purposes—*First*, with relation to the warp-wires alone, and this whether or not the latter are coiled; *second*, with relation to the mechanism which will automatically wind and string the woof-wire across the warp-wires; *third*, with relation to the co-operation of the warp and woof wire weaving mechanisms."

Then follow numerous claims relating to the different devices by which the warp-wires are caused to progress intermittingly, by which the woof-winding mechanism is carried across the series of warp-wires from one to the other, by which the woof-winding mechanism, after having completed the operation, is returned to its starting point, by which the finished fence, as it is constructed, is stored upon the reel. These and several others, relating to other features of the patent, are not involved in the present suit, and need not be noticed.

The twelfth claim, of which alone infringement is asserted and relied upon at the hearing, relates to the needle device, by which, as the woof-wire is carried to each warp-wire of the series in turn, it is wound around or about each warp-wire, thus forming the mesh of the fence. Said twelfth claim is as follows:

"In a device for use in the manufacture of wire fence, comprising wires crossing each other, and secured together where they cross, for winding and stringing a woof-wire upon the warp-wires, a longitudinally-slotted needle, S, adapted to hold the woof-wire, and supported, to rotate in its bearing, substantially as and for the purpose set forth."

It is said on behalf of complainant that this device constitutes the fundamental principle of the patentee's machine, and is the nucleus about which all other mechanisms of the patent are formed, and which must be found in all other machines constructing or manufacturing similar fence, to render their operation successful. There is no proof in the record showing the state of the art on the subject of wire-fence manufacturing machines when complainant's patent was granted. It may therefore be assumed in its favor that said patent is of such a pioneer character as to entitle its claims to a broad and liberal construction, such as will sustain the patentee's invention.

The complainant's expert, William S. Bates, after stating that defendant's woof-winding mechanism was substantially the same as that described in the patent sued on, proceeds to give his construction of said twelfth claim, and a comparison thereof with the corresponding mechanism in defendant's machine, as follows:

"The twelfth claim in terms refers to a device for winding and stringing woof-wire upon the warp-wires of a wire fence. The mechanism claimed in the claim is a longitudinally-slotted needle, adapted to hold the woof-wire, and supported to rotate in its bearings, as set forth in the specification and drawings of the patent. This needle is supported that it may be moved across the fence from side to side. It may be stopped opposite each warp-wire, and may there be moved towards the wire, so that the slotted needle straddles the wire, (warp,) bringing the wire into its axis. It is then revolved, and winds the woof-wire upon the warp-wire, and it is then raised (automatically) off the warp-wire, and moved on to the next one, where the same operation takes place. The slot in the needle enables it to straddle the warp-wire and release it again, so as to wind the woof-wire around it, and pass on to the next warp-wire. The needle is supported in the bearing so that it can revolve on the arm, which is pivoted so as to carry the needle towards and from the warp-wire. This arm also travels across the fence to move the needle from one wire to another. The needle itself is composed, essentially, of a pinion, by which it is revolved, a slot in the pinion to enable it to straddle the warp-wires, and a bearing to support it, and the eye through which the woof-wire is threaded, so that it is carried by the needle. Other parts of the device are immaterial to the subject of this claim. Turning now to defendant's woof-winding mechanism, I find in it an arm which travels across the fence from side to side, which is adapted to stop opposite each warp-wire. This arm is pivoted, so that it can approach and recede from the warp-wire, and it has a pinion mounted in a bearing in it, and corresponding with the pinion of the complainant's patent. This pinion in defendant's mechanism is slotted, to enable it to straddle the warp-wires; it has a bearing to support it on the

arm, and it has a projection with an eye in it, through which the woof-wire is threaded. The woof-wire is thus carried by the slotted pinion, and when the pinion straddles the warp-wire, and it is revolved, the woof-wire is twisted around the warp-wire. When the pinion leaves the warp-wire, and moves on to the next, it carries the coil of woof-wire with it, and twists it around the next warp-wire, and so on across the fence. This device in defendant's mechanism, therefore, has all the material elements of the complainant's mechanism as defined in the twelfth claim of the patent. Both mechanisms have what is called in the patent 'a longitudinally-slotted needle;' that is, they both have a slotted pinion, mounted in a bearing so that it can revolve, and provided with a projection and an eye in it, through which the woof-wire is threaded. The mode of operation is the same in both of them; that is, they straddle the warp-wire, bring the wire into the axis of the needle or pinion, by virtue of the slot in it, and thus revolve, carrying the coil of woof-wire around the warp-wire, thus twisting it around the warp-wire, and then by virtue of the slot leave the warp-wire, and pass on to the next one, and repeat the operation. The function and mode of operation being the same, and the important parts of construction being the same, I consider that the two devices are identical, notwithstanding some slight differences of form which exist."

He then points out as differences of form the fact that the projection which carries the needle in complainant's device is nearly cylindrical, or in the form of a slotted sleeve, while in the defendant's arrangement the useless portions of metal are cut away, leaving an arm which is nearly flat, projecting from the pinion; also, that the pinion in defendant's device is larger in proportion than in complainant's. Again, complainant's needle revolves always in the same direction, while the defendant's revolves alternately in opposite directions, thus changing the direction of the wind of the woof-wire on the warp-wire. This, it is said, is a mere matter of choice, depending upon the gearing of the needle, and involving only mere matters of mechanical preference. Again, the needle in complainant's mechanism, as it rotates to wind the woof-wire upon the warp-wire, is also moved longitudinally to a slight extent, so as to cross the coil or tie of the woof-wire, and thereby form the elongated twist-knot already mentioned. In the defendant's mechanism there is no such longitudinal reciprocating motion. This last difference in the two devices is the one mainly relied upon by defendant and his expert to establish non-infringement. This slight longitudinal reciprocating motion of the complainant's needle is not in terms referred to in said twelfth claim, and is clearly shown not to be necessary in the manufacture of wire fences, but it is described in the specification as desirable, for the reason that it operates to form an elongated twist-knot, which has greater security than the simple crossing of the wires. The positions taken on behalf of defendant are—*First*, that said longitudinal reciprocating motion of the needle in the woof-winding mechanism of the patent, having been described as one of its functions or operations, should be taken as an essential element of the device or combination covered by the twelfth claim, and which the court cannot properly treat as immaterial, under the rule laid down in *Water-Meter v. Desper*, 101 U. S. 332, and *Gage v. Herring*, 23 O. G. 2119, 107 U. S. 640, 2 Sup. Ct.

Rep. 819, that a patentee makes all the elements of a combination material by the restricted form of his claim; second, that the separate elements of which the combination is composed are not included in the monopoly of the patent, as held in *Rowell v. Lindsay*, 31 O. G. 120, 113 U. S. 97, 5 Sup. Ct. Rep. 507, and *Voss v. Fisher*, 30 O. G. 1096, 113 U. S. 213, 5 Sup. Ct. Rep. 511; and, third, that the patent being for a combination of several elements, and defendant not using one of them, —viz., the longitudinal reciprocating motion of the needle or pinion, — there is no infringement, upon the well-settled doctrine illustrated by the cases of *Vance v. Campbell*, 1 Black, 427; *Dunbar v. Myers*, 11 O. G. 35, 94 U. S. 187, and other authorities.

The decision of the case accordingly turns upon the question whether claim 12 of the patent is to be restricted by descriptive limitations; that is to say, by reading into it, as a material element thereof, the slight longitudinal reciprocating motion of the needle, S, as counsel for defendant contends. If the claim is thus restricted, there is clearly no infringement. If it is not construed to include such longitudinal reciprocating motion of the needle, it is equally clear that there is infringement. As already stated, the claim does not in terms mention this longitudinal motion of the needle, but refers to its rotary action. The object and purpose of the two motions were essentially distinct and different. The rotary motion was intended and operated to wind the wool-wire around the warp-wire, to form the mesh of the fence. The longitudinal reciprocating motion was designed and operated to form a knot of such shape as the patentees considered most desirable for security. It was preferential in its character. The mechanism as a wool-winding device for crossing the wool-wire around the warp-wire is in itself complete and operative without the longitudinal motion of the needle. That the patentees did not intend to cover the latter feature and operation of the needle by the twelfth claim is clearly shown by the fourteenth claim, which distinctly and in express language includes such motions of the needle. The fourteenth claim is as follows:

"In a device for use in the manufacture of wire fence, comprising wires crossing each other, and secured together where they cross, for winding and stringing a wool-wire upon the warp-wires, a longitudinally-slotted needle, S, adapted to hold the wool-wire, and supported, to be rotated on its own axis and be reciprocated longitudinally in its bearing, substantially as and for the purpose set forth."

It is perfectly manifest, therefore, that the patentees intended by the fourteenth claim to cover both the rotary and the longitudinal reciprocating motions of the needle, S, and that the twelfth claim was intended to cover only the needle's rotary motion. The construction which defendant's counsel contend for will make the twelfth and fourteenth claims identical. In *Tondeur v. Stewart*, 28 Fed. Rep. 561, it was said by Judge ACHESON that a construction which would make two distinct claims of a patent cover, not different things, but one and the same thing, was a result to be avoided, if possible. *Tondeur v. Stewart* presented substantially the same question involved in this case. When a patented device

performs two distinct operations, and for distinct purposes, no reason is perceived why a claim based thereon may not be made to cover only one of such operations without including the other. The twelfth claim of the patent sued on relates to the slotted needle, S, not generally or broadly as described in the specification, but only as it is adapted to hold the woof-wire, and supported, to rotate in its bearing, substantially as and for the purpose (not purposes) set forth. The purpose of the rotary motion of the needle, as set forth, was only to wind the woof-wire around the warp-wire. That was its main and most important function. That feature the claim was intended to cover. The longitudinal reciprocating motion of the needle effected by or through the circumferential groove, S², and employed to form a knot of certain preferential shape, is carefully omitted from the claim. No good reason appears for reading that feature of the needle's movement into the claim. There is nothing in the specification which may be looked to in ascertaining the true scope of the invention which will warrant the court in so construing the twelfth claim as to make it include by intendment or operation of law the longitudinal reciprocating motion of the needle, and thereby make said claim identical with the fourteenth claim of the patent; nor is there anything disclosed by the record as to the state of the art which should lead the court to so restrict the claim as to thereby protect the infringer, who has embodied the very essence of the patentee's invention. The patent in our opinion is entitled to a more liberal construction, such as was adopted in *Lake Shore & M. S. Ry. Co. v. National Car-Brake Shoe Co.*, 26 O. G. 915, 110 U. S. 229-238, 4 Sup. Ct. Rep. 33. The claims of the patent there sued on (No. 40,156, granted to James Bing, October, 1863, for an improvement in car-brakes) were as follows:

"(1) The shoe, A, and sole, B, both being constructed and adapted to each other, substantially as described, so that the sole can have a lateral rocking movement on the shoe, for the purposes specified.

"(2) The combination of shoe, A, sole, B, clevis, D, and bolt, G, the whole being constructed and arranged substantially as specified."

Only the second claim was sued on. The defendant contended that the element of the lateral rocking motion or movement of the sole, B, should be read into the claim, as it was described as one of the features of the sole in the specification. It was held both in the lower court (4 Fed. Rep. 219) and in the supreme court that this contention on behalf of defendant could not be sustained; that the intent to cover a broader construction was fairly deducible from the specification, and nothing appearing to show that the patentee was not entitled to the broader construction. That suit involved almost the direct point under consideration in the present case, and is conclusive against the restricted construction which it is sought to have placed upon the twelfth claim.

The conclusion of the court is that the slight longitudinal reciprocating motion of the needle, S, is not an element of the twelfth claim, and that the device covered by said claim is infringed by the defendant's machine. It follows that complainant is entitled to the relief sought by its bill, and that defendant should be enjoined from further

infringement, which is accordingly so ordered and adjudged, with costs of suit to be taxed against the defendant. The usual reference may be had, if desired, by complainant.

MERRIAM *et al.* v. TEXAS SIFTINGS PUB. CO.

(Circuit Court, S. D. New York. March 15, 1892.)

1. COPYRIGHT—REPRINT—FALSE REPRESENTATIONS—TITLE-PAGE.

The date 1890 on the title-page of a reprint of Webster's Dictionary, edition of 1847,—the copyright having expired,—indicates the date it was printed, and is not a representation that it is a new edition of that year, though the book does not represent itself to be a mere reprint.

2. SAME—ADVERTISEMENTS—INJUNCTION.

Defendant advertised a reprint of the 1847 edition of Webster's Dictionary, the copyright having expired, as "latest edition, 10,000 new words," etc., old price \$3, and that the new low price of \$1 was made possible by improvements in machinery, etc. *Held*, on application of the owner of the copyright of subsequent editions, that defendant be enjoined against the further circulation of such misleading advertisements, and that, because of their already extensive circulation, a printed slip must thereafter be attached to each book, stating it to be a reprint of the edition of 1847.

3. TRADE-MARK—WHAT CONSTITUTES—WEBSTER'S DICTIONARY.

There is no characteristic of a trade-mark in the words "Webster's Dictionary," or in the form or size of that work as usually printed by G. & C. Merriam, such as to prevent its use by others in publishing old editions on which the copyright has expired. *Merriam v. Shoe Co.*, 47 Fed. Rep. 411, followed.

In Equity. Bill by Homer Merriam and others against the Texas Siftings Publishing Company for an injunction. Granted.

Charles N. Judson, for plaintiffs.

Pierce & Fisher, for defendant.

SHIPMAN, District Judge. This is a bill in equity, brought by the plaintiffs, who were and are owners of the copyrights in various editions of Webster's Unabridged Dictionary, and publishers thereof, to restrain the defendant from offering for sale or selling a cheap reprint of the edition of 1847 under representations which import that it is a copy of the edition of 1864 or of one of its successors, upon which editions the plaintiffs have expended a large amount of money, and which have had a high reputation. The bill is not based upon any supposed trade-mark rights in the name "Webster's Dictionary." It has no substantial foundation upon any alleged imitation or simulation of the external appearance of the plaintiffs' edition of 1864. Its proper foundation is upon the alleged attempts of the defendant to pass off upon the public a reproduction of an inferior edition which had long since gone out of the market and into general disuse, as the superior and widely known edition which had been prepared and published by the plaintiffs or their predecessors at great expense. The bill alleges, in substance, as follows: That the edition of 1864, which was published originally by the firm of G. & C.

Merriam (the predecessors of complainants) was a complete revision of the earlier editions of the same dictionary, compiled and edited by Noah Webster and others at and before the year 1847, and was revised at the expense of said G. & C. Merriam, under the care and direction of Rev. Noah Porter, D. D., and others, and was at great expense printed and published by said firm, which had the exclusive right to publish and sell the same. The Merriams had published an edition of 1847, which was a revised edition of the original edition of Webster's Dictionary printed in the year 1828. Said dictionary of 1847 was at the time of its publication a book of considerable value, and was justly esteemed, and was commonly known by the trade as the "Edition of 1847." To it the publishers, in the year 1859, added numerous improvements, such as tables of illustrations, synonyms, an appendix of new words, etc., and the book was thereupon copyrighted, and became known to the public as the "Edition of 1859." The dictionary of 1847, so improved, bore upon its title-page a statement that the same was revised and enlarged by "Chauncey A. Goodrich," and upon the pages immediately following the title-page a statement as to the times when the same was copyrighted; and, upon several pages following, the publisher's preface, and a succinct history of said revised edition in the form of an essay entitled "The Revised Edition," with the date thereof; and, upon the pages immediately following the same, a history of the several editions of said dictionary and of said Noah Webster, from which the date of publication and copyright thereof and of the prior editions could easily be gathered. The exclusive right to print, publish, and sell said book up to the year 1889, under copyright laws of the United States, belonged to said G. & C. Merriam and their successors, who continued to publish and sell the same up to the time of the publication of the revised edition of 1864, and thereupon said books of 1847 and 1859 were withdrawn from the market, and said book of 1864 alone became known among the trade and by purchasers as "Webster's Dictionary, Unabridged," and supplanted and rendered obsolete all previous editions of said dictionary, and thereafter no copies of any editions previous to 1864 were printed, or were bought and sold, except as second-hand books. Subsequently said G. & C. Merriam, for the purpose of making said book still more valuable, in the year 1879 added a supplement to the dictionary of the year 1864, containing a large number of new words, and in the year 1884 added a further new and still larger supplement or appendix to this same dictionary, containing new tables, all which additions said G. & C. Merriam made a part of said dictionary by binding the same together, and sold the same as separate and distinct editions thereof, under and by the same name of Webster's Dictionary, or Webster's Unabridged Dictionary, and by which said dictionary of the year 1847 was rendered still further obsolete and unsalable, each of which editions were duly copyrighted. That there is set forth in each copy of said book of 1864, as well as in each copy of all later editions of said dictionary, a history of each of the editions, together with a statement of the year when the same, and each of them, was compiled, by means of which the exact dates of composition and of

publication of each of said parts became well known, or could be ascertained by any one who examined said dictionary. A large demand was created for the dictionary of the year 1864, with its said supplement and appendix, and a large and lucrative trade was secured, as well in the United States as also in all parts of the English-speaking world. By reason of the great expense incurred in the several revisions and in the publication of the dictionary, the edition of the year 1864, with said supplement and appendix, cannot be sold at a fair profit at retail for less than about \$12 a copy, and at wholesale for less than \$8 to \$10 a copy, while said edition of the year 1847, with or without the improvements, was, when new, commonly sold for \$4.50 to \$6, and can now occasionally be bought, only at a second-hand book-store, for about \$2 a copy.

The foregoing allegations of the bill are true. After the copyright upon the editions of 1847 and 1859 had expired, Ogilvie & Co., of Chicago, caused to be printed and published a copy of so much of the edition of 1847 as contained the words and definitions, with the principal part of the additions contained in the edition of 1859, including its appendix of new words. As this copy was made from photo-lithographic plates, the columns and paging were the same as in the original edition. The title-page was the first part of the title-page of 1847, and, in addition, purported to state the additional material which was contained in the book, and at the bottom of the page appeared, in distinct type, the words, "Chicago, Illinois. Published by E. W. Ogilvie Company, 9-15 River street. 1890." The book does not contain the copyright notices, the historical matter, the prefaces by the author, editor, and publisher, or the advertisement which were contained in the edition of 1847. It is bound in the ordinary leather binding of dictionaries and of Webster's Dictionary, and contains upon the lid of the cover the words "Ogilvie's Edition." The back of the book has the words "Webster's Dictionary" in the ordinary place in which the name of the book is printed, and below is a label, containing the words, "1,500 Illustrations and Appendix of 10,000 words." The book, taken by itself, does not profess to be a reprint of the edition of 1864, nor to be a late edition of Webster's Dictionary, unless that assertion is implied by the figures "1890" upon the title-page; and I am inclined to the belief that these words denote the year in which a book is printed, and do not necessarily denote that it is a new edition of that year. The book is, in appearance, a poorly executed reprint, upon poor paper, of the dictionary part of an old Webster's Dictionary, and would not deceive an intelligent person, who examined it, and who had a general knowledge of the subject; but the uneducated might easily be misled into the belief that it was a modern book. The defendant is a corporation, which publishes a weekly paper called the "Texas Siftings," and has purchased or obtained the option of buying a large number of copies of the Ogilvie book, which it is now undertaking to sell. As an additional inducement to subscribe for its paper, the annual price of which is four dollars, it offers to furnish for five dollars its weekly paper and a copy of Webster's Dictionary, by which

is meant the Ogilvie edition, which it describes in one of its advertisements in the following way:

"Latest edition. Weight nine pounds. Contains 1,615 pages, 1,500 illustrations, and 10,000 new words. Price \$8.00, but given free only to Texas Sifting subscribers."

In another advertisement it is called "Latest Edition. Price \$8.00." After stating that 100,000 copies of the dictionary had been printed for the defendant, the advertisement continues, as follows:

"Webster's Dictionary has heretofore been sold for no less a sum than \$10.00 a copy, but, owing to the extraordinary cheapness of paper, and wonderful economy in labor connected with the improvements in machinery, that enables publishers to print ten sheets in the same time and at the same cost that they used to print one, we can offer this great and valuable dictionary at a very much smaller price than it has ever been offered before."

In another advertisement, "Siftings and this Dictionary, which in itself is worth \$10.00, will be delivered," etc. Another advertisement contains this language:

"Mr. E. M. Pine, of the Philadelphia Inquirer, says: 'This is the best copy of Webster's Dictionary I ever saw.' The editor of the Philadelphia Times, who received one of these dictionaries, writes: 'It is immense. Inclosed find five dollars. Send another copy. We need it in our business.'"

It is proved that two persons—one a student in a college in Pennsylvania, and the other a hotel-keeper in Pennsylvania—became subscribers to the paper and bought the book upon the faith of these advertisements, supposing that they were respectively to obtain a copy of the edition of Webster's Dictionary which they knew commanded a high price. The inducement to send \$5 to the publishers was the expectation of obtaining a copy of the edition for which \$8 or \$10 was the ordinary price, and which they desired to own. These advertisements were intended and were calculated to deceive persons who were not familiar with business. They did deceive at least two persons. They have undoubtedly accomplished, to some extent, the purpose for which they were issued. The ingenious wording of the advertisements, and the plausible statement of the reasons which permitted an \$8 or \$10 book to be given for \$1, would naturally mislead many persons who were anxious to get a valuable dictionary, which they had theretofore been unable to obtain. The only \$8 or \$10 copy of Webster's Dictionary is a copy of the edition of 1864, or of one of its successors, and the effort of the defendants is to palm off upon the public its copies, which are worth from \$1.50 to \$2 each, as the book of the plaintiffs, which is a thing of much higher intrinsic value. No direct evidence was given of the amount of the matter in dispute, but it is easy to see from the testimony that the amount is such as to give this court jurisdiction.

Upon the preceding facts the law has been recently stated with clearness. *Merriam v. Publishing Co.*, 43 Fed. Rep. 450; *Merriam v. Shoe, etc., Co.*, 47 Fed. Rep. 411; *Black v. Ehrich*, 44 Fed. Rep. 793. The plaintiffs are not entitled to an exclusive use of the name "Webster's Dictionary" upon copies of editions the copyrights of which have expired,

for the name is not a trade-mark. Mere copies of the edition of 1847 and 1859 can be reproduced by a publisher, over his own name, provided he makes no misrepresentations to induce the public to believe that it is another book, the right to publish which is the exclusive property of the plaintiff. The mere form or size of the volume in which Webster's Dictionary has ordinarily appeared does not, in the mind of the public, connect the plaintiffs with the manufacture of the dictionary, and there is no characteristic of a trade-mark in such ordinary form or size. A court of equity would not probably hold that the mere act of the publication of this book, taken by itself, disconnected from any other representations or advertisements, or advertised for what it actually is, would be the subject of an injunction, upon the ground that such act was an unlawful competition in trade. The gist of this case consists in the fact that the defendant, in its attempts to sell the book, made free and ingenious use of misrepresentations, which were intended and calculated to mislead the public into a belief that the book was the one which had long been produced and sold by the plaintiffs. That such was the natural effect of the defendant's advertisements cannot be doubted. Wrongs of this description, whereby, through an artifice of any sort, the goods of one manufacturer become confused in the public mind with the goods of some other manufacturer, may be redressed by a court of equity." *Merriam v. Shoe, etc., Co., supra.* The defendant should be enjoined against the circulation or use of advertisements or circulars which tend to misrepresent the character of the Ogilvie edition of Webster's Dictionary, or lead the public into the belief that it is a reproduction of a modern edition of that work; and especially against the use of the advertisements which are in evidence in this case, or of similar advertisements. If the book had not been advertised in the manner which has been described, I should not think it proper to require the defendant to place any notice in the volume itself; but, inasmuch as these advertisements have been extensively circulated, and orders for the book may hereafter be received by the defendant, which will be the fruit of the advertisements, each book delivered by it or its agents should contain a notice, by printed slip attached to the title-page, that it is a reprint of the edition of 1847 of Webster's Dictionary, with a list of the additions that have been made thereto, and which the book contains.

CHATTANOOGA MEDICINE CO. v. THEDFORD *et al.**(Circuit Court, N. D. Georgia. November 11, 1891.)*

TRADE NAME—TRANSFER—CONSTRUCTION OF CONTRACT.

M. A. Thedford, owning a third interest in the right to make and sell a compound known as "Dr. A. Q. Simmons' Liver Medicine," formed a partnership with his two co-owners, and for a time they prosecuted the business under the name of "M. A. Thedford & Co." Thedford afterwards sold his interest in the right to his co-partners, and also conveyed to them all his right to "the firm name and style of M. A. Thedford & Co.," "for the purpose of manufacturing, advertising, and selling the 'Simmons Liver Medicine,'" provided, however, that in the use of the firm name he was not to be responsible, "it being simply to be used as a trade-mark of the business." *Held*, that the grantees had the exclusive right to use the firm name in connection with the "Simmons Liver Medicine" only, and not in connection with a medicine advertised as "M. A. Thedford & Co.'s Original and only Genuine Liver Medicine or Black Draught."

In Equity. Bill by the Chattanooga Medicine Company against M. A. Thedford and W. J. Satterfield for an injunction. Denied.

This is a bill in equity, brought by complainant against defendants to enjoin the latter from manufacturing, advertising, and selling the medicine known as "M. A. Thedford's Liver Invigorator." For a proper understanding of the issues to be determined by the court in its present decision, which is on the application for a temporary injunction, a brief statement of the facts may be necessary. About the year 1840, Dr. A. Q. Simmons, a resident of north Georgia, began the manufacture and sale of what has since been known as "Dr. A. Q. Simmons' Liver Medicine," "Dr. A. Q. Simmons' Vegetable Tonic," etc. Subsequently, and about the year 1856, Dr. Simmons transferred to his son-in-law, J. H. Thedford, the right to manufacture, advertise, and sell "Dr. A. Q. Simmons' Liver Medicines," by whom, in 1872, the same was transferred to his son, Miles A. Thedford, one of the defendants here. In the same year, Miles A. Thedford, who had formerly lived in north Georgia, went to Chattanooga, and formed a partnership with Nicklin & Rawlings, a firm of druggists in that city, for the purpose of manufacturing, advertising, and selling said medicines. A few years thereafter, Miles A. Thedford went to Louisville, Ky., where, in 1873, he formed a partnership with Edward Wilder and Robert L. Edgerton, under the firm name and style of Miles A. Thedford & Co., with the object of continuing to make, advertise, and sell said "Simmons Liver Medicines," using the same wrappers for their packages and bottles there that were used in Chattanooga, except as to color of paper, ink, and place of manufacture. After carrying on this business for a short time, Miles A. Thedford returned to Chattanooga, and on October 14, 1875, sold to William G. Smith and Charles McKnight a two-thirds interest in his right, title, and interest in the manufacturing, advertising, and selling "Dr. A. Q. Simmons' Liver Medicine," at the same time forming a partnership with the said Smith and McKnight, under the firm name of M. A. Thedford & Co. On November 26, 1876, Miles A. Thedford conveyed to Z. C. Patten his remaining one-third interest in the right to make, mix, manufacture, ad-

vertise, and sell said "Dr. A. Q. Simmons' Liver Medicine," at the time binding himself not to engage in the manufacture and sale of the same, unless he became the owner of any part of the interest sold to Smith, McKnight, or Patten, in which event nothing in the transfer should be construed as interfering with his right to manufacture and sell said medicine. In the same instrument M. A. Thedford transfers all his right, title, claim, and interest in and to the use of the present trade-mark and the firm name and style of M. A. Thedford & Co. to Z. C. Patten, W. G. Smith, and Charles McKnight, for the purpose of manufacturing, advertising, and selling said "Simmons Liver Medicine," the transfer carrying with it a proviso that in the use of the signature and firm name of M. A. Thedford & Co. he, Thedford, was to be in no way responsible, as it was simply to be used in the business of manufacturing, advertising, and selling "Dr. A. Q. Simmons' Liver Medicine" as a trade-mark. It also appears from the pleadings and evidence presented that complainant did not have the sole right to manufacture and sell Simmons' Liver Medicine. It seems that in September, 1868, a firm of the name of Zeilin & Co., of Philadelphia, acquired by purchase from a son of Dr. Simmons the right to manufacture, advertise, and sell a medicine known as "Dr. Simmons' Liver Medicine;" Dr. Simmons having transferred that right to his son in the same manner that he transferred the same right to his son-in-law, J. H. Thedford. The firm of M. A. Thedford & Co., composed of Smith, McKnight, and Patten, seemed to have been succeeded by a company called "Dr. A. Q. Simmons' Medicine Company." Against this company and others J. H. Zeilin & Co., in the year 1877, brought a bill in equity in the circuit court of the United States for the eastern district of Tennessee, seeking to enjoin said company from manufacturing, advertising, and selling said "Dr. A. Q. Simmons' Liver Medicine," and the result of that case was the granting of a permanent injunction, as prayed for. The present complainant is the successor, through Dr. A. Q. Simmons Medicine Company, to all the rights acquired by it from M. A. Thedford through Smith, McKnight, and Patten.

J. T. Lupton and John L. Hopkins, for complainant.

N. J. & T. A. Hammond and C. P. Goree, for respondents.

Before NEWMAN, District Judge.

NEWMAN, District Judge. After much reflection, I am satisfied that a proper determination of the question before the court in this case depends upon the construction to be given the contract of sale from Thedford to Patten and his associates. The evidence does not show that the medicine made by M. A. Thedford & Co., of Rome, is the same as to ingredients as that made by the Chattanooga Medicine Company, and there is such an entire dissimilarity in labels and wrappers used by the former company to those used by the latter, that it could hardly be held, if the case turned upon that alone, that there was any infringement of complainant's rights. The case seems really to turn upon the right of the Chattanooga Medicine Company to use the name of "M. A. Thed-

ford & Co." as they are now using the same in the manufacture, advertisement, and sale of what is called "M. A. Thedford & Co.'s Original and Only Genuine Liver Medicine or Black Draught." Indeed, the main contention of counsel for complainant is that M. A. Thedford is violating his contract in the use of his name in the connection with the medicine which he is preparing and offering for sale. Did Thedford, in his contract with Patten, bind himself so that he violates his agreement in the use of his own name in connection with what he calls "T. L. I.?" The language of the contract, so far as material here, is as follows:

"I hereby transfer and convey to the said Z. C. Patten all and every of my rights, title, and interest whatsoever that I have been, and am now, or may hereafter become, possessed of in the right to manufacture, make, advertise, and sell the said 'Simmons Liver Medicine.' And I hereby bind myself not to engage in the business of manufacturing or selling the said medicine under any name or style, or to become interested in its manufacture through any other person whatsoever, except I should become the owner of any part or interest sold to Smith, McKnight, or Patten in the manufacture and sale of said medicine under the firm name style of M. A. Thedford & Co. Then nothing in this conveyance shall be construed to interfere with my right in manufacturing and sale of said medicine. It is also agreed and understood that all my right, title, claim, and interest in and to the use of the present trade-mark that I now own and possess, or have previously or may hereafter own and possess, and the firm name and the style of M. A. Thedford & Co. is hereby transferred to Z. C. Patten, W. G. Smith, and Charles McKnight, for the purpose of manufacturing, advertising, and selling the 'Simmons Liver Medicine,' and they have the sole right to use said firm name in any manner they may see proper in the manufacturing, advertising, and selling the said A. Q. Simmons Liver Medicine, and to sell, lease, or transfer the same to their assigns or successors; and plates, electrotypes, and lithographing stones, and printed matter bearing the signature of M. A. Thedford & Co. are sold and conveyed to said Patten, Smith, and McKnight, for use aforesaid, of manufacturing, selling, &c., said 'Simmons Liver Medicine;' provided, however, that in the use of said signatures and firm name of M. A. Thedford & Co. I am in no way responsible, it being simply to be used as a trade-mark of the business, and, as such, the right to use it is transferred to the said Patten, Smith, and McKnight, and their successors."

It will be seen from the language used in the contract that the transfer and sale of the right to use the name of M. A. Thedford & Co. was confined to its use in connection with the manufacturing, advertising, and selling "Simmons' Liver Medicine," and with that alone. It seems to be perfectly plain from the words used that the parties intended by the contract to restrict the right to the use of the name of M. A. Thedford & Co., so that it should be used in order to hold the present business of Thedford to be in violation of his agreement; that the contract must be given a much broader signification than the above indicated. I am not prepared to hold, in view of the language of the parties, that Patten and his associates acquired more by this contract than the right to use Thedford's name in advertising and selling what is known as "Dr. Simmons' Liver Medicine." If the construction of this contract goes beyond that indicated, and if the intention of the parties, as derived from the contract, could be that Thedford agreed not to use his own name in the manu-

facture and sale of any liver medicine, it would be questionable, at least, if the contract would not be in restraint of trade, and therefore against public policy, and void. It is understood, of course, that the sale of the right to make, advertise, and sell a compound with secret ingredients would be valid, in no way violative of public policy; and that is what I understand that Thedford, by his contract, has done. Justifying in any way the contention of complainant as to the right to use the firm name of M. A. Thedford & Co., it is necessary to separate the proviso which concludes the quotation which I have made above from the contract from that which precedes it, and this I do not think can fairly be done. The language of this proviso is:

"Provided, however, that in the use of said signature said firm name of M. A. Thedford & Co. I am in no way responsible, but this is simply to be used as a trade-mark of the business, and, as such, the right to use it is transferred to the said Patten, Smith, and McKnight, and their successors."

Now, the right to use this firm name in the preceding part of the contract is for the purpose of "manufacturing, advertising, and selling 'Simmons' Liver Medicine." It can hardly be said by this proviso, which was intended to be restrictive in its effect, the parties intended to enlarge the right to use the name beyond that which has been before expressed. I think it may safely be said that the court will not, in contracts of this sort, in which a transfer is made of the rights to the use of a person's own name in a business enterprise, extend or enlarge the operation of the same beyond its necessary import. In the case of Zeilin & Co. against Dr. A. Q. Simmons' Liver Medicine Company and others, (said company having succeeded the firm to which M. A. Thedford had made the sale,) to which suit McKnight and Patten were parties defendant, a decree was entered by which the defendants were enjoined "from making, selling, or offering for sale any medicine under the title of 'Dr. A. Q. Simmons' Liver Medicine,' or 'Dr. Simmons' Liver Regulator or Medicine,' and from using the name or word of 'Simmons,' or the *fac simile* signature of A. Q. Simmons, in any way upon any bottles or packages of liver medicine or of medicine made, advertised, and sold for the liver." After this decree of court it became necessary to abandon the wrappers and the use of Dr. Simmons' name entirely. Then it was, or soon thereafter, that the name and wrapper now used by the Chattanooga Medicine Company was adopted.

The claim of the complainant here, so far as its claim is based on the contract, that the decree in the Zeilin suit left them the right to the preparation itself, and to the name of M. A. Thedford & Co., and to the picture of an old man, which picture, as I understand it, they claim they may use, provided that Dr. Simmons' name is not anywhere used in connection with the picture. The difficulty about complainant's contention is that Thedford transferred the right to use his name in advertising and selling "Dr. Simmons' Liver Medicine," and the complainant is using it to advertise and sell M. A. Thedford's Liver Medicine, which appears to me to be a use of his name not contemplated when the contract was made, or covered by its terms. Much has been said

in the argument of this case about what is claimed to be the effort of the M. A. Thedford Medicine Company, of Rome, to convey to the public by their wrappers and advertisements, and to impress upon all readers of their literature, the idea that the medicine they are selling is the same as the original Simmons' Liver Medicine. There is some force in this argument, but since the decree in the Zeilin suit complainant has no right to make what is known as "Dr. Simmons' Liver Medicine," and in the face of this decree, by which it is adjudged that it has no right to the name of Dr. Simmons, this court cannot, at their instance, prevent other persons from using the same. In other words, so far as the name of Dr. Simmons is concerned in connection with liver medicine since the decree alluded to, it is declared that it has no right and no standing in court to assert the right to use the same.

It is further said that complainant has in its labels resorted to fraudulent devices, and one calculated to deceive the public, in that it holds out to the world that the medicine it is making was discovered by M. A. Thedford, 1840, and that the arrangement of its wrappers is such as to lead the public to believe that the picture of an old man thereon is the picture of M. A. Thedford; and in fact it says that Thedford is comparatively a young man, and that it does not itself, therefore, come into a court of equity with clean hands, and should not be allowed any relief for that reason. Complainant, on the other hand, says that defendants' conduct, especially in the matter of attempting to advertise and sell under the name of J. H. Thedford & Son, Dr. Simmons' Liver Medicine, and the conversation to which it testified, shows that M. A. Thedford has been acting in bad faith, and seeking to avoid the effect of a contract honestly entered into, and to deprive the others to whom he sold, and their successors, of their distinct rights under the contract. I think it wholly unnecessary to discuss either of these contentions, in view of my opinion as to the construction of the contract, which is really the basis of the whole matter. I conclude therefore:

First. That Thedford only parted with the right to use his name in connection with Dr. Simmons' Liver Medicine.

Secondly. By reason of the decree in the Zeilin suit complainant has no right to advertise or sell Dr. Simmons' Liver Medicine.

Third. That complainant has no right to use Thedford's name in connection with liver medicine otherwise than I have stated; and Thedford may use the same as he is now doing without infringing any of its rights.

Fourth. I have stated that, as to any infringement of trade-mark, considered independently of contract rights, I do not think there is such a similarity as to justify interference by the court with the defendant.

The conclusion is that injunction must be denied.

SMITH v. BOUKER, (two cases.)

(Circuit Court of Appeals, Second Circuit. December 14, 1891.)

1. BAILMENTS—DUTY OF HIRER OF CHATTEL—AGENTS.

The hirer of a chattel impliedly undertakes to use it well, to use it for no other purpose than that for which it is hired, to take proper care of it, and to restore it at the time appointed. In all these things he is bound to exercise the diligence of a prudent man; and for any default, whether his own personal fault or negligence or that of his subagents or servants, he is responsible to the owner.

2. SAME—CHARTERED SCOW—LOSS—NEGLIGENCE OF SERVANT.

Where respondent chartered libellant's scows to transport a building from one place to another, and also engaged a tug to tow the scows, and by the negligence of the master of the tug and his subordinate the scows became a total loss, it was held that respondent was liable.

40 Fed. Rep. 839, affirmed.

In Admiralty. Appeals from decrees of the circuit court of the United States for the southern district of New York, affirming *pro forma* decrees of the district court for said district. The libelants, De Witt C. Bouker and George A. Bouker, were each the owner of one of two scows lost in the same accident. The cases were heard together in the district court, which sustained the libels, (40 Fed. Rep. 839,) and respondent appealed. On this appeal the court delivered its opinion in one suit only, directing the same disposition to be made of the other. Affirmed.

Moore & Wallace and Frank D. Sturges, for appellant.

Wing, Shoudy & Putnam, (Harrington Putnam, of counsel,) for appellee.

Before WALLACE and LACOMBE, Circuit Judges.

WALLACE, Circuit Judge. This is an appeal from a decree for the libellant for the value of a scow. Smith chartered the scow of Bouker at an agreed price per day, to be used in transporting a building from one location to another. The transportation necessitated the use of a tug, and Smith engaged Jaycox, with his tug and crew. While the tug was towing the scow, she ran aground, and before she could be got off, and the scow taken to a place of safety, a storm arose, and the scow was so injured as to be practically worthless.

We are satisfied that there is no merit in any of the specific allegations of fault set forth in the libel. It was a suitable time to start upon the trip. The scow was to be taken through a channel from Rockaway inlet, and thence a short distance on the open sea. It was necessary to proceed when there was high water in the channel, and it was high water then. A storm was approaching, and it was probable that if the trip were postponed until high water again the sea would be too rough, perhaps for several days, to permit the scow to be towed safely. Any delay consequent upon the postponement would have been at the expense of the charterer. Jaycox was interested in having such a delay, as he would get pay for his tug in the mean time; and his protests about the

danger of starting at that time were prompted, we think, by this motive. There is as little merit in the other allegations which set forth that the tug was of insufficient capacity to handle the scow, or that the scow should not have been taken through the channel. The accident was caused by the incompetency of Hults, who was familiar with the channel, and was on board the tug for the trip, not to assist in her management, but to give Jaycox the benefit of his knowledge of the channel. He was not experienced in steering a tug and scow sufficiently to be intrusted with that duty in the difficult passage through the channel. Jaycox should have stood by the wheel. Instead of doing so, he deserted it, and asked Hults to take the wheel. Hults did the best he could, but could not control the tug, as she was influenced by the scow, and ran her aground. The case seems to be one in which the libellant in the present action and the libellant in the other action, for the loss of scow No. 5, have affiliated with Jaycox to fix Smith with the damages occasioned by Jaycox's negligence. Notwithstanding the failure to establish the specific allegations of the libel, its general averments are sufficient to authorize a recovery upon the facts as they appear, and the only question is whether Smith is liable for the negligent acts of Jaycox or Hults. It is elementary law that the hirer of a chattel impliedly undertakes to use it well, to use it for no other purpose than that for which it is hired, to take proper care of it, and to restore it at the time appointed. In all these things, he is bound to exercise the diligence of a prudent man; and for any default, whether his own personal fault or negligence or that of his subagents or servants, is responsible to the owner.

There is a class of cases in which one who makes a contract with another to perform a specified undertaking, not reserving to himself any control over the means or instrumentalities to be employed, is not liable for the negligent act of the other in the course of performing the contract, or of the servant of the latter. This case is not of that class. No one can escape from the burden of an obligation which rests primarily upon him by engaging for its performance with the contractor. Whart. Ag. § 485. Smith could not absolve himself from his duty as a bailee by employing Jaycox to perform any part of it. Although Jaycox was towing the scow with his tug by a contract with Smith, he was nevertheless performing Smith's implied contract, as were also all those who were employed for the time being by Jaycox. If, by reason of some negligent act of Jaycox or Hults in the management of the tug, a third person had been injured, who was a stranger to the implied contract between Smith and the libellant for the proper care of the scow, Smith would not have been responsible, if it appeared that he had no control over the service which he had contracted with Jaycox to perform. *Quinn v. Construction Co.*, 46 Fed. Rep. 506. The decree of the court below is affirmed, with interest and the costs of this court, and the cause is remitted with instructions to proceed accordingly.

THE CITY OF NEW YORK.

THE JOHN E. BERWIND.

THE YOUNG AMERICA.

MOORE v. THE CITY OF NEW YORK AND TWO STEAM-TUGS.

(Circuit Court of Appeals, Second Circuit. December 14, 1891.)

COLLISION—FOG—MODERATE SPEED—TOWAGE—DUTY OF TOW TO SOUND FOG SIGNALS.

The steamer City of New York, going down the East river, ran into a fog before rounding the Battery. A tow some 1,000 feet long, in charge of two tugs, was proceeding from Amboy to Jersey City, and was at the time of collision at the intersection of the North and East rivers, below the Battery. The tugs were sounding fog signals. No signals were given from the tow, except that a woman in a rear boat of the tow blew a horn when she discovered the steam-boat. The latter, when she first saw the tow, was moving at the rate of six miles an hour; and, though she at once reversed, she struck and sank one of the canal-boats. *Held*, that the steamer's speed was not moderate, as required by rule, and that she should have heard and acted upon the signals of the tow, and was in fault for not doing so. *Held*, also, that, as the tugs were performing all their statutory duties, they were not guilty of negligence because no signals were given from the tow. 44 Fed. Rep. 693, reversed.

Appeal from the Circuit Court of the United States for the Southern District of New York.

In Admiralty. Suit by Moore to recover for the loss of a canal-boat in collision with the steam-ship City of New York while the canal-boat was in tow of the tugs Young America and John E. Berwind. The district court held all the steamers in fault, (44 Fed. Rep. 693,) and their owners each appealed. Reversed.

Wing, Shoudy & Putnam, (Charles C. Burlingham, of counsel,) for the City of New York.

Robinson, Bright, Biddle & Ward, (Henry Galbraith Ward, of counsel,) for the steam-tugs.

McCarthy & Berier, (Edwin D. McCarthy, of counsel,) for Moore and Daily.

Before WALLACE and LACOMBE, Circuit Judges.

WALLACE, Circuit Judge. The libel in this cause was filed by the owner of the canal-boat Western Star against the steam-boat and the two steam-tugs to recover the damages occasioned by a collision between his canal-boat, while she was in tow of the two tugs, with the steam-boat. The district court adjudged the steam-boat and the two tugs jointly in fault for the collision, and condemned them for the damages sustained by the libellant. The owner of the steam-boat and the owner of the two tugs both appealed from that decree. The question now to be determined is whether the steam-boat was solely in fault, or the tugs were solely in fault, or whether both were in fault. The collision took place between Governor's island and the Battery, at the intersection of the East river with the North river, a few minutes after 7 o'clock in the morning of

February 14, 1890. The tugs were proceeding from South Amboy to Jersey City, having in tow 14 canal-boats and barges arranged in 4 tiers. The tows were on a hawser 80 fathoms long, and averaged about 100 feet in length each, and there was about 15 feet of line between each tier. Thus the tugs and tows stretched over a distance of nearly 1,000 feet. The tide was strong ebb. The tugs were trying to get the benefit of the eddy between the tides of the two rivers below the Battery. They were going very slowly,—not over a mile and a half an hour,—and were maintaining proper fog signals to indicate that they were proceeding with a tow. A woman, who was on the rear boat of the tow, saw the steam-boat a moment before the collision, some two or three hundred feet away, and blew a horn to her several times before the collision. The steam-boat was coming out of the East river, bound for her slip at New York in the North river, on one of her usual trips from New London. Just after reaching the North river tide, she struck the starboard boat of the third tier of the tow, sinking her almost immediately. She had very shortly before stopped to avoid a ferry-boat which passed across her bows, and thereupon immediately proceeded again at half speed. She was going through the water at 6 or 7 miles an hour when she discovered the tow, and then immediately reversed her engines, and did all she could to prevent collision. At half speed she could not be brought to a stand-still before running twice her length, or a distance of about 630 feet. For 5 or 10 minutes before the collision the fog had been so dense that vessels were not visible more than 250 or 300 feet away. The steam-boat did not see the tow until she got within about 100 feet of the vessel she struck. The theory of her witnesses is that she did not hear the fog signals of the tugs, nor the horn which was sounded by the woman on the rear boat.

The learned district judge, as appears from his opinion, condemned the steam-boat because she was negligent in not hearing the fog signals of the tugs, and not anticipating the tow behind them and stopping before it came in sight, and condemned the tugs for negligence in not giving fog signals from the boats in tow while crossing the East river. 44 Fed. Rep. 693. We differ with the district judge as to the speed of the steam-boat at the time she discovered the tow, believing, not that she was going very slowly, but that she had regained very nearly her full half speed, and was going at such speed that she could not be brought to a stand-still within twice the distance at which another vessel could be seen in so dense a fog. In this view of the facts, she was not going at the moderate speed in a fog which the statute requires. We are not quite satisfied that she did not hear the whistles of the tugs, and did not proceed upon the assumption that the tow was to the northward of her path; but, if she did not hear the whistles, she ought to have heard them, in view of their proximity and the atmospheric conditions. As she should have heard them, and understood their significance, she is culpable to the same extent as she would be if she had actually heard them and disregarded them.

We do not think the tugs were guilty of any negligence which was contributory to the collision. Concededly, they performed all their

statutory duties.² What signals should they have given from the boats or barges? Should it have been by a mechanical fog-horn or a bell? The one would have indicated the presence of a sailing vessel under way, and the other of a steam-ship or sailing ship not under way. If either of such signals had been given, and the collision had taken place, it could have been very persuasively urged that the steamboat was misled thereby. From what place in the tow should the signals have been given? If they had been given from the rear end, or from the middle, would not an approaching steam-ship have felt safe in steering between that place and the signals from the tugs? It may be doubted whether the use of any fog signals, not embraced in the code of signals prescribed by statute, and which are intended to give precise and definite information, is legally allowable. It may be doubted whether the giving of fog signals by boats or vessels in tow would tend to diminish the risk of collision, and whether the multiplication of signals would not lead to confusion and misconception. The board of supervising inspectors of steam-vessels, until as late as 1886, seemed to have supposed that they were authorized under section 4412 of the Revised Statutes to prescribe supplementary fog signals for steam-vessels, and did prescribe them for such vessels while towing. Tows like the one in the present case were common, and had been for many years, on the great rivers and in the harbor of New York. Yet the inspectors do not seem to have considered it expedient to make any other regulations applicable to the navigation of such tows than that the steam-vessel should sound the signal of three blasts in quick succession to indicate that she was towing. And it is significant that in the act of congress of August 19, 1890, (26 St. pp. 320, 326, c. 802; art. 15, subd. 2f.) adopting, among other things, the code of fog signals devised by the international marine conference, while vessels being towed are permitted to give a specified signal, they are not required to give any, and are expressly prohibited from giving any other than that which is required to be given by the towing vessel. It is possible that if some signal had been given in the present case from some one or more of the boats of the tow, or along-side, the steam-boat might have heard it, and so governed her movements as to avoid collision. But the tugs had little time in which to adopt any special precautions, as it was only about five minutes before the collision that the fog became sufficiently dense to require them; and they are not to be held liable merely because, in the light of subsequent events, it appears that something not done might have been useful. The collision would not have happened if the steam-boat had exercised the degree of care required of her under the circumstances of the case. She was aware of the significance of such signals as were given by the tugs, and knew that they denoted the presence of a vessel towing. She knew that similar flotillas of boats, similarly arranged and stretching over as long a distance, were constantly being towed by tugs in the harbor of New York. If she had been reasonably vigilant, she would have heard the fog signals sounded from the tugs; and in that case it would have been her plain duty to reduce her speed to the lowest rate consistent with her steerage-way, and wait before proceeding faster until she had a right to assume that the flo-

tilla was beyond her path. Her own testimony shows that if she had done this she could have been brought to a stand-still, after seeing a vessel in her path 100 feet away, in season to prevent collision. The rule approved by the international marine conference, that "a steam-vessel hearing, apparently forward of her beam, the fog signal of a vessel, the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over," merely formulates the duty which had previously been recognized by the courts as incumbent upon steam-vessels under such circumstances. Act Aug. 19, 1890, (26 St. pp. 320, 326, c. 802, art 16;) *The Kirby Hall*, 8 Prob. Div. 71; *The Dordogne*, 10 Prob. Div. 6; *The City of New York*, 35 Fed. Rep. 604. Holding, as we do, that the legal responsibility of the steam-boat is precisely the same, whether she did not hear signals which she ought to have heard and acted upon, or whether she heard them without acting on them, we think the collision is attributable solely to her own misconduct. If the tugs had been in violation of any statutory provision for preventing collisions, it would have to be presumed that the fault was a contributory cause of the disaster. As it is, it is merely a matter of conjecture whether any additional precautions would or would not have prevented the disaster. The decree of the court below is reversed, and the cause remanded, with directions to enter a decree against the steam-boat and her stipulators, for the libelant, for the full amount of his damages, with interest from the date of the report of the commissioner in the district court, and for his costs in the district court and in this court, and for the owner of the tugs for the costs in this court.

PENNSYLVANIA R. CO. *et al.* v. DAILY'S ADM'X.

(Circuit Court of Appeals, Second Circuit. December 14, 1891.)

Appeal from the Circuit Court of the United States for the Southern District of New York.

In Equity. Libel *in personam* by the administratrix of Patrick Daily against the Pennsylvania Railroad Company as owner of the tugs Young America and John E. Berwind, and against the Norwich & New York Transportation Company as owner of the steamer City of New York, to recover for the death of her intestate, who was drowned in consequence of the collision, giving rise to the libel against these three vessels. 49 Fed. Rep. 956. By stipulation of the parties, decrees of like effect as in that case were entered in this, both in the district court, and upon this appeal. For former report, see 44 Fed. Rep. 693.

Charles C. Burlingham, for appellant Norwich & N. Y. Transp. Co.

Henry Galbraith Ward, for appellant Pennsylvania R. Co.

Edwin D. McCarthy, for appellee.